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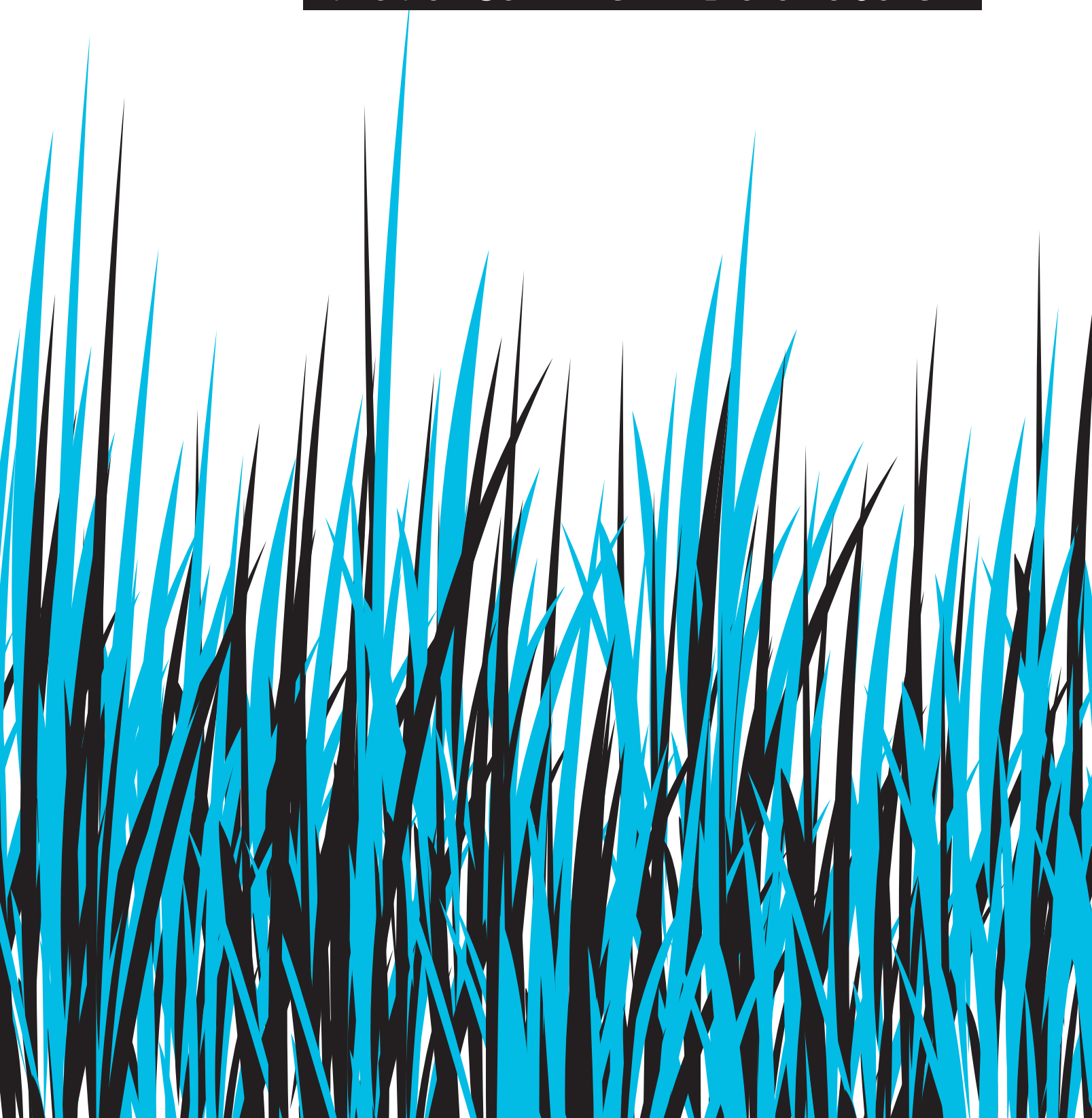
Living With Litigation

Tips For Surviving the Disputes Jungle



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Introduction

"At best litigation is an intrusion into the smooth running of our business; at worst, it is a total pain." That was a typical comment from an otherwise cheerful client at the conclusion of a recent case – although the word he used was not in fact "total"!

No-one welcomes disputes, but for any business they are a fact of life. Most of course are resolved without the need for law and lawyers through enhanced customer service or negotiation. Even when solicitors do get involved, alternative forms of resolution often avoid the need for court action. But sometimes there is no other option.

The way in which courts operate is governed by a complex series of rules set out in rigorous detail in a series of volumes not recommended to those of a nervous disposition or with bad backs. They are the stuff of life to litigation lawyers but indigestible to anybody else. You have no need to read these – why employ your solicitors otherwise?

However, even if you can leave the process of law to your advisers, there are practical impacts of the rules which will affect you and your business. An understanding of these at the outset can not only provide you with the best platform for success in your case, but also with a real opportunity to minimise the downside of the process in the way it hinders the smooth running of your business, takes up management time and presents a series of headaches for those in charge.

This booklet contains separate articles on a number of essentially practical issues – from dealing with disclosure and witnesses; handling media and nuisance claims; to project management and funding.

For those who have had no experience of the litigation process before, we hope that it will provide some reassurance; for those who have 'been there and got the medal' we believe that it will offer some encouragement towards successful resolution of any future business issues.

To the client who found litigation 'a pain' we can at least offer this anaesthetic.

Guy Harvey
Partner

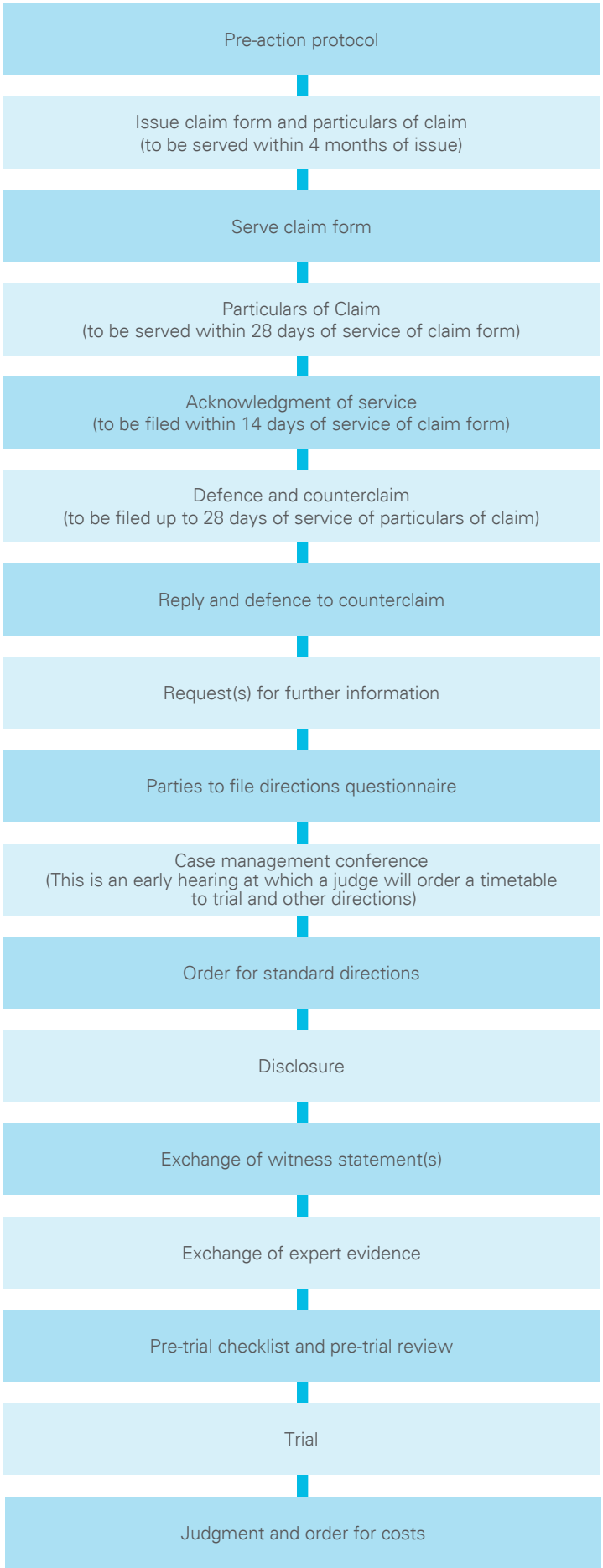
Step-by-step Guide to a Claim

The English civil court system consists of the High Court and the County Court. Although this booklet predominantly focuses on High Court litigation much of the material is relevant to both. Generally speaking the High Court deals with claims that are of a higher value and of greater complexity than County Court actions.

The flow chart to the right sets out the typical path of a claim in the High Court as dictated by the Civil Procedures Rules (the CPR), which have the 'overriding objective' that cases should be dealt with justly and at proportionate cost.

It should be noted that a number of interim applications can be made in addition to the process we have outlined. For example, if no defence is filed, an application can be made for judgment in default. There is also the ability to apply for summary judgment (i.e. without a trial hearing witness evidence) where a claim or defence has no real prospect of success or if there is no compelling reason for a trial.

One further point to note is that before any proceedings are commenced, the parties are required to follow certain steps, which are set out in various Pre-Action Protocols (contained within the CPR). These steps include exchanging information and documentation in an effort to settle the matter without recourse to litigation and the courts can impose penalties on parties that fail to take these pre-action steps.



Putting Your Legal Team in Place

Your first thought when contemplating litigation or when faced with a claim may be to dial up your external lawyers and hand everything over to them. However, if your business already has a litigation risk management plan and core internal team in place your approach to litigation can be proactive rather than reactive.

Litigation is a risk for all businesses, and as with any other identified risk, it can be managed by putting in place risk management planning and procedures. This will enable your business to deal with its litigation risk effectively and reduce the scope for bad decisions made during the heat of the moment when litigation, whether actual or threatened, arises.

A business's litigation risk management plan should identify a **core litigation team** drawn from different areas of the business. The plan should include contact details and standby team members so that the appropriate expertise can be sought and a senior decision maker consulted at all times. Critical litigation issues have a tendency to arise or require urgent action at the most inconvenient times, such as at the end of the working week or over public holidays.

Your in-house litigation team

The two key members are:

In-house counsel/litigation manager
The in-house counsel will be the main point of contact for the external legal team. Whilst the external solicitor will project manage the litigation, the in-house counsel's role as interface and co-ordinator will also involve a degree of project management. In-house counsel will also oversee communications within and outside the business in order to minimise the risk of waiving privilege. This is discussed in more detail below.

Senior decision maker
As key decisions often need to be taken quickly it is essential that a decision maker with the requisite authority is on hand. Although in-house counsel will be the key person to review documents and to authorise the signing of a statement of truth on behalf of the business, there are other forms of decision making that may be required at short notice, for example approval of a settlement deal or giving the go ahead to apply for an urgent injunction.

Other members of your in-house team may include the following specialists, as appropriate:

Finance
Not only will provision need to be made in the accounts for any substantial litigation but the finance specialist may need to be involved in providing information that will inform decision making on litigation strategy.

IT
The IT team will be heavily involved in the disclosure process (see page 17 of this document), and will need to be involved from the outset in document preservation and then in scoping and overseeing the e-disclosure exercise, whether or not external IT experts are retained to assist with e-disclosure.

PR
Apart from general media coverage if there is a high profile dispute or if one party decides to air its grievances in the press, once court proceedings are issued, the details of the case are usually in the public domain and may attract press attention.

HR
The HR team will be involved in identifying employees' roles in a dispute, locating documents that employees have dealt with, and liaising with employees who are likely to be called to give witness evidence.

Compliance
There may be issues involving areas such as data protection and anti-money laundering procedures as well as regulatory requirements.

Your external litigation team

The external team will work with your in-house team and will comprise:

Solicitor
Your solicitor will act as project manager in conjunction with both your in-house counsel and external counsel. The composition and size of your solicitor team will vary depending on the needs of the case, but the team will be constituted and work streams assigned so as to allocate resources most effectively; typically with a partner with overall conduct of the case, a senior solicitor as your main point of contact from day to day and other designated team members on hand and involved as appropriate.

External counsel
In consultation with you, your solicitor will identify the most appropriate external counsel for your case and will instruct them on your behalf. The external counsel will work closely with the solicitor and your in-house counsel and will, ideally, be involved from the outset to provide specialist input on merits and strategy. In substantial cases, it is likely that the external counsel will include at least two barristers, with a senior counsel leading the case, assisted by a junior or team of juniors.

Experts
Potential expert witnesses should be contacted at an early stage so that they can evaluate the strengths and weaknesses of the claim to assist with decision making on case strategy and views on the quantum and timing of any settlement. There is a risk that the other party could successfully apply for disclosure of early communications you have had with experts, including their draft reports or initial findings, so care needs to be taken in the early stages to restrict communications and to follow the tips for preserving privilege set out below.

Other external team members may include:

Costs lawyers to deal with the preparation of the costs budget that the court requires at an early stage of the litigation.

IT specialists to assist with the e-disclosure exercise, particularly in complex cases or those with a large volume of documents.

PR advisers to assist with reputational issues and media management if you do not have an internal PR capability.

Forensic accountants to carry out detailed analysis.

Privilege

In any litigation context, when communications are passing amongst the in-house team and also externally, it is essential to protect those communications as much as possible from potentially having to be disclosed to your opponent. This is explained further below.

Certain communications attract privilege, which means that a party is entitled to withhold them from production as evidence to a third party or to the court. The definition of 'communication' is very wide. As well as the obvious paper documents, including notes of telephone calls and minutes of meetings, it includes emails, text messages and voice recordings.

There are two key types of privilege that are recognised under English law:

1. Legal Advice Privilege
2. Litigation Privilege

These are outlined below:

1. Legal Advice Privilege

Legal Advice Privilege covers general legal advice, whether or not litigation is pending or in contemplation. It also extends to advice given in a 'relevant legal context' but not to business advice or factual information.

Legal Advice Privilege does not cover communications with third parties. It will only prevent compulsory disclosure of communications between:

- (1) the lawyer and (2) his client

The 'client' is the instructing party but this is limited to the individual or identified group of individuals responsible for seeking legal advice on behalf of your business. It does not extend to all your personnel.

The type of communications to which Legal Advice Privilege applies are those which have come into existence for the purpose of giving or receiving legal advice about what should prudently and sensibly be done in the relevant legal context.

Advice cannot be pure business advice, so for example strategic or commercial advice will not be covered, as it lacks the relevant legal context.

An important exception is that in the context of EU competition investigations, in-house counsel correspondence does not hold privilege, even when it is providing purely legal advice.

2. Litigation Privilege

Litigation Privilege is a form of privilege that will apply in respect of certain communications from the time that proceedings are 'reasonably contemplated'. This has been interpreted as meaning that litigation is a 'real likelihood rather than a mere possibility'.

The first type of communications that are covered are the same as for Legal Advice Privilege, namely those between:

- (1) the lawyer and (2) his client

However, Litigation Privilege has a wider ambit than this and so also extends to communications between:

- (1) the lawyer and/or (2) his client and (3) a third party

Importantly therefore, the benefit of Litigation Privilege is that communications between the lawyer

and/or his client and a third party such as an expert or potential witness are privileged. However, communications between any of the parties above are only covered if they are made for the 'dominant purpose of litigation'.

Loss of privilege

All types of privilege are lost if a document is no longer confidential. If a document must be disclosed to an external third party, or even to someone within your business who is not one of those individuals directly responsible for instructing the relevant lawyers, it is safest to insist on a written agreement that sets out that the documents are confidential and are not to be disseminated further.

Communication of privileged advice from the recipient in your business to your board of directors should not cause loss of privilege. However, care should be taken with board minutes because minutes made of discussions for a non-privileged purpose will not be privileged. A board minute summarising or attaching a copy of legal advice will be privileged but if the minute goes on to discuss the advice or its implication the privilege will be lost.

You should also be careful when internally forwarding privileged communications. Where it is essential to do so it would be preferable to label such communications, as suggested in the tips below.

Tips

Complying with the following increases the chances of documents being covered by privilege before the English courts:

- Identify the members of your team who request and receive legal advice from the lawyers.
- Minimise communications outside the lawyer/client team and use oral communication as the preferred method with other employees and third parties to avoid creating records that would not be protected by privilege.
- Consider copying sensitive internal communications to your external lawyer if legal advice is sought. A wholesale copying in policy is not a failsafe however, as copying in lawyers to advice on business decisions does not make such communications privileged. Moreover, blanket copying in of external lawyers to all emails will not find favour with the court.
- Communications that fit the criteria for privilege should be marked 'confidential and legally privileged'. Marking communications in this way does not make them privileged but it is evidence that you were thinking about privilege at the time.
- Board minutes dealing with legal advice should be separated from those discussing other issues.
- Avoid forwarding communications from lawyers containing legal advice outside the client team because by forwarding that communication, its confidential nature is lost and privilege will no longer attach to it.
- Keep privileged and non-privileged documents separate and create separate documents where possible rather than putting legal advice and business advice into the same document.

Internal Management Considerations

Resolving disputes takes time that could usefully be spent doing other tasks more central to your enterprise. You will have to address the initial impact of the dispute and investigate its causes before you engage external assistance. You will need to provide instructions to the external assistance when engaged. You must monitor their management of the process and provide input where necessary. All of these steps can be disruptive and time-consuming. So what can you do to lessen the overall impact of litigation?

There are a number of points to consider which will lessen the impact of the process. These points can be categorised into those arising before instructing legal advisors and those arising afterwards.

Pre-instruction considerations

Whether breach of contract, fraud or negligent loss, at the moment you realise that there has been a breach, your reaction will often be to focus on minimising the damage, particularly if the breach will heavily affect your business. Often, swift action will be necessary and an attitude of 'act first, consider later' can prevail. However, implementing remedial action without careful planning jeopardises your ability to maximise your eventual recovery.

Rushing to respond might jeopardise your ability to mitigate the loss. It can also decrease your chances of recovering otherwise unnecessary management costs, particularly if you fail to document the steps you take and your reasons for taking them. To establish a claim for wasted management costs, you have to prove that your opponent's breach of contract was sufficiently disruptive to justify diverting employees and senior management away from their usual activities. Whilst the justification might be self-evident, it is easier to establish with written, contemporaneous reasons. More importantly, you are unlikely to be able to establish the costs of this disruption without making detailed records of the time your employees and senior management spend away from their usual activities. Therefore your response to a breach should include establishing and maintaining an evidential record of the steps you take.

Post-instruction considerations

Although the dividing line between them may be difficult to pinpoint, there is a difference between wasted management time (i.e. the time spent minimising the impact of a breach) and claim-related time (i.e. the time spent preparing for the subsequent legal claim). Costs generated by wasted management time are recoverable as a head of damage, whereas claim-related costs are not, unless they can be recovered as legal costs. For them to be recoverable as legal costs, you either have to be acting as a litigant-in-person or the work must have been undertaken by, or through, your legal representatives.

In order not to jeopardise the recovery of the costs of wasted management time, you should endeavour to

record separately management and claim-related time. If it is necessary to engage temporary staff to assist with extra management tasks, you should seek to ensure that those staff members do not become involved with claim-related tasks such as evidence collation or statement preparation. To the extent that it is necessary to obtain assistance with claim-related tasks, you should look to your legal representatives to provide the extra bodies.

Unfortunately, your senior management and full-time employees will always incur a certain amount of claim-related time since they have first-hand knowledge of the issues of the dispute and are therefore not able to provide witness evidence in relation to it. By choosing your legal representatives wisely, engaging efficiently with them and understanding the litigation process, you can minimise the time that your staff have to spend with claim-related work, as well as making the process less stressful. The investment time that you will have to commit to the litigation will not be regular and some parts of the litigation process will require considerably more investment than others. We focus on three most important stages below (evidence, disclosure and trial), but you will have to invest time throughout the proceedings.

You should assign an appropriate member or members of staff to act as a liaison with your legal representatives and provide them with instructions. It is more efficient if one member of staff provides both of these functions, bridging the space between your legal representatives and the rest of your organisation as well as making decisions on the conduct of the litigation as a whole, but this might not always be convenient. If the outcome of the litigation is particularly important to your business, it follows that you should designate a senior member of staff as the party responsible for providing instructions. It is however unlikely to be a good use of their time if they also act as the liaison for the administrative elements of dealing with the claim.

Whether you choose a director, an in-house counsel, a manager, or a combination of these, avoid litigating by committee as this increases both time and legal costs. If it is necessary for the board to make significant decisions, inform your legal representatives so that they can provide you with as much notice as possible before any notable decisions need to be made.

Who to assign internally to conduct the litigation process is a decision that needs to be taken early. At the outset, you will have a far better understanding than your legal representatives of the issues and history of the dispute. The identity of those figures central to the dispute will often be straightforward. Clarifying what happened (in effect obtaining their evidence, at least in general terms) will usually be the first step you must take. It is always sensible to secure at as early a stage as possible the continuing cooperation of these central players. Their commitment to resolving the dispute may wane as their involvement with it lessens. It can be particularly problematic if they leave your employment. Consequently, obtaining a signed witness statement as early as possible can be a crucial protection against a future change of heart.

The process of disclosure, whereby each party investigates and discloses any supportive or adverse documentation, is central to litigation in common law countries and common in arbitration worldwide. Documentation has a broad definition, encompassing pretty much any medium on which information can be stored. With the rise of electronic communication, disclosure has more and more transformed into an IT-based process. In larger and even medium-sized disputes, it is now usual to obtain support from specialist suppliers. However, whether large or small, disclosure is fundamentally a trawl through your metaphorical inbox. You will know where it is necessary to search (although you might need guidance from your legal representatives to realise it). In larger disputes, your IT staff will need to liaise with the disclosure specialists closely to guide them through your systems to ensure that the process causes the minimum disruption.

Lastly, if you cannot ensure that the right people attend trial at the right time to adduce their evidence formally, all your careful preparations collating evidence and undertaking disclosure can be undone. Without their attendance at trial, courts tend to disregard the written evidence of witnesses. Thus ensuring that your

witnesses are going to attend trial, by compulsion if necessary, is critical. Trials can be lengthy processes, meaning that you may have to make a significant commitment of time to see them through. However, by working closely with your legal representatives you can ensure that their impact on your business is kept to a minimum.

Project Management

An initial reaction to litigation may be to see it as an unquantifiable and unpredictable unknown. Whilst litigation is of course inherently unpredictable, it is still possible to impose order on the perceived chaos by viewing a case as a project and then planning and running it accordingly.

Structure

A case does have a structure, and in general terms, a court case will include the following stages, with a number of weeks allocated to each:

- Pre-action stage: exchange of correspondence and documents
- Statements of case: the claim and the defence and any counterclaim and reply to the defence
- Case management conference: setting a timetable for the case up to trial
- Disclosure: identification of relevant documents and exchange of lists of documents
- Exchange of witness statements of fact
- Exchange of expert evidence
- Pre-trial review and preparations
- Trial

That 'typical' case timetable is the basic framework but it is worth remembering that the majority of cases settle before trial, which means that the timetable does not usually run its full course.

The Project

By approaching the case as a project to which project management analysis and tools can be applied, priorities and strategy can be set in terms of timing and cost according to your business's particular needs and resources, both human and financial.

Your external lawyers will act as project managers and will work with you to devise a project management plan and deliver the project in accordance with your requirements. The plan will be reviewed regularly in conjunction with you and adapted as required.

Timing

The court will fix a timetable for the various stages, and this will run over a period of months until trial.

The timetable will not cover the pre-action stage, however. It is therefore important to agree and assign adequate time and resources to the pre-action stage, not only because the court may impose sanctions for failure to take pre-action steps, but also because focusing in detail on the case at the earliest stage, and

identifying key documents, witnesses and issues, will mean that your statement of case will be more detailed and your overall approach to the case more informed, which will give you an advantage in your dealings with your opponent.

It is essential that everyone involved in the case realises that litigation rarely runs to the timetable set by the court. Delays due to unforeseen events such as new evidence or interim applications occur in almost all cases. Additional unallocated time should therefore be factored into any project management plan on a contingent basis. Having said that, the courts have recently become much tougher on parties who fail to meet court set deadlines. You should always ensure that you are ready to meet any of the dates which have been ordered.

Cost

Your external lawyers have expertise in cost budgeting. Having reviewed the case with you, they divide the work for each stage of the litigation into discrete elements, assign appropriate resources in the form of lawyers and support staff to each task, and then estimate the time required and the cost involved. This gives you visibility as to the likely litigation spend and the points of highest expenditure, typically during the disclosure and trial stages, so that you can budget accordingly.

Since the introduction of new costs rules in 2013, the courts require formal and detailed costs budgeting in most cases. Parties must prepare and exchange detailed costs budgets at an early stage in the proceedings. The court will then scrutinise the budgets and will either approve them or require revisions to be made. Each party then has to adhere to its approved costs budget for the remainder of the case unless it seeks and obtains the court's approval to amend it.

Disclosure

It is generally accepted that one of the most expensive stages of litigation is the disclosure process. It is therefore of little surprise that reducing the spiralling costs of disclosure was a key target of the Jackson reforms. This chapter summarises the disclosure process and the key issues to consider following the significant changes introduced by Lord Justice Jackson together with some important practical advice.

These various new rules have been introduced with the aim of limiting the costs of disclosure. However, there is a balance to be achieved in controlling costs on one hand and in denying access to justice by prohibiting parties from being able to undertake (and demand) a thorough examination and disclosure of all material documents. This tension is somewhat ironic since access to justice is one of the key principles underpinning Lord Justice Jackson's reforms.

Pre-action disclosure

In some instances, a court may order disclosure before proceedings have even commenced. The pre-action protocols under the CPR explicitly encourage the early disclosure of documents as part of the open and transparent approach to litigation. Specifically, parties should exchange documentation which enables the other to understand the legal arguments being advanced and take this into account when determining their own position.

The first step in the disclosure process is therefore for your lawyer to write to the other party and request copies of any key documents. In the event this request is refused or remains unacknowledged without good reason, an application to the court can be made. It is then at the court's discretion to make an order for disclosure. It should be noted that failure to comply with the requirements of the pre-action protocols carry costs sanctions. Disclosure can also be requested from third parties at the pre-action stage in certain circumstances albeit that the courts have stated that this should be a 'last port of call'.

Types of disclosure

The order for typical disclosure is for what is known as standard disclosure. This requires each party to disclose to the opposing party:

- the documents on which it relies;
- that adversely affect its case or another party's case; or
- that support another party's case.

Under the standard procedure, documents are usually disclosed by serving a list of documents on the

opposing party. The underlying principle is that the court can only deal with the case justly if all relevant material is out in the open. However, since 1 April 2013, a new disclosure procedure has applied for most claims meaning that standard disclosure is no longer the default, but is still one option. A key initiative here is the introduction of a 'menu' of disclosure options for all multi-track (i.e. larger) claims with the exception of personal injury. There is considerable flexibility and it is open to the parties to try and agree the form and scope of disclosure if possible.

Parties will need to consider which option to opt for early in proceedings, especially in light of the cost budgeting process which requires a detailed costs budget to be filed with the court early on in the proceedings.

The 'menu' options include:

1. An order for a party to disclose the documents on which it relies and, at the same time, to request any specific disclosure it requires from any other party.
2. An order that directs, where practicable, the disclosure to be given by each party on an issue-by-issue basis.
3. An order for each party to disclose documents which, it is reasonable to suppose, may contain information that will enable that party to advance its own case or damage the case of any other party, or leads to an enquiry that has either of those consequences.
4. Standard disclosure.
5. An order dispensing with disclosure (although this is unlikely).

The result is far greater discretion for the parties which will require greater thought at an earlier stage in the proceedings. The hope is that this will encourage cooperation between the parties and therefore limit both the number of documents to be disclosed and the associated significant costs of disclosure.

In larger cases, there are more onerous requirements on the parties. Each party must file and serve a disclosure report, not less than 14 days before the first case management conference (CMC).

This report must:

1. Briefly describe matters such as the documents that exist that are (or may be) relevant to the matters in issue and where, and with whom, the documents are (or may be) located.
2. Describe how any electronic documents are stored.
3. Estimate the broad range of costs that could be involved in giving standard disclosure (including the costs of searching for and disclosing electronic documents).
4. State which type of disclosure order will be sought.

Not less than seven days before the first CMC, the parties must discuss, and seek to agree, a proposal for the disclosure exercise. In most cases, the court will make the disclosure order at that CMC.

It is important to be aware that the time periods specified in the rules are deadlines. It is likely that work preparing the disclosure report, and discussions with the opposing party (or parties), will have to start significantly earlier.

Practical considerations

As a result of these developments, there is now a requirement for greater planning at an early stage. In particular, a good grasp of the key issues from the outset will be needed. For example, what types of documents should be disclosed; discussions as to where these documents are actually held and in what format; which individuals have access to the relevant material; how should relevant documents be disclosed (and again in what format); and should key word searches be used.

This list is non-exhaustive and merely gives a hint at the wide range of factors that need to be considered. Lawyers will need to work closely with clients and their IT expert to identify and fully address the numerous key issues.

A reasonable search

You will be required to conduct a reasonable search for relevant documents that are, or have been, in your control. For the avoidance of doubt you are not obliged to carry out an exhaustive search for documents, sparing no expense and leaving no stone unturned.

What constitutes a 'reasonable' search will depend on the facts of each case, but there are certain factors that the court will apply when assessing the reasonableness of a search. These include:

1. The number of documents
2. Nature and complexity of the proceedings
3. Ease and expense of retrieval of any particular document
4. Significance of any document likely to be located during the search

Another factor to consider in the context of electronic documents is the availability of documents, or contents of documents, from other sources. Depending on the circumstances, it may be reasonable to search for electronic documents by means of agreed keyword searches.

When determining the extent of the search for documents that is required in each case, the underlying principle is proportionality. The court will be looking to manage the disclosure exercise so as to facilitate a just outcome, but with an eye to balancing the sums in issue with the cost of litigating.

Privileged Documents

Where documents are privileged, it is extremely important that you do not take any steps that might result in privilege being lost (or 'waived'). This may occur if confidentiality in the material is lost.

E-disclosure

The growth of technology means that electronic data is now perhaps the dominant form of document disclosure in litigation.

Early preparation is crucial. In the context of electronic disclosure specifically, it is mandatory for the parties to discuss electronic disclosure issues (including document preservation, the scope of the search for electronic documents, and the format in which inspection will take place) prior to the first CMC or, possibly, even before proceedings are issued.

The parties should monitor the costs of the electronic disclosure exercise on an on-going basis to keep them to an appropriate and proportionate level. The volume of electronic documents in a party's possession can be very significant and, if they are not controlled, the costs of an electronic disclosure exercise can quickly become disproportionate to the sums in issue. The importance of monitoring and ensuring that costs are kept proportionate has only increased since the introduction of the new costs management regime from 1 April 2013.

The most important point to bear in mind on the subject of electronic disclosure is that many documents only ever exist in electronic form and will therefore never come before the court if electronic searches are not conducted.

Also bear in mind that electronic documents:

- are difficult to destroy.

- contain more information than meets the eye.
- can be searched more easily than their hard-copy documents.
- are frequently used unguardedly.

Confidential documents

Unless you possess a right or duty to withhold inspection, you will not be able to prevent the other party from seeing any documents that are required to be disclosed just because they are confidential. However, the court rules prevent a party that has acquired documents on disclosure from using those documents outside the litigation in which they are disclosed, except in certain circumstances: for example, where the court's permission is obtained.

If there are any commercially sensitive relevant documents that you do not want to be disclosed, your legal team will need to consider whether they can ask the court to put in place some specific protective measures. Sometimes, for example, it is possible to obtain an order that an opponent's legal advisers (but not the opponent) may inspect those documents. You should always give consideration to an appropriate 'confidentiality ring'.

Important points to consider

There are three very important points to bear in mind:

1. Do not destroy documents

As soon as litigation is even contemplated, you must take steps to ensure that you suspend any routine document destruction policies in place.

The list of documents will need to state what has happened to any documents that have been lost or destroyed. A suggestion that potentially important documents may have been lost or destroyed after the proceedings began could be very damaging to your case and lead to the court drawing adverse inferences.

2. Do not create documents (or annotate or amend existing documents)

Some documents that are created may be protected by litigation privilege. However, you will need to monitor carefully any communications about your dispute, whether internal or external. This includes communications between, or involving, those who are not witnesses or potential witnesses, or who are not involved in making decisions about the way in which the litigation should be conducted. It may be appropriate to inform your personnel not to communicate about the dispute at all, unless they are instructed to do so. In any event, you should inform your employees to take particular care when using e-mail.

You should also inform your employees not to amend, or in any way annotate, existing documents. Documents containing any relevant annotations will be treated as separate documents and may need to be disclosed even if the original document was not disclosable. Informal annotations, in particular, can be prejudicial to the case of the party that is obliged to disclose them.

3. Do not ask any third party to send you documents

There are certain documents that you may not have in your possession, and may not have the legal right to possess, inspect or copy (for example, the working papers of any third-party professional agents, such as other firms of solicitors, or accountants). Those third-party documents will not be disclosable, unless they come into your possession.

It is therefore extremely important that neither you nor any employees ask any third parties to send you documents that may relate to the dispute, until your legal team has had had the opportunity to assess the documents they propose to send.

These points underline the need for procedures to be put in place to allow disclosure to be managed effectively and will require you to work closely with your legal team.

Summary of disclosure obligations – dos and don'ts

- Do not destroy any documents that might be relevant to the dispute. You are required to preserve disclosable documents, including electronic documents that would otherwise be deleted in accordance with a document retention policy or in the ordinary course of business. Consider whether the instruction should be given to suspend any standard document retention policies.
- Do not access, amend, delete or destroy any electronic documents that might be relevant to the dispute.
- Do not create any new documents that might have to be disclosed in the litigation.
- Do not mark or annotate any existing documents that might be relevant to the dispute.
- Discuss with your lawyers any documents that you propose to circulate internally.
- Do not ask any third parties to send you documents.

Looking After Your Witness

This chapter offers some practical guidance on how to get the best from your witnesses. It goes without saying that witness evidence – both written and oral – is of crucial importance to the prospects of any case. As such, the steps outlined below should not be underestimated.

The role of a witness

It is the job of a witness to put forward facts as they relate to him in order to provide the court with a first-hand account of particular events. This can be distinguished from an expert witness who may give evidence on both facts and opinion based on his particular qualifications. Furthermore, an expert is independent and must provide the court with evidence based on his honest professional opinion.

One important point to highlight at the outset (and no doubt of some relief) is that a witness cannot be sued on account of anything said or done during the litigation. This is known as the witness immunity rule and there are obvious public policy considerations at play in enforcing this. An exception to the rule is the exhibit to a witness statement. It has been held that an exhibit is outside the scope of the rule (*Accident Exchange Limited v Autofocus Limited [2009] EWHC 3304).* Further, the witness immunity rule does not extend to experts.

Practical considerations

At an early stage, the availability of a witness to attend court on the hearing dates should be confirmed in writing. This will necessarily involve consideration of how long each witness's evidence is likely to last. The dates will be flexible but at least allow for a window within which a witness can ensure he is available to give evidence. Often a witness summons will be served on each witness requiring him to give oral evidence even where they are perfectly willing to attend; often this is for his comfort in explaining to his employer that he has no option but to attend. Where a witness is served with a summons he must be reimbursed for his travelling costs and for loss of earnings.

That is not to say that a witness generally should not be paid his reasonable expenses. Indeed, these can be claimed back by the successful party given that parties are entitled to recover reasonable expenses as they relate to witnesses. From a practical perspective then, witnesses should be reminded to keep receipts of monies spent in case these are needed.

Prior to the hearing, ensure that you confirm that the witness knows the location of the court and leaves sufficient time for travel and arrival at court. This seems obvious but can avoid unnecessary last minute panic on the day of the hearing. It is also a good idea to talk through what the witness can expect in terms of layout of the court room and who is likely to be present so surprises on the day can be minimised.

If a witness has any special requirements through disability, lack of common language, etc, these should be discussed with the other side and the court at an early stage.

Preparing your witness

Preparation is crucial when giving evidence as a witness. Some general tips include:

- Ensure the witness reads over his statement before attending court.
- Familiarise the witness with any documents he is likely to be shown in cross examination which he is not familiar with.
- Warn about the perils of social media and emphasise that a witness must not post anything about the case online.
- Similarly highlight that lying or misleading the court could result in the witness committing the criminal offence of perjury.
- Advise the witness to attend a hearing in advance to get a flavour of a courtroom in action.
- Remind the witness of court room etiquette – the judge should be addressed as My Lord/My Lady. Also, all answers should be directed to the judge and not to the barrister asking the questions.
- Discuss whether a professional witness familiarisation course would be useful preparation for that particular witness.

The latter is an important consideration and, for some witnesses, may be very useful. However, a key distinction needs to be drawn between preparations and 'coaching' a witness, the latter of which is not permitted. To some extent, it is a finely balanced art though one judge described coaching a witness as *"the orchestration of the evidence to be given".*[1]

On the other hand, specialist training courses delivered by independent third parties to familiarise a witness with the procedures of what to expect in court are allowed and often a mock cross-examination is carried out to try and prepare a witness for this experience. This can serve to remind a witness to remain calm when giving evidence and to avoid becoming aggressive or defensive during cross-examination as to do so can seriously undermine his credibility. The Bar Council Professional Standards Committee has issued guidance on appropriate forums of witness training which states that any such training should be delivered or observed by a solicitor or barrister. The key point is that at no point should the training appear to suggest the evidence that that witness should give.

Witness evidence post Jackson

Since April 2013, courts now explicitly have the power to limit the scope of witness evidence in the following ways:

- Identify or limit the issues to which factual evidence may be directed
- Identify the witnesses who may be called or whose evidence may be read
- Limit the length or format of witness statements

This all goes to the heart of the mantra of proportionality post Jackson and underlines the importance of identifying the key issues on which a witness's evidence is to focus.

A recent decision has shed some light on how the courts will use these powers. In this case[2] the judge made a number of directions, on the application of the defendant, with regards to witness evidence. He then went to talk generally to the approach of the courts in this regard. He noted that the power to exclude or limit witness evidence is best exercised prior to the preparation of statements. He confirmed however, that the

1. *Pritchard J in R v Salisbury unreported 19 May 2004.*
2. *MacLennan v Morgan Sindall (Infrastructure) Plc [2013] EWHC 4044 (QB)*

court may also exercise its powers after that point with a view to ensuring an efficient and fair trial. The judge indicated that given the potential seriousness in making such a restrictive order, the court will want to be sure that it has all of the relevant facts before doing so. There is, of course, a fine balance to be struck between efficiency and justice.

By way of summary, we set out below five points for witnesses to remember when giving evidence:

1. If you do not know something, say that you do not know and never guess
2. Listen carefully
3. Take your time
4. Answer only the question asked
5. Be polite and courteous to the Judge – never forget it is his or her courtroom

Don't Make A Drama Out Of A Crisis

Common to all crisis events is the notion of change. The change can either be sudden or it can evolve over time. However, what marks out crisis events is the fact that they represent urgent problems that need immediate attention. One of the difficulties that organisations have in thinking through how they will respond to crises is the seemingly chaotic and unpredictable way in which situations develop. Whilst this is true, it does not mean that crises cannot be planned for, anticipated and in many cases predicted.

Very many crises actually result from predictable events. Technological failures, oil spills, product failure are all foreseeable events in particular industries but there are many which are harder to predict. The paradigm example here would be terrorist attacks which are difficult to predict with any accuracy.

Planning for a crisis

The key to successful crisis management and handling lies in planning and in many ways it is the planning process itself that is as important for an organisation as the eventual plan. Whilst it is true that not all events can be anticipated, organisations can ensure that they identify key risks and prepare for those.

Preparation: Risk audits

The initial preparation for a crisis plan should include preparation of an issues list or a risks audit. This should set out not just the risks that an organisation knows about internally (common dangers in the sector, for example) but should also gather information from media, government and any other sources that would tend to highlight where risks may be emerging – and this is all about identifying future risks. This, depending on the industry, could be a wide-ranging exercise. For some industries, particularly highly regulated sectors such as energy and pharmaceuticals, an organisation will often monitor external sources in a very structured way and the risks are well known because they are regulated. For organisations that are less regulated, some blue-sky thinking is likely to be required. In addition to data-mining, interviews with senior staff will be invaluable to thinking through and identifying future issues and risks. The preparation stage should also include a review or audit of business plans and processes with a view to seeing or identifying whether these are apt to deal with emerging risks and crisis planning.

Contents of a crisis plan

Whilst the content of crisis plans will vary from organisation to organisation and from sector to sector there are particular elements that all plans should contain. The first is up-to-date information on the key personnel, together with contact details, roles and tasks in relation to handling the crisis. Organisations should put processes in place to ensure that key contact details are updated on an on-going/regular basis. Key personnel are likely to include PR Consultants and lawyers, and all external third parties who can

assist in ensuring the organisation responds robustly and appropriately.

The plan should explain how the organisation will identify a crisis event. This should not be overlooked in order to avoid an organisation failing to recognise an emerging crisis and then having to take remedial action. Stakeholder communication is obviously key to the plan and this will include communications both externally and internally. Situation rooms are also vital as there needs to be a space where all the key individuals can gather, which has all necessary facilities to deal with the crisis such as telephones, internet and access to provisions.

Decision-making in a crisis

Organisations should think through and develop their processes for decision making and have thought about, and describe, levels of control and authority limits in a crisis situation. Everyone should know who will be the key decision-maker and who has authority to make particular decisions. Another important key ingredient of all plans is thinking through and preparing for different scenarios. It is a case of thinking the unthinkable.

Plan testing

The planning process itself is an invaluable process for organisations to work through. It encourages buy-in from key stakeholders and provides an opportunity for reflection on the issues and risks an organisation faces. In addition to the process itself, plans need to be tested. Broadly speaking the work-throughs for crisis plans can either be discussion-based or operational. Discussion-based testing is obviously cheaper than operational testing and involves seminars and roundtables. There are, however, ways to increase the stress component for discussion-based testing by using gaming exercises. On the other hand operational testing can be expensive but it is useful as it mimics realistic scenarios and tends to be hands-on and in real-time.

Whatever testing process is used the benefits are significant. They allow plans to develop, issues to be addressed and highlighted and, most importantly, key players can start to recognise their limitations. Testing individual strengths under stress allows the organisation to make informed decisions about who, for example, should be the public face of the organisation.

Role of individuals

There is an increasing focus by regulators generally on the role of individual directors and senior staff. This applies to investigations by, for example, the Health & Safety Executive (HSE), and the investigation of financial crime by both the Serious Fraud Office (SFO) and the Financial Services Authority (FSA) (as was) and the Financial Conduct Authority (as is). This increased regulatory focus on individuals goes hand in hand with a general emphasis on corporate misfeasance in the media and government, and this has come into sharp focus in relation to the failure of boards to provide proper oversight of banks.

For regulators such as the HSE tone at the top is paramount. Similarly, the SFO takes the view that the board and senior directors must set the tone for an anti-corruption/bribery culture. Regulators generally take the view that by focusing on individual directors or senior staff, compliance messages will hit home and that this will impact positively on how organisations operate. In other words, it is the threat of personal liability (fines or imprisonment) against senior staff that will drive compliant behaviour most effectively.

Regulatory environment

Crisis planning needs to take account of the changing regulatory environment. Organisations need to consider the prospect of a senior board member being held liable for a regulatory/criminal failure. Crisis planning needs to address how an organisation will deal with key directors/managers being implicated in

an investigation. What happens in practice is that the interest of the organisation and the individual will diverge and separate sets of lawyers start to advise each party. In these circumstances, the organisation must plan for dealing with the absence of a key individual where that individual is simply unable to continue to direct the organisation. Clearly it depends on the nature of the allegations or investigation against the individual, however this could mean that the individual plays no part whatsoever in on-going management, or plays a very limited role or only deals with a limited range of factual matters.

Ignorance is no excuse. All directors and senior staff are or should be aware that they need to take their obligations and duties seriously. For organisations acting internationally the potential for ignorance of local laws or regulations is very high and this is a significant area of risk to organisations operating in different jurisdictions.

Investigations

Crises will often be precipitated by investigations by regulators or enforcement bodies. These investigations will tend to focus on individuals, and this means that thought needs to be given to the basis on which the organisation will indemnify or meet the cost of separate legal representation. Typically organisations will have directors' and officers' insurance policies, but these are written differently from insurer to insurer, and will kick-in at different points depending on the terms of the policy. It is important to recognise that insurers are increasingly aware of the potential problems, in particular, with boards, and premiums have significantly increased in what are perceived as high risk industries.

Often investigations are carried out by third parties (for example, regulators and government agencies) and individual directors will be questioned as part of that process. Individuals will have their own interests to protect in these circumstances and there is a question over who carries the cost for this. Investigations can be costly both in terms of the time and in terms of the legal or technical advice needed to protect the position of the organisation and/or individuals. Ultimately, investigative processes in relation to potential breaches of financial or health and safety regulations/legislation need to be closely managed by organisations to ensure that the organisation is aware when the interests of an individual start to diverge from that of the organisation. The more an organisation has planned for these events, the better able it will be to deal with these difficult situations with resilience.

Managing a crisis

When a crisis occurs, one of the most difficult aspects of any crisis is dealing with constant enquiries, calls and emails from the press, concerned members of the public, and industry or consumer bodies whilst you try to deal with the substance of the crisis itself. However, the reputational damage from not dealing with public statements correctly can have effects which endure long after the other effects of the crisis have subsided.

Public statements

It is simply not an option to ignore the press. The best thing to do is to think about how best to handle them, what information you can give to them and when. We all know that a 'no comment' type of statement can be detrimental, and the aim is to ensure communication without prejudicing your organisation's position or giving incorrect or misleading information. Any comment can and will be picked up or reviewed by regulators or be relevant to any court proceedings that follow, particularly in relation to liability and any implied acceptance of blame will no doubt be seized upon.

However, there is a difference between taking the blame and taking responsibility. The choice of words can be vital in conveying the right message to the public and making sure that they do not think that you are washing your hands of the issue. Explaining what you are doing to fix the problem or expressing sympathy or regret are phrases that can strike the right balance. If you are at fault, do not leave it too long to apologise. Denials will also affect credibility, particularly if they relate to something that could or should

have been within your capacity to know or find out.

Getting the message right in public in the initial stages and being seen dealing with the implications of the crisis can be invaluable in protecting the reputation of the organisation and ensuring it can re-build and move on when the dust has settled. It is essential to choose the right words: crafting an effective statement which conveys accuracy and avoids ambiguity is essential, but can take hours to draft. Above all, whatever you say or publish must avoid speculation or factual inaccuracies.

You should also think about the messages that you need to send to different types of people, such as employees, investors, regulators, the media and the public generally. In many situations, your organisation may also have to give clear and practical advice to the public.

Planning public statements

Given the importance of public statements, it is sensible to plan for them.

A crisis plan should also contain a strategy for dealing with public statements and dealing with the press. One option is to have a small team of people to agree and implement a communication strategy. In some cases it may even be possible to prepare draft template responses that can serve as a better starting point to any public communication than a blank piece of paper. This may feed into an ability to categorise 'types' of crisis, and build in responses to them.

It is also worth considering what will happen if the primary spokesperson for the company is either involved personally in the crisis or is indisposed for some reason. The importance of ensuring that there is a back-up for situations where the key board members are conflicted and need separate advice has already been considered.

As detailed above, there are a number of legal risks attached to making a public statement and lawyers' attention to detail and caution can help ensure statements are as watertight as possible, but there is also a need to ensure this approach fits with the communication strategy of the organisation.

Your insurers may also need to be involved in any discussion to make sure that they are happy with the statements being made. Check your policy is in an accessible place, up to date and current contact details of brokers and insurers are available. Make sure that you have a broad understanding of what events require notification, when and to whom.

The control of legal privilege in communicating with lawyers and PR companies should be considered at this early stage. Ensure that you control the flow of information and give thought to establishing a core 'client' team for the purposes of engaging with lawyers. Do not forward or circulate information or documents unnecessarily, and think about any data protection or potential Freedom of Information (FoI) requests that could result in disclosure of any information.

Social Media

Effective use of social media is essential for a business and many businesses now actively encourage employees to join social networks, but there are risks for both employers and employees.

A user policy that clearly sets out how an employer expects its employees to engage with social media in general terms and who would own the account should employment end can be helpful in these circumstances. This creates a formal framework that can be relied upon where necessary and is becoming an essential requirement in every employment contract.

It is possible to create a link between your status updates on LinkedIn and your Twitter account. The effect is that anything you post on your LinkedIn account will simultaneously be tweeted, and vice versa. However potential problems can arise when a LinkedIn account is connected to a company Twitter account that is operated by more than one user. Used correctly, this can allow employees to 'feed' the

company Twitter page with updates, such as forthcoming events or current awareness. However, the more people that are given access, the greater the risk for error or things going wrong.

It is easy to see the reputational issues that can arise here. If you are going to allow employees to connect their LinkedIn account to a Twitter account that is not exclusively their own, it is important to ensure that this is restricted to specific members of staff, and that there is both a clear policy in place and a robust take down mechanism.

If you have the resources, it is a good idea to have someone who is monitoring social media and blogs – both as a crisis emerges, to try to quash rumours and as a crisis develops, to disseminate information and set the record straight. With the potential for re-tweets, that can be a powerful pre-emptive tool. Finally, social media can also be a fast and effective way of gauging consumer and public reaction and this should not be ignored.

Funding Litigation

This chapter explains the types of funding available and what that funding might cover. There are many ways to fund litigation, some of which are more common than others. Options range from the traditional private client retainer to third-party funding or trade union funding.

The funding landscape changed significantly in April 2013. The Jackson reforms saw the introduction of damages based agreements (DBAs) and led to success fees and insurance premiums no longer being recoverable from the other side. The result is that, now more than ever, a litigant with a good claim has a variety of choices available to it to fund litigation, which, in some instances, can offload risk onto the law firm or a third party for a share of its potential damages therefore controlling cash flow although these options all come at a cost.

Traditional Retainer

Under a traditional retainer, a client pays for work carried out on its behalf on the basis of standard hourly rates, irrespective of the outcome of the litigation.

There are also fixed fee retainers and capped fee retainers. Fixed fee retainers are often fixed by reference to each stage of the litigation i.e. £x for pre-action work, £x for issuing proceedings and so on. Capped fee retainers may be provided on a similar basis i.e. by stage, or as an overall figure for the litigation.

Fixed and capped fees provide the client with certainty and allocate the risk of inefficiency onto the law firm. However, these types of retainer can lead to disagreements as to the scope of the work covered. A way of avoiding such disagreements is to arrange for regular feedback on the work being undertaken and to be undertaken in the future.

Conditional Fee Agreements

A conditional fee agreement (CFA) is referred to by many as a 'no win no fee' agreement. Typically the law firm, and sometimes counsel, provide their services on the basis that they will only be paid their standard hourly rates in specified circumstances i.e. if the claim is successful. If the claim is successful then the client is not only liable for paying the fees caught by the CFA but they will also be liable for paying a 'success fee'. The success fee is an additional amount payable for the legal services over and above the standard hourly rates. Success fees are expressed as a percentage uplift on the hourly rate and cannot exceed 100%. If the claim is not successful then the client does not have to pay any of the fees (or expenses) that fall under the CFA. Full CFAs, where literally it is a case of 'all or nothing' are very rare.

More recent are 'no-win-low fee' CFAs (also known as 'partial' or 'hybrid' CFAs) under which the client pays a lower amount than the standard hourly rate throughout the litigation with the balance and the success fee

being payable in the event that the claim is successful.

Success fees due under CFAs entered into after 1 April 2013 are no longer recoverable from the other side. This means that if the claim is successful the client would be liable for any shortfall between the recovered costs and the amount due under the CFA including the success fee

As the client only pays in certain circumstances, the law firm (and counsel if appropriate) is sharing the risk of the litigation with the client. It is therefore sensible to define success carefully to avoid conflict later down the line.

Damages Based Agreements

Damages Based Agreements (DBAs) are another form of contingency fee. Under a DBA a client would only be required to pay for the legal services provided during the litigation at all if it obtains 'a specified financial benefit' and was successful. If the client is successful then the amount payable is determined as a percentage of the recovered damages. The maximum permitted percentage (including VAT) is 50% of the sums recovered.

As with CFAs, if a claim is successful the client would be liable for any shortfall between the recovered costs and the amount due under the DBA. If the claim is not successful then the client does not have to pay any of the fees or expenses that fall under the DBA.

Although it is currently not possible to have 'partial' or 'hybrid' DBAs, third party funders are stepping in to provide support which in effect creates these (see below).

Similarly to CFAs, the client only pays if the litigation is successful meaning that the law firm (and counsel if appropriate) is sharing the risk of the litigation with the client.

After the Event Insurance

Unlike the USA and some other jurisdictions, the usual rule in English disputes is that the loser pays the costs (or a proportion of them) to the winner. This means that in complex cases the incidence of costs can be a big issue and, indeed, can determine whether a case should be pursued. In addition, where a smaller claimant is attacking a larger defendant, the issue of whether the claimant will be ordered to pay the defendant's' costs can be used as a weapon.

After the Event Insurance (ATE) is a type of legal expenses insurance which is taken out after a legal dispute has arisen. An ATE insurance policy insures the client against its potential liability in the event it loses the case. An ATE policy typically covers the client's own disbursements, including counsel, and the other side's costs (subject to a maximum limit).

Until April 2013 ATE premiums were recoverable from the other side in the event of victory. This is no longer the position except for cases where the policy was issued before 1 April 2013 or cases which relate to insolvency proceedings, publication and privacy proceedings or claims for damages in respect of diffuse mesothelioma.

ATE premiums are often sizeable, to reflect the risk being underwritten by the Insurer. However, now that ATE premiums are no longer recoverable from the other side ATE providers are offering new ways of paying for the premium, including:

Staged premiums — the premium increases as the case progresses and therefore remains proportionate to the costs actually being incurred (and costs budgeting makes these calculations easier and more reliable).

Deferred premiums — the premium is only payable at the end of the case.
Contingent premiums — the premium is only payable if the case is successful.

Premiums can be calculated by a reference to a number of factors including: (i) the amount of cover being sought; (ii) the merits of the case; and (iii) the method of payment.

ATE is different to before-the-event insurance, which is usually taken out before the legal dispute has arisen and is often included as part of the client's house or motor insurance.

ATE removes the risk for the client of having to pay the other side's costs in the event the case is unsuccessful. It can, if disclosed, also be used as a tactical weapon to encourage settlement. The other side will know that an insurer has conducted an independent analysis of the merits of the case and decided it was strong enough to cover. It also provides a financially weaker claimant with the evidence to undermine any attempt by a defendant to get a security order for its costs.

Third Party Funding

Third Party Funding typically involves a commercial funder agreeing to pay some or all of a claimant's legal fees (and disbursements) in return for a fee. This fee is usually a proportion of the proceeds recovered as part of the litigation process whether by judgment or settlement.

If the claim is unsuccessful then the funder loses their investment and is not entitled to receive any payment from the client.

The funder provides the money purely as an investment and is otherwise unconnected with the litigation. However, a funder will want to be advised of any settlement offers from the other side and be involved in the resulting discussions.

The share of recoveries payable can be subject to negotiation, but funders will usually have reference to: (i) the expected quantum of damages; (ii) the merits of the client's case; (iii) the amount of funding needed; and (iv) the expected duration of the case.

Funders will generally only fund claimants although they may provide funding to defendants with a significant counterclaim. Where a counterclaim is being funded, the size of the counterclaim will be considered relative to the size of the claim itself when assessing the associated risk.

More recently funders have extended the market offering upfront payments to solicitors who are operating a DBA. This may well prove to be a valuable addition to the market. The whole area of this form of funding is evolving and is likely to be of increasing importance in coming months and years.

Trade Union Funding

Depending on the nature of the dispute, Trade Unions will provide legal advice to their members for no charge.

Legal Aid

The availability of legal aid has been severely limited following the implementation of the Jackson Reforms. There are certain circumstances where it is still available but is subject to eligibility criteria including means testing.

Nuisance Claims

Many clients have unfortunately come across nuisance claims at one time or another. The claimant refuses to take no for an answer and continues to bombard you and the courts with unmeritorious claims and applications. This chapter summarises the key challenges presented by nuisance claims and provides tips on how best to deal with a vexatious litigant.

Nuisance claims are typically commenced by the same individual or group of individuals as have raised similar actions previously against the same or associated defendants. Eventually they become 'vexatious litigants'.

A large number of vexatious litigants are litigants in person. However, there are instances of vexatious solicitors. Indeed the law relating to vexatious litigants primarily stems from the activities of a single man; Alexander Chaffers. From 1863-1896 Mr Chaffers, who was previously a solicitor and attorney, issued some 48 sets of vexatious litigation against leading figures including the then Prince of Wales, Archbishop of Canterbury, Lord Chancellor and a number of judges.

Vexatious litigants can have a significant effect on the efficient operation of civil justice and have the capability to undermine the rule of law. They are often frustrated individuals seeking remedies or retribution which the courts are unable to provide. Vexatious proceedings usually have little or no basis in law and place undue strain on the courts' already limited time and resources. In addition, vexatious proceedings subject "*the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant*" (Lord Bingham CJ in *Attorney-General* v *Barker*). That being said, the defendant must still fully defend the claim otherwise it could be subject to a default judgment in the claimant's favour.

A vexatious litigant is best described by Lord Bingham CJ in the Barker case. He stated:

> "[t]he hallmark usually is that the plaintiff sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, thereby imposing on defendants the burden of resisting claim after claim; that the claimant relies on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, in actions against successive parties who if they were to be sued at all should have been joined in the same action; that the claimant automatically challenges every adverse decision on appeal; and that the claimant refuses to take any notice of or give any effect to orders of the court. The essential vice of habitual and persistent litigation is keeping on and on litigating when earlier litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop."

Problems with nuisance claims

The problems incurred when dealing with vexatious litigants can be generally categorised as attributable to either their behaviour or the conduct of the claim.

Behaviour

Examples of vexatious behaviour include:

- Persistently bringing proceedings:
  - to determine an issue that has already been determined by the court;
  - that cannot succeed or that have no reasonable prospect of success;
  - for improper purposes,
- Inappropriately using previously raised grounds and issues in subsequent proceedings;
- Persistently failing to fulfil adverse costs orders made against them;
- Persistently making unsuccessful appeals; and
- Persistently engaging in inappropriate courtroom behaviour.

All of the above can lead to the defendant spending more time and money than it would necessarily need to spend on non-vexatious litigation.

Conduct of the claim

Examples of the types of problems experienced during a claim include:

Incorrect or poor interpretation and analysis of the law: claimants who do not understand the law or are emotional or angry quite often attempt to interpret the law in ways that are not possible on any view or have a poor grasp of the legal issues in dispute and are therefore unable to put forward a coherent and well thought out case.

Poor written and oral submissions: many submissions raised by the vexatious litigant may be irrelevant or may be put forward in such a way that makes it difficult for the judge and the defendant to establish or understand the main issues in dispute. This in turn could lead to adjourned hearings and the defendant spending further time and money in attempting to unravel the issues in a well-articulated manner where possible.

Lack of understanding or compliance with the court's procedural rules: the court rules apply equally to any party involved in a claim before the courts regardless of whether or not they have legal representation. There can be severe consequences if a party fails to comply with the CPR, including the striking out of a claim or defence. However, the CPR are often applied less stringently to those who may not be expected to be familiar with them, such as litigants in person. This can result in:

- applications being brought out of time, in the wrong court or against the wrong parties using incorrect or confused arguments;
- hearings being adjourned for failures by the vexatious litigant: (i) to file evidence timeously or at all; (ii) to produce relevant documents at the hearings; or (iii) to turn up. Adjournments can also be due to the litigant taking too long to make its submissions or making confused submissions thereby using up all the court's time allocated to the hearing; or
- the defendant having to take on the role of the claimant in producing hearing bundles (which help ensure the smooth running of a hearing) for the court, counsel and the litigant.

Lenient judicial system/judges: litigants in person deal with a legal system designed for lawyers. As a result, the system is often perceived as too complex and obscure for them meaning they may feel at a

disadvantage, even if they have been involved in litigation before. To address this perceived disadvantage litigants in person are usually treated in a manner that tries to achieve fairness in accordance with the courts overriding objective, namely, that cases are dealt with justly, at a proportionate cost in a way that seeks to place the parties on an equal footing. However, this can mean that judges allow the litigant more leniency than would ordinarily be given if they were represented. Judges may restrain from enforcing sanctions for missing court deadlines, assist the litigant in hearings by asking questions of the other party's counsel and extend deadlines.

As revealed earlier, the Jackson reforms have introduced a new culture of strictness into the courts. It will be interesting to see whether the traditional leniency of judges when hearing such litigants in person continues to be applied.

Options available to a defendant

Vexatious proceedings are typically deemed as two or more sets of proceedings in respect of the same subject matter which amount to harassment of the defendant in order to make them fight the same battle more than once with the attendant multiplication of costs, time and stress.

To try and tackle the issue of vexatious proceedings, a number of legal remedies are available, in the right circumstances, to a defendant:

1. The court is not blind to vexatious litigation and might, of its own accord or on an application of the defendant, decide to strike out a claim, application or statements of case as an abuse of process, possibly stating they are 'totally without merit'.

2. If when the court dismisses a claim, application or statement of case as totally without a merit, the court may on its own motion or upon an application of the defendant make one of the three forms of civil restraint order (CRO) against the vexatious litigant:

   (i) **Limited CRO** This order, which lasts the duration of the proceedings, seeks to restrain a vexatious litigant, who has made two or more applications which are totally without merit, from making any further applications in relation to a single set of proceedings without first obtaining the permission of the particular judge identified in the order.

   (ii) **Extended CRO** This order, which usually lasts no more than two years, seeks to restrain a vexatious litigant, who has persistently issued claims or made applications which are totally without merit, from issuing any further claim or making any applications in the courts specified in the order concerning any matter involving or relating to, in any way whatsoever, the proceedings in which the order was made without first obtaining the permission of the particular judge identified in the order.

   (iii) **General CRO** This order, which usually lasts no more than two years, seeks to restrain a vexatious litigant, who persists in issuing a claim or making applications which are totally without merit in circumstances where an extended civil restraint order would not be sufficient or appropriate, in the courts specified in the order without first obtaining the permission of the particular judge identified in the order.

CROs can also be sought against non-parties if they are in fact the driving force behind the litigation.

3. **Civil proceedings order** This is an order which seeks to prevent the vexatious litigant from issuing or carrying on any proceedings in any court without the court's permission. Applications for civil proceedings orders can only be made by the Attorney General. When deciding whether to make such an order the court will look at the number and type of proceedings commenced, the individual's conduct and character displayed during those proceedings, the degree of hardship suffered by the defendant and the

likelihood of unmeritorious litigation continuing if the individual is not restrained. The Attorney-General is unlikely to make an application for a civil proceedings order unless at least six separate claims have been commenced and struck out or were unsuccessful. A civil proceedings order can be for an indefinite period. In fact there are some orders on the list of vexatious litigants maintained by the High Court that were granted as far back as 1950.

4. **All proceedings order** This is an extension of a civil proceedings order. If the vexatious litigation has been in both the civil and criminal courts, the court can make an all proceedings order which covers both jurisdictions.

How to deal with a vexatious litigant

Every vexatious litigant is different and there is no single 'correct' way to deal with them or their claims. However, we are able to offer from our experience some tips on how to manage vexatious litigants and their claims:

- If, on receipt of the claim form, the claimant's name appears familiar, double check whether the claimant has issued proceedings in respect of the same issue before.
- Check the claimant's name against the list of vexatious litigants on the HMCTS website.
- Try to meet with the vexatious litigant at an early stage to flesh out what the issues are or, if possible, to reach some form of settlement if appropriate. This may not be easy as the litigant may be angry or emotional but the meeting could prove useful (if held on an open basis) later in the proceedings to demonstrate that you have fully engaged with the litigant from the beginning of the proceedings.
- Consider filing and serving a list of issues to help define the issues.
- Try to maintain high levels of courtesy even if the vexatious litigant does not. Although you should not feel obliged to respond to every piece of communication, a simple acknowledgment can suffice in certain circumstances.
- Remember that correspondence is likely to be seen by the court so try to remain polite even if the vexatious litigant is trying to attack you personally or your reputation or business.
- Try to explain the basis of the vexatious litigant's case to them and why you consider it is unmeritorious. They may not listen but the point is that you have tried.
- As early as possible explain in writing, and repeat when required, the procedural steps and time limits, particularly the new cost management rules that came in to force on 1 April 2013. A litigant who has been informed of his obligations from the outset might find it difficult to obtain leniency from a judge. It can also help avoid future misunderstanding and delay. If possible, try to allocate responsibilities between the parties.
- Ensure you record details of all your conversations with the vexatious litigant and follow up with a note of the conversation to confirm what was discussed.
- Try to conduct the litigation as quickly as possible. This could lead to a costs order in your favour and enforcement of it might help bring matters to a close.
- If there appears to be no reasonable ground for issuing the claim, or if the vexatious litigant fails to comply with the court rules or a court order, apply to have the claim struck out as totally without merit.
- Assist the court by giving adequate time estimates, produce hearing bundles if the vexatious litigant does not and set out the other parties' case in a clear methodical manner when drafting your defence.
- If the circumstances allow apply for a CRO against the vexatious litigant.
- Should the vexatious litigant persist, make a complaint to the Attorney-General requesting that he makes an application for a civil proceedings order against the vexatious litigant.

The Trial: A Quick Guide

In any dispute, the trial is the culmination of many months of preparation and can be both stressful and daunting. Many clients are keen to understand what to expect at trial and needless to say the depiction in TV courtroom dramas is quite different from the day-to-day reality. The points highlighted below provide a 'snapshot' of a typical court experience, if such a thing exists.

Court etiquette

- When the judge either enters or leaves the courtroom, everybody must stand when the usher calls "court rise" and not sit down until the judge does. Before the judge sits, and after he has stood up to leave, he will bow to the court and everybody in court must do likewise. If you enter or leave the court-room whilst the judge is sitting, you should face the judge, bow, and walk backwards until you are at the door. These gestures may seem archaic but are part of the general level of respect that is expected by judges.
- Lawyers (or indeed clients) should never react to anything that is said during evidence or in submissions - the judge will inevitably note this and you do not want to do anything which gives credence to an argument being run by the other side.
- Similarly, if you need to communicate with someone in court and it is not possible to wait until the next break in proceedings then you should always speak as quietly as possible, or alternatively hand your counsel a note. Quite aside from etiquette, there are clear tactical considerations at play in ensuring that the other side does not overhear your discussions with counsel.
- Formal dress should be worn in court.
- All electronic devices (particularly mobile phones) must be switched off.

Procedure in court

Traditionally, the claimant sits on the left of the courtroom (as you enter the courtroom) and the defendant sits on the right. Witnesses should sit towards at the rear of the court until they are called. Clients tend to sit at the rear on 'their' side of the courtroom.

The court day usually begins at 10.30 am and finishes between 4.00 pm and 4.30 pm with a one hour break for lunch at 1.00 pm. However, these guidelines are subject to change should the timetable be under time pressure, in which case the judge may decide to begin earlier or finish later than planned.

Sequence of evidence

The sequence of events at trial is usually conducted as follows:

- Claimant's opening submissions followed by defendant's opening submissions.
  It should be noted that the judge may request written opening submissions in addition to or instead of oral submissions.
- Evidence from claimant's witnesses of fact followed by the defendant's witnesses. In each case the witness will be asked to verify the contents of his statement and be asked any supplemental questions by the side whom is calling him. He will then be cross-examined by the other side. Re-examination can take place solely to deal with items raised in cross-examination.
- Similarly, any evidence from the claimant's expert witnesses precedes evidence from the defendant's expert witnesses.
- The defendant's closing submissions are made followed by closing submissions for the claimant.

  In the Commercial Court, the position can be slightly different with the defendant's closing submissions coming after those of the claimant, although the claimant has a right of reply.
- A judge may also request written closing submissions in particularly complex cases.

Judgment

Save for the simplest of cases, judgment is not usually handed down immediately after closing submissions and instead will usually follow at a future date. Frustratingly for all concerned, this can be several months after the trial has concluded.

Quite often the judgment will be made available to the parties in draft form before being formally handed down. In these circumstances you must ensure that you fully understand the terms on which the draft judgment has been released – for example, often this is circulated on the express condition that is it confidential until the final written judgment is handed down.

The final written judgment is usually handed down in a short hearing at court and a copy will be handed to the parties by the judge's clerk shortly before the hearing begins.

Costs applications

After judgment has been handed down, there will be consideration of the issue of costs. Although the usual approach is that 'costs are in the case' i.e. the loser pays the winner's reasonable costs, the issue of costs can be subject to separate proceedings which include a detailed assessment of the winner's costs and a ruling on the amount payable by the losing party.

Appeals

It is also usual at this stage to discuss with your legal representatives the scope for any appeal. Although the grounds for appeal are limited to situations in which there has been an error in fact or law or where there has been some serious procedural or other irregularity in the proceedings, the prospects of an appeal being successful should be discussed with your lawyers.

Guide to the London Courts

Supreme Court

The Supreme Court is the most senior court in the UK. It hears final appeals for civil and criminal cases from England, Wales and Northern Ireland and civil cases from Scotland.

There are twelve Supreme Court Justices who hear appeals on arguable points of law of the greatest public and constitutional importance. It also hears cases on devolution matters under the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006.

The Supreme Court is located in the former Middlesex Guildhall on Parliament Square.

The Supreme Court, as well as being the final court of appeal, plays an important role in the development of United Kingdom law.

Court of Appeal

Where a matter is appealed, it will usually lie to the next level of seniority of judge in the Court hierarchy. The Court of Appeal hears appeals from the High Court, the County Courts and from certain tribunals including the Lands Tribunal and the Employment Appeal Tribunal. A Court of Appeal judge is referred to as a Lord Justice of Appeal.

There is a Civil Appeals Office, responsible for the administration in relation to civil matters in the Court of Appeal. The Appeals Office will ensure compliance with procedural steps and can provide assistance in relation to any potential administration problems.

If granted consent by the Master of the Rolls, a court officer may exercise the jurisdiction of the Court of Appeal for matters where there is no substantial dispute between the parties, matters incidental to proceedings in the Court of Appeal or matters concerning the dismissal of an appeal or application where a party has failed to comply with an order, rule or practice direction. Most of this would be handled on paper, although there are weekly 'dismissal lists' taken in open court. The orders are reviewable by the court.

In the majority of circumstances permission to appeal must be granted either at the hearing where the original decision was made, or by an application to the Court of Appeal.

High Court of Justice

A claim should be started in the High Court on the basis of its financial value, the complexity of the facts, legal issues, remedies or procedures involved and/or the importance of the outcome of the claim to the public in general. Without proper written agreement between the parties, certain claims must be started in the High Court. The High Court of Justice comprises three divisions:

1. Queen's Bench Division

The Queen's Bench Division deals primarily with damages claims in respect of:

- Personal injury
- Negligence
- Breach of contract
- Defamation
- Non-payment of debt
- Possession of land or property

Cases are decided by High Court judges or the President of the Queen's Bench Division.

With some exceptions, the claimant will generally be able to choose whether to bring the claim in the Queen's Bench Division or Chancery Division.

The Queen's Bench Division includes the following specialist courts:

- The Divisional Court, in which two judges sit, is responsible for certain criminal cases and for judicial review.
- The Admiralty Court deals with shipping and maritime disputes such as in relation to collision, salvage or the carriage of cargo.
- The Commercial Court deals with complex cases arising out of business disputes. Issues covered would include international trade, banking and arbitration disputes.
- The London Mercantile Court deals with business disputes of lesser value and complexity than the Commercial Court.
- The Technology and Construction Court in which specialist judges with more sector-specific knowledge tend to sit.

As each has its own specialist area, these courts have distinct procedures for bringing and managing claims.

2. Chancery Division

There is a degree of overlap between the Chancery Division and Queens Bench Division, however, the main areas dealt with by the Chancery Division are:

- Property-related disputes
- Competition issues
- Intellectual property claims
- Companies claims
- Insolvency claims
- Probate claims
- Appeals from the lower courts

The Chancery division also contains the Patents Court, specialising in patents and registered designs, and the Bankruptcy and Companies Court which, amongst other things, deals with the compulsory liquidation of companies.

The Chancery Division is presided over by the Chancellor of the High Court with cases being heard by one of the eighteen High Court judges.

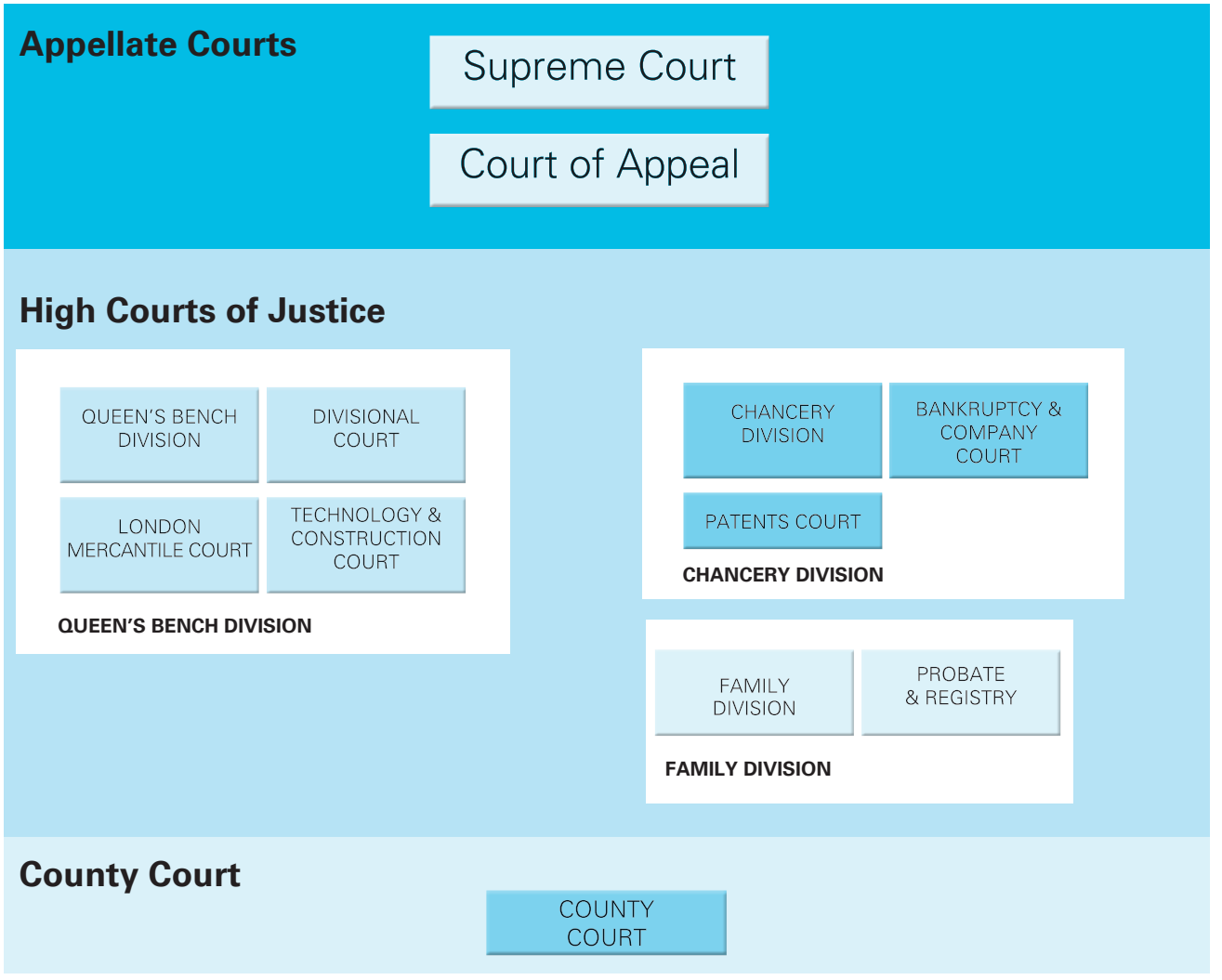
3. Family Division

The Family Division, as you would expect, is concerned with family law matters such as adoption and complex cases of divorce. Decisions of the Family Division can also be controversial: in 2000, it authorised the separation of conjoined twins without the parents' consent.

County Court

The County Court is primarily used for small track claims (up to £10,000) or fast track claims (up to £25,000). There are a number of County Court hearing centres in London and many others across the country, however, cases will usually be lodged in the county in which the defendant is based. Civil cases are usually dealt with in County Court by a district judge.

Court Structure



Glossary

Acknowledgment of Service
The formal document by which a claim is acknowledged by a defendant.

After the Event Insurance
Insurance taken out after the 'event' which is the subject matter of legal proceedings to cover some or all of the potential costs liabilities in a particular set of proceedings (particularly if the case is lost).

Case Management Conference
An early hearing at which the judge will typically make the first order for directions in a case, and set down the timetable to trial. The parties are obliged to discuss and seek to agree directions before the first CMC. There may be a number of CMCs during the proceedings.

Chancery Division
A division of the High Court which deals with business law, trusts law, probate law, insolvency, and land law in relation to issues of equity. It also houses specialist courts which deal with patents and registered designs and company law matters respectively.

Civil Appeals Office
The Court Office that is responsible for the administration of the Court of Appeal Civil Division.

Civil Procedure Rules
These rules took effect on 26 April 1999 and govern all types of civil disputes.

Civil proceedings order
An order that:

(i) no civil proceedings shall without the leave of the High Court be instituted in any court by the person against whom the order is made;

(ii) any civil proceedings instituted by him in any court before the making of the order shall not be continued by him without the leave of the High Court; and

(iii) no application (other than one for leave) shall be made by him, in any civil proceedings instituted in any court by any person, without the leave of the High Court.

Civil restraint order	A court order restraining a party from making applications in proceedings without the permission of the court.
Claim Form	The form on which a claim is issued.
Commercial Court	A division of the High Court which deals with complex cases arising out of business disputes, both national and international. There is particular emphasis on (i) international trade; (ii) banking; (iii) commodity; and (iv) arbitration disputes.
Conditional fee agreement	A conditional fee agreement or CFA is an agreement between a client and legal representative which provides for the lawyer's fees and expenses, or any part of them, to be paid only in certain circumstances - usually only if the client wins the case.
Consent Order	An order confirming an agreement between the parties.
Counterclaim	Any claim bought by the defendant against the claimant in the same set of proceedings.
Damages Based Agreements	An agreement between a representative and a client, whereby the representative's agreed fee is dependent on the success of the case and is determined as a percentage of the compensation received by the client.
Default Judgment	Where a respondent/defendant to a claim has not presented a court or tribunal with a response or defence within a specified time limit, or where a response has not been accepted, the court or tribunal may issue a default judgment deciding the claim without a hearing if they consider it appropriate to do so.
Defence	A formal document setting out a defendant's position in response to the claimant's statement of claim or particulars of claim.
Directions questionnaire	Questionnaire to be completed by the parties to assist the court in deciding on allocation to a particular track (i.e. small, fast and multi-track). It must be completed for cases in which a defence is received on or after 1 April 2013.
Fast track claims	A court procedure for the resolution of civil disputes usually used for small and straightforward cases with a financial value of between £10,000 and £25,000. These cases tend to be brought in the County Court.
Financial Conduct Authority	The UK regulator responsible for regulation of the conduct of firms authorised under FSMA.
FSA	The Financial Services Authority which is the former regulator for the UK financial services industry. The FSA was an independent non-governmental body with statutory powers under FSMA.

FSMA	Financial Services and Markets Act 2000
Health & Safety Executive	A non-departmental public body responsible for the encouragement, regulation and enforcement of workplace health, safety and welfare, and for research into occupational risks in England and Wales and Scotland
High Court	The court of unlimited civil jurisdiction comprising three divisions: Queen's Bench, Chancery, and the Family Division.
Jackson reforms	A package of interlocking changes following Jackson LJ's review of civil litigation costs, impacting on a number of areas of civil litigation, including but not limited to: costs, funding, case management, disclosure and Part 36 of the Civil Procedure Rules.
Judgment	A decision of a law court or judge.
Legal Advice Privilege	Confidential communications between lawyers and their clients made for the dominant purpose of seeking or giving legal advice.
Litigation Privilege	Confidential communications between lawyers and their clients, or the lawyer or client and a third party, which come into existence for the dominant purpose of being used in connection with actual or pending litigation.
London Mercantile Court	A Court which deals with business disputes, both national and international. It is designed to deal with claims of lesser value and complexity than the Commercial Court.
Master of the Rolls	The judge who presides over the Court of Appeal (Civil Division) and who was formerly in charge of the Public Record Office.
Multi track claims	A court procedure for the resolution of civil disputes usually used for cases over £25,000 and those which are not straightforward. Simple claims valued up to £100,000 are typically brought in the County Court. Complex claims or claims over £100,000 are typically brought in the High Court.
Order	An instruction issued by a court or tribunal either on the application of one or both of the parties, or of its own initiative.
Particulars of Claim	A document setting out the case of the claimant and specifying the facts relied upon. Formerly known as a statement of claim.
Pre-trial review	In complex litigation, the court may hold what is known as a pre-trial review. This hearing is usually fixed to take place up to ten weeks before the date listed for trial.
Queen's Bench Division	A division of the High Court dealing with claims for damages in respect of personal injury; negligence; breach of contract; libel and slander (defamation); non-payment of a debt; and possession of land or property.

Request for further information	A formal request for more information about a party's claim or defence or for documents. Note that the court can order a party to respond if he does not do so voluntarily.
Serious Fraud Office	An independent government department, operating under the superintendence of the Attorney General. Its purpose is to protect society by investigating and, if appropriate, prosecuting those who commit serious or complex fraud, bribery and corruption and pursuing them and others for the proceeds of their crime.
Small track claims	A court procedure for dealing with the quick resolution of civil disputes usually used for claims of £10,000 or less. The rules and procedures are designed to be less formal, and more accessible to litigants in person. Only limited costs are recoverable in small claims proceedings.
Standard disclosure	A form of disclosure that requires a party to disclose documents: (i) on which he relies; (ii) which adversely affect his or another party's case, or support another party's case; and (iii) that he is required to disclose by a relevant practice direction.
Statement of case	The document(s) in which a party sets out its case in civil litigation (e.g particulars of claim and a defence). Known as a 'pleading' before the introduction of the Civil Procedure Rules.
Summary Judgment	A court judgment, given at an early stage of the proceedings, without a full trial of the issues and hearing of evidence on the basis that the claim, defence or issue has no real prospect of success.
Supreme Court	The highest court of appeal in the UK for civil cases, which also hears appeals in criminal cases from England, Wales, and Northern Ireland.
Technology and Construction Court	A sub-division of the Queen's Bench Division which deals with technology and construction disputes, and other disputes that involve questions or issues that are technically complex.
Third-party funding	The process whereby litigants finance their litigation or other legal costs through a third party funding company. These third party funding companies provide cash advances to litigants in return for a percentage share of the judgment or settlement.
Trial	A formal examination of evidence by a judge or jury, in order to decide guilt in a case of criminal or civil proceedings.
Witness statement	A formal document containing an individual's own account of the facts relating to the issue(s) arising in the dispute.

Meet the team

Guy Harvey, Partner
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Guy has over 30 years' experience of a wide range of complex disputes across various sectors, including judicial review, professional negligence, international litigation, contentious chancery work and cases at every level of the English Courts. Guy has also had extensive experience of mediations across a wide range of disputes and of various international arbitration and ADR procedures and has been consistently recognised as a leader in his field in the legal directories.

Guy recently advised Albion Water in its multi-million pound claim for damages in the Competition Appeal Tribunal. Guy advised in the cover-pricing investigation in the construction industry and has also been involved with investigative work in connection with frauds in cases such as Barlow Clowes, BCCI and Barings. He is also a member of both the Fraud Advisory Panel and the London Solicitors Litigation Association.

John MacKenzie
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John is a solicitor advocate and deals with a range of commercial litigation matters but principally intellectual property, IT, corporate and property litigation. John has dealt with many major claims before the Court of Session, both at first instance and before the Appeal Court. He continues to appear before the higher courts on a regular basis.

Jane Wessel, Partner
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Over a 23 year period, Jane Wessel has amassed in-depth knowledge and wide experience of international commercial arbitration, appearing as counsel in arbitrations under the rules of most of the major international arbitration institutions in countries throughout Europe, Asia, and North America. Her experience spans a wide variety of legal issues, including contract interpretation, joint venture arrangements, anti-trust issues, licence agreements, intellectual property, and complex damages claims including competition damages claims.

Jane also advises and represents clients in litigation in the courts and tribunals of England and Wales, with a particular focus on damages claims relating to cartel activity. Jane is a US attorney and an English solicitor and a Fellow of the Chartered Institute of Arbitrators and a CEDR certified mediator.

Claire Stockford, Partner

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Claire has represented investors in investment treaty arbitrations involving Turkey, Lithuania and Kazakhstan. She has also acted for clients in many commercial arbitrations conducted under both institutional (International Chamber of Commerce (ICC), London Court of Arbitration (LCIA), International Centre for Dispute Resolution (ICDR)) and ad hoc rules in cases seated in London, Dublin, Geneva and Zurich. Claire's experience encompasses many different jurisdictions and industries, ranging from oil exploration to the luxury hotel market.

She also advises and represents clients in litigation in the courts and tribunals of England and Wales, with a particular focus on damages claims relating to cartel activity. Claire is a barrister and a Member of Gray's Inn.

Ben Pilbrow, Associate

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Ben has a broad knowledge of legal areas and good exposure to Shepherd and Wedderburn's core sectors of financial services and energy. He has an in-depth knowledge of the law and a highly analytical approach which helps his clients achieve success. Ben is also a solicitor advocate and a member of the Professional Negligence Lawyers Association and London Solicitors Litigation Association. Before joining the firm in 2012, he was a partner in a boutique London firm.

Katie Logan, Associate

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Katie's main areas of professional interest are real estate litigation, insolvency and financial services dispute resolution. She has a wide range of experience in the High Court and County Courts and in mediations, acting for clients including property investment companies, banks and insolvency practitioners in complex contractual disputes, landlord and tenant matters and property issues arising under various insolvency regimes.

Katie's recent cases include substantial service charge and dilapidations claims, cases involving wrongful termination of contracts, landlord and tenant disputes and claims against guarantors. Katie is a member of both the Property Litigation Association and the London Solicitors Litigation Association.

Mandy Deeley, Associate

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Mandy advises clients on a wide range of commercial litigation and alternative dispute resolution, including representing clients at mediation, adjudication and arbitration. Her focus is on commercial contract disputes and intellectual property litigation, in particular trade mark infringement and passing off claims. Mandy is qualified in Scotland, England and Wales and regularly advises clients on both sides of the border including in relation to proceedings in the English and Scottish Courts.

Mandy is admitted as a solicitor in Scotland and England & Wales.

Hayley Pizzey, Assistant

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Hayley trained with the firm and since qualifying into the team has had a variety of experience in the High Court as well as the County Courts and the Competition Appeal Tribunal. She has advised clients on a wide range of commercial litigation including contract disputes, judicial review, debt recovery claims, property litigation, financial services disputes, insolvency matters and mediation.
Hayley has acted for clients including private and public companies, banks and administrators, landlord and tenant matters in a variety of matters including debt recovery, possession claims and various insolvency regimes and is also a member of the London Solicitors Litigation Association.

Matthew Phillip, Assistant

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Matt is admitted as a solicitor in Scotland and in England & Wales and deals with disputes in both jurisdictions relating to commercial contracts, infringement of intellect property, brand protection, professional negligence and civil fraud.

He has a particular interest in contractual disputes and brand protection and regularly helps clients to protect and enforce their intellectual property rights. This includes assisting them from the outset of a dispute by advising on pre-action communication and litigation strategy.

Matt joined the firm as a trainee in 2009 and qualified as a solicitor in Scotland in August 2011. He was admitted as a solicitor in England & Wales in April 2013.

Alastair Brown, Assistant

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Alastair trained with the firm and since qualifying into the team has worked on a variety of dispute matters in the High Court and County Courts and in mediations. Alastair has an interest in property related disputes and works closely with Katie Logan in advising commercial landlords on landlord and tenant matters and in interpretation of complex property contracts as well as other members of the team in a range of contractual and insolvency related disputes.

Alastair is a member of both the Property Litigation Association and the London Solicitors Litigation Association.

Douglas Campbell, Assistant

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Douglas trained with the firm and qualified into the team. He has had exposure to disputes in a range of legal areas, including insolvency, contract, competition and partnership, acting and assisting on cases in both the High Court and County Courts. Douglas has a particular focus on the financial services sector, and in particular insolvency, regulation and markets. Douglas is a member of the London Solicitors Litigation Association.

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