TRAVERS SMITH

# A guide to commercial litigation in the High Court of England and Wales

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## Introduction

This guide aims to provide a high-level overview of the key steps which are likely to be involved in a piece of commercial litigation in the English courts. As litigation can be a long and complex process, this guide is intended to be a 'roadmap', to help parties (and potential parties) to litigation understand it and know what to expect from the outset.

**COVID-19** – Due to the COVID-19 pandemic, the English courts have introduced interim case management procedures which are outside the scope of this guide. For further information please see our dedicated COVID-19 guidance here.

## Overview

**1. Pre-Action Stage**

- Initial investigations
- Letter of claim
- Pre-action correspondence
- Alternative dispute resolution / attempts to settle

**2. Case Preparation**

- Statements of case
- Case management conference
- Disclosure
- Witness statements
- Expert evidence

**3. Trial**

- Pre-trial review
- Skeleton arguments
- Trial
- Judgment

Each of these steps is covered in more detail below. Litigation can involve additional procedural steps, depending on the nature of the case, that are not covered in this guide.

## 1 Pre-action stage and starting a claim

### BEFORE COURT PROCEEDINGS START

The courts expect potential parties to litigation to take certain 'pre-action' steps before formally issuing a claim at court. In most cases, these steps will include the claimant writing a letter of claim to the defendant (setting out in detail the facts and law giving rise to the claim, and the remedy the claimant is seeking) and the defendant providing a detailed written response. Parties are expected to cooperate in exchanging information, and in some cases documents, about the claim at this initial stage, with a view to considering whether and how the dispute might be resolved without recourse to court proceedings. If a party is overly aggressive at this early stage or does not engage in settlement discussions / attempts to resolve the dispute via a form of alternative dispute resolution (or 'ADR', for more on which see below), then the court may penalise them at the conclusion of the trial when it comes to consider costs.

### STARTING A CLAIM

If the dispute cannot be resolved at this initial stage, the claim must be issued at court. This is done by filing a short document called a 'Claim Form' which sets out basic information about the claim, along with a set court fee[1]. In most commercial matters, the Claim Form will be accompanied by longer 'Particulars of Claim' which set out the background to and details of the claim.

## 2 Statements of case

Following service of the Claim Form and Particulars of Claim on the defendant, there is a set timetable for service of the defendant's formal written response to the claim (the 'Defence') and the claimant's written reply to the Defence (the 'Reply'). These documents, along with the Claim Form and Particulars of Claim, are collectively referred to as the 'statements of case' or 'pleadings'.

## 3 Case management

The court has wide-ranging powers to manage all aspects of the litigation process. It will expect parties to try to agree the timetable to trial, with specific dates for completion of each stage, including disclosure of documentary evidence, and exchange of witness statements and expert evidence (if required).

In certain claims for less than £10 million, the parties will also be expected to exchange and attempt to agree budgets in respect of their costs up to and including trial. The

[11] The amount of the court fee varies depending on the value of the claim, but for High Court claims which exceed £100,000, the fee will be either: (i) 5% of the value of the claim if it does not exceed £200,000; or (ii) £10,000 if the value of the claim exceeds £200,000.

timetable to trial and costs budget are often contentious. If the parties cannot agree them, they will have to be determined by the court at a hearing called a Case Management Conference (or 'CMC').

At the CMC, as well as setting the timetable to trial and the trial date, the court will generally also consider and decide such matters as the scope of disclosure to be given in the case (see below), and whether any expert evidence is required.

## 4 Disclosure

There are strict rules in respect of, and obligations on parties to litigation as to, preservation and exchange of documentary evidence. The disclosure process is intended to enable all parties to evaluate the strength of their respective cases before trial, with a view ultimately to reducing costs.

As soon as litigation is contemplated, which will in most cases be many months before formal court proceedings are issued, prospective parties must preserve all documents which might be relevant to the issues in dispute. This will include dispensing with any routine document destruction policies which may be in place.

The current[2] disclosure obligations on parties to litigation are wide-ranging. A party is required to disclose documents in their control on which they rely and, crucially, those which adversely affect their own case, adversely affect another party's case or support another party's case. Parties are therefore obliged to disclose documents which undermine their own position in the litigation. This is a critical part of the 'cards on the table' approach which the disclosure process is designed to achieve.

A 'document' for these purposes is very broadly defined as anything in which information of any description is recorded. It therefore includes all types of electronic documents and communications as well as paper documents.

Parties are not obliged to provide to their opponents documents which are privileged. Privilege is a complex topic which is outside the scope of this guide but, very broadly, it will apply to protect documents containing legal advice, or which relate to litigation reasonably in prospect. For further information regarding the law on privilege please contact a member of the Dispute Resolution Department.

Disclosure is complex and time-consuming. In large commercial cases it will generally involve lawyers reviewing many thousands of documents to assess their relevance. The court takes the parties' disclosure obligations very seriously and there are potentially serious consequences if a party fails to comply.

## 5 Witness evidence

### FACTUAL WITNESSES

While much of the evidence in a case will be documentary, some of it will be provided by witnesses who have first-hand knowledge of the relevant facts. Factual witnesses provide their evidence in a written witness statement prepared with assistance from

[2] There is currently a pilot scheme operating in the English Business and Property Courts which is designed to streamline the disclosure process. The parties are expected to discuss and decide at the outset what the issues in the case are, which documents are likely to be relevant to those issues and how the searches for those documents should be carried out. It is not yet clear how effective this pilot scheme will be and whether it will be applied across all courts in England and Wales but at present those cases subject to it will follow a different process to that outline above.

the solicitors to the relevant party following a detailed interview, or series of interviews, with the witness. If the case proceeds to trial, witnesses of fact will usually have to attend court and be cross-examined on the evidence in their witness statements by the opponent's barrister (for more information on the differences between solicitors and barristers see below).

Anyone who has first-hand knowledge of the relevant facts can be a factual witness; they do not need any formal qualifications (in contrast to expert witnesses, which are described immediately below).

### EXPERT WITNESSES

It is common for disputes to involve technical points which require the parties to adduce evidence from expert witnesses in order to help the court resolve them. Such technical points could relate to, for example, company accounting, foreign law or how long a piece of specialist machinery might be expected to last. Expert witnesses provide their evidence in the form of a written report setting out their experience and their opinion on the relevant points in dispute. There is generally then a process whereby the parties' experts meet to discuss, and try to narrow, the issues in dispute between them.

Expert witnesses owe their primary duties to the court, and not to the parties instructing them. It is therefore critical that they are and remain at all times independent and objective.

The parties must obtain the court's permission to rely on expert evidence. The question of what, if any, expert evidence should be adduced is generally decided before, or at, the CMC.

## 6 Interim applications

It is not uncommon for matters to arise during the course of litigation but before trial which need to be decided by the court, either "on the papers" or at an oral hearing. These matters range from a relatively simple application for the extension of a procedural deadline which is not agreed between the parties, to more complex applications, such as for disclosure of specific documents. Such applications, and the opposing party's response, will generally have to be supported by evidence, usually in the form of a witness statement with exhibited documents.

## 7 Trial and preparation

The majority of cases settle before reaching trial. However, for those that do not, significant preparation for trial is required, including on the following key aspects:

### TRIAL BUNDLE

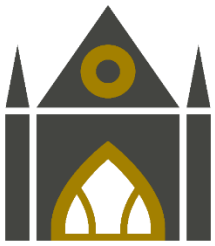
The parties work together to produce an agreed bundle of documents which includes all the documents which will be referred to

during the trial. This is often a time-consuming process, particularly in significant cases where the trial bundle can contain many thousands of pages. In most large commercial cases, the trial bundle will be electronic, with the parties, their legal teams and the judge accessing it via individual screens set up in the court room.

### SKELETON ARGUMENTS

Shortly before trial, the parties are required to lodge at court written 'skeleton arguments' summarising the arguments they will make during the trial. While the full arguments will be made orally during the trial, the skeleton arguments are important documents as they introduce the trial judge to each side's position, and the judge will return to them repeatedly during the trial.

### TRIAL



Trials vary in length from a few days to many months, depending on the nature and complexity of the case, and the number of factual and expert witnesses. There are several stages to the trial. There is often a pre-trial review hearing where the court will check that trial preparation is complete and resolve any outstanding case management issues. The first stage of the trial itself will generally be for each party's barrister to make opening speeches summarising their clients' respective positions, and the arguments and evidence they rely upon. Then witnesses of fact, followed by any expert witnesses, will be cross-examined by the barristers. Finally, each party's barrister will make closing speeches, summarising the key points of evidence and legal arguments heard by the court during the trial. Those closing speeches will usually be accompanied or followed by written closing submissions which summarise each party's arguments, and the evidence heard during the trial.

## 8 Judgment

Following the trial, the judge will consider all of the parties' evidence and submissions and deliver a judgment. Generally, this occurs some time after the trial itself (and in some cases, particularly complex ones involving lengthy evidence, many months after).

A judgment can be appealed but the court's permission must be obtained, and appeals can only be brought on specific, narrow grounds, namely that the decision was wrong or unjust because of a serious procedural or other irregularity during the proceedings in the lower court. There are strict court rules relating to appeals, including with regard to timing, and permission.

The losing party is required to pay any damages awarded under the judgment. If they do not then the court, on the application of the successful party, has various powers to enforce the judgment. These include seizure of goods, charging orders, third party debt orders and attachment of earnings orders. These methods are effective if the losing party's assets are within the English courts' jurisdiction. If the assets are located outside

the jurisdiction, the English courts have arrangements in place with a number of jurisdictions to facilitate cross-border enforcement (although not with all jurisdictions, so care must be taken in this regard).

## 9 Key features of English civil litigation

### PUBLIC NATURE OF LITIGATION

A key feature of English civil litigation is that it follows the principle of 'open justice'. This means that cases are almost always heard in open court and anyone is able to attend. Litigants who have concerns about confidentiality should be mindful of this when embarking on litigation. Even before the case is tried in open court, certain key documents are filed at court and members of the public and/or press are able to access them. These include documents that will contain a significant level of detail about the claim, some of which may be confidential or otherwise sensitive.

There may also be interim court hearings before trial which will also be open to the public.

### COSTS

Litigation can be unpredictable, and the costs of it therefore hard to estimate accurately at the outset. Those costs can often also be very significant. An important feature of English litigation is that the unsuccessful party will generally be ordered to pay a significant proportion of the successful party's costs. Therefore, the unsuccessful party will generally have to pay not only its own costs of the litigation, but also a significant proportion of its opponent's costs as well, in addition to any sum that the court orders by way of substantive compensation for the claimant's losses. The courts have a broad discretion in awarding costs and will take into account certain factors (for example, any attempts made by the parties to settle the claim) when making an assessment.

**There are several arrangements which help parties meet the cost of litigation. These include, but are not limited to:**

- conditional fee agreements under which the litigant pays no fee or a reduced fee if the case is unsuccessful, but in general a higher than normal fee if the case is successful;
- litigation funding, where a third party agrees to pay some or all of the costs of the litigation in return for a share of the proceeds if the claim succeeds; and
- 'after the event insurance' which is arranged after the dispute has arisen and will generally cover both the insured's own costs of litigation and any costs of the insured's opponent that the insured is ordered to pay.

Although available, such arrangements are not commonly used in respect of significant commercial litigation in the English courts.

## SETTLEMENT

The English courts actively encourage litigants to make serious attempts to settle disputes both before formal court proceedings are issued, and, once proceedings have been issued, before trial. There are no hard and fast rules as to the timing of, or format for, settlement discussions: they can occur at any stage in the litigation process, from the earliest pre-action correspondence, right up to the day of the trial (and in some cases even after trial has ended but before the court has given its judgment), and may be very informal (e.g. a phone call between the parties, or between the parties' lawyers) or more formal (e.g. a structured mediation where a specialist negotiator will seek to identify common ground between the parties and encourage a settlement).

When, and how, to make any settlement offer or approach is an important tactical consideration throughout the life of a case, particularly because whether and how parties engage in attempts to settle a dispute can have significant costs consequences following trial. In general, the courts will be quick to apply costs sanctions against parties who have not reasonably engaged in settlement discussions or failed to accept a reasonable offer.

## ALTERNATIVE DISPUTE RESOLUTION (ADR)

There are situations where parties wish to avoid litigation through the courts because, for example, they do not want to incur the costs of court litigation or they do not want to air the dispute in public. There are several forms of 'alternative dispute resolution' (or 'ADR'). Some are designed to facilitate settlement, such as mediation (discussed above) or 'early neutral evaluation', a process where a neutral third party (often someone with considerable expertise, such as a retired judge) will provide an early non-binding view on the merits of the case. Other forms of ADR are designed to produce a binding decision, such as arbitration, where an independent arbitrator hears and decides the case in a similar manner to a judge but, critically, during a process which is private. These processes are all selected through agreement of the parties and often contracts will require the parties to use one of these processes in the event of a dispute either instead of, or before, court proceedings.

## SOLICITORS & BARRISTERS

A party's litigation legal team is likely to be made up of both solicitors, like Travers Smith, and barristers. Both come under the umbrella term of 'lawyers' but have different expertise and play different roles in the litigation process. Solicitors work more closely with their client, taking instructions and advising on a day-to-day basis. They are

also generally more closely involved in the early stages of a case before proceedings are issued, particularly with regard to initial fact-finding and evidence-gathering. Solicitors are also more heavily involved in the legwork of each stage of the litigation process, for example, preparing disclosure, and obtaining statements and reports from witnesses and experts (as described above), albeit that barristers are also often involved in that process. Barristers are more court-focussed. In particular, they will present oral arguments to the court during hearings, prepare the parties' formal statements of case which are lodged at court, and draft any other written submissions to the court such as skeleton arguments prior to hearings. Barristers are often referred to as 'Counsel'.

**PLEASE BE ADVISED**

This guide is based on the Civil Procedure Rules as at March 2021. Nothing contained in this guide constitutes legal advice and it should not be relied on when considering taking any step in respect of an actual or potential dispute. As every dispute is different, if you are considering commencing or defending a claim, you should seek specific legal advice as soon as possible.

**FOR FURTHER INFORMATION, PLEASE CONTACT**

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Meet the Team here