

1. **Civil Court System**

A. Supreme Court (was House of Lords; House of Lords opinions still binding precedent)

B. Court of Appeal

C. High Court – court of first instance/appeal court

(a) First instance is justified if:

- Financial value of claim/amount in dispute
- Complexity of facts/legal issues/remedies/procedures; OR
- Importance to public
- Writs/order to control over 5,000 GBP

(b) 3 divisions

- Chancery division
 - ♦ Business list
 - ♦ Property, trusts and probate
 - ♦ Intellectual property
 - ♦ Insolvency and companies list, revenue list, competition list
- King's bench division
 - ♦ Commercial court, circuit commercial court, technology and construction court, admiralty court
 - ♦ 'general' – PI, professional negligence, contract breach
 - ♦ Administrative court – judicial review
 - ♦ Planning court
- Family division

ii. **County Court – court of first instance/appeal court**

- If value of claim (other than PI) is greater than 100k, can be commenced in either HC or CC
- PI that don't involve negligence worth less than GBP 50,000
- Non-PI worth less than GBP 100,000 - CC
- No separate divisions, where no specialist judge is required
- Amount is exclusive of
 - ♦ Interest, costs, counterclaim, contributory negligence, and deduction of social security benefits

iii. Appeal Tribunals

(a) Tribunals

iv. Magistrate's Court

(a) Limited civil jurisdiction

v. **Rights of Audience**

- (a) Solicitors can carry out advocacy in MC, CC, Tribunals and Appeal Tribunals
- (b) Solicitors generally cannot carry out advocacy in HC, Court of Appeal and Supreme Court, unless they undertake training and pass assessments to obtain Higher Rights of Audience

D. Civil Procedure Rules

i. 'overriding objective' – enables court to deal with cases **justly and at proportionate cost**, both court and **all parties must give effect** to overriding objective and must be considered **at all stages of litigation**

- (a) Ensuring parties are on equal footing
- (b) Saving expense
- (c) Dealing with case in ways which are proportionate to amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party
- (d) Ensuring case is dealt with expeditiously and fairly
- (e) Proportionate measures should be taken to identify vulnerable parties/witnesses and give appropriate directions

E. Case Analysis – investigation of legal issues; to be completed by both claimant and defendant and to be reviewed throughout case

- i. Investigation of legal issues to determine what must be proved or disproved
- ii. Should be reviewed throughout case to take into account any changes in case law, emerging fact and evidence in case and any potential for settlement
- iii. Look at:
 - (a) Duty
 - (b) Breach

- (c) Causation
- (d) Loss
- (e) Parties
- (f) Limitation
- iv. Standard of proof – on a balance of probabilities

2. **Costs**

- A. Court's Broad Discretion to Allocate Fees
 - i. Generally, unsuccessful party will be ordered to pay costs of successful party
 - ii. Court can make a different order, and will take into account range of factors, including conduct of parties and whether a party has succeeded on all of its case or only part
 - iii. Generally will only allow a **reasonable and proportionate** sum to be recovered
 - iv. 'costs follow event'
 - (a) Generally, unsuccessful party pays costs of successful party
 - v. **Court will consider costs order at end of any interim hearing and end of trial**
 - vi. **Court can require non-party to pay costs if it substantially controls and funds proceedings**
 - vii. If there is an **unreasonable** refusal to agree to ADR, court will use its discretion in allocating costs
- B. **Standard Basis (proportion taken into account)**
 - i. **Reasonable and proportionate** expenses incurred, and in amount
 - ii. Any doubt is resolved in favour of paying party
- C. Indemnity basis (just need to be reasonably incurred)
 - i. Have been **reasonably incurred** and
 - ii. Are reasonable in amount
 - iii. Any doubt is resolved in favour of **receiving party**
- D. Proportionate – if they bear reasonable relationship to following:
 - i. Sums in issue in proceedings
 - ii. Value of any non-monetary relief in issue in proceedings
 - iii. Complexity of litigation
 - iv. Any additional work generated by conduct of **paying party**
 - v. Any wider factors involved in proceedings, such as reputation or public importance
- E. Unless court orders otherwise, **or unless court has stayed proceedings or judgment**, party must comply with order of payment of costs within **14 days** of
 - i. Date of judgment or order if it states amount of costs
 - ii. If amount of costs is decided later, date of certificate which states the amount; or
 - iii. In either case, such other date as court may specify
- F. Costs Procedure
 - i. Types:
 - (a) **Fixed costs (fixed by rules) – applies unless court orders otherwise !** - are recoverable by one party from another in certain circumstances in litigation (**uncontested disputes, enforcement proceedings and small claims**); awarded whether or not they were incurred
 - (b) **Assessed costs** - are those where court will need to be involved with decision as to amount payable
 - ii. Assessments:
 - (a) **Summary assessment** is used in **fast track proceedings** and in other cases where a hearing has lasted no more than a day (must prepare statement and serve not less than **24 hours** before time fixed for hearing); includes hearings, and judge will assess costs as soon as order is made
 - (b) **Detailed assessment** is used in other cases
 - **Service on the paying party must be within three months of the date of judgment**
 - **points of dispute must be served by paying party within 21 days of service**
- G. Interim cost orders
 - i. Costs in any event (and summary assessment of costs)
 - (a) Party in whose favour this order is made is awarded its costs of interim hearing from other party regardless of who eventually wins at trial
 - ii. Costs in the case
 - (a) Party who wins will recover its costs of interim hearing from other party
 - iii. Costs reserved
 - (a) Decision about who pays is put off to a later occasion; if no decision is later made then costs will be in the case
 - iv. Claimant or defendant's costs in the case

- (a) If claimant is successful and received order that it should be entitled to its costs at end of trial, it can include the costs on interim application
- v. Costs thrown away
 - (a) If judgment or order is set aside, party in whose favour this costs order is made is entitled to costs incurred as a result of judgment or order being set aside
- vi. Costs of and caused by
 - (a) Party must pay costs resulting from something party has done
- vii. Costs here and below
 - (a) Party in whose favour costs order is made is entitled not only to that party's costs in respect of proceedings but also to that party's costs of proceedings in any lower court
- viii. No order for costs
 - (a) Each party will bear its own costs of this hearing

H. Legal Aid

- i. The 'means' test determines whether an applicant:
 - (a) is funded in the magistrates' court;
 - (b) is funded in Crown Court trials and, if so, whether they should make an income contribution; and
 - (c) will the applicant have to make an income contribution if their appeal is unsuccessful or abandoned.
- ii. There are two types of means test:
 - (a) the 'initial' means test - applicant's gross household income, weighted to take account of family circumstances, such as the number of dependants and essential living costs, such as mortgage or rent = adjusted income;
 - (b) or the 'full' means test - applicant's gross household income, with allowable outgoings and a weighted living allowance combined = their disposable income.
- iii. All applicants undergo the initial means test, which assesses their gross income.

3. Pre-action Considerations and ADR

A. Pre-action conduct

- i. Parties must consider whether negotiation or another form of ADR might allow them to avoid proceedings and should not just press ahead in a '**mechanical manner**'
- ii. Court will decide whether non-compliance with a pre-action protocol will merit adverse consequences
- iii. **Non-compliance may be justified where a limitation period is about to expire or where there is another reason for urgent proceedings or for the element of surprise**
- iv. **If not complied with, court can impose sanctions in relation to costs or interest, or stay a claim**
- v. Example – pre-action protocol for PI
 - (a) Claimant write letter of notification to potential defendant giving brief details to enable defendant to notify insurer
 - (b) Parties consider any rehab needs
 - (c) Claimant should write to defendant to give full details of claim (**Letter of Claim**)
 - (d) **D acknowledges Letter of Claim within 21 days**
 - (e) **D investigates and sends full Letter of Response within 3 months** of letter acknowledging claim. If D denies liability or quantum
 - (f) Parties disclose key documents, engage in appropriate negotiations and make proposals for settlement
 - (g) Joint selection of quantum expert

B. Limitation Act 1980

- i. If proceedings are not commenced within relevant limitation period, claimant will be barred from recovering damages
- ii. **PI Claims – 3 years** of latest of:
 - (a) Date when cause of action accrued; or
 - (b) Date of knowledge of person injured
- iii. **Fatal accidents** – person injured must be able to bring a claim, and within **3 years** from later of:
 - (a) Date of death; or
 - (b) Date of knowledge of dependent
- iv. **Date of knowledge: knowing**
 - (a) That injury was **significant**;
 - (b) That it was **attributable** (at least in part) **to alleged wrongdoing**;
 - (c) Identity of defendant; AND

Dispute Resolution

- (d) If it is alleged that wrongdoing was by someone other than defendant, the identity of that person and the additional facts supporting bringing claims against defendant
 - (e) Other considerations
 - It is knowledge of facts which permits limitation period to start running
 - Claimant may or may not realise that, given those facts, they have a claim in negligence
 - This is not relevant to this test
 - v. Extensions of time
 - (a) In the interest of justice and if equitable
 - (b) Court will look at
 - Conduct of parties
 - Reasons for delay
 - Effect of such a late claim on evidence
 - vi. **Contribution** – claiming contribution from another person who may also be liable for damage
 - (a) Limitation date is **2 years** from date on which right to recover contribution arose, which is calculated as
 - Date when judgment was given imposing liability on first party; or
 - In cases where first party agreed to make payment, date on which amount to be paid was first agreed
 - vii. **Latent damage (does not apply to PI)**
 - (a) Rules in PI and fatal accidents claims take precedence
 - (b) Limitation period is extended to **later** of:
 - **Six years from** when cause of action accrued; or
 - **Three years from** when he had requisite:
 - ◆ Knowledge; and
 - ◆ Right to bring a claim
 - (c) Subject to long-stop limitation date of **15 years from date of latest negligent act/omission** which caused all or part of damage
 - (d) Date of knowledge – date when material facts about damage in respect of which damages are claimed
 - viii. **Judgments – action to enforce judgment – 6 years** from when judgment became enforceable
 - ix. **Tort and contract claims – 6 years** from date on which cause of action accrued
 - x. **Disability** – date begins when disability ends and is
 - (a) 2 years in relation to contribution claims;
 - (b) 3 years in relation to personal injury or fatal accident claims; and
 - (c) 6 years in most other cases
 - (d) Person is under disability whilst they are a minor or lacks mental capacity to conduct proceedings
 - xi. **Fraud/concealment/mistake – limitation does not start to run until claimant discovered fraud, concealment or mistake (or could with reasonable diligence have discovered it)**
- C. **Alternative Dispute Resolution**
- i. Types:
 - (a) Negotiation
 - (b) Mediation
 - Mediator has no authority to make any decision which is binding on parties
 - If no agreed resolution, content of mediation will remain confidential and will not be made known to court
 - (c) Arbitration
 - Impartial adjudicator whose decision parties to dispute have agreed will be final and binding
 - Private
 - Easier enforcement in certain jurisdictions
 - (d) Mediation-arbitration
 - Will initially try mediation, but if that doesn't work, will move to arbitration
 - (e) **Expert appraisal – does not deliver binding decision, just an opinion**
 - (f) **Expert determination – expert gives binding decision**
 - (g) Conciliation
 - Like mediation in that it's facilitative but with an evaluation
 - ii. Reasons to use

- (a) Court expects parties to explore ADR
- (b) Preserves or creates a better relationship between parties
- (c) Less expensive and/or saves time
- (d) Greater privacy
- (e) Less disruption to clients
- (f) Outcomes that reflect risks
- (g) Greater control over process
- (h) Greater involvement of parties themselves
- iii. Cases not suitable for ADR
 - (a) Very few

4. **Commencing and serving proceedings**

A. Parties to Proceedings

- i. Partnership – name under which partnership carried on business at time, course of action accrued unless it is inappropriate to do so (ex. Partnership with multiple changes of name of partnership or multiple mergers)
 - (a) Name partners personal if it is likely to be necessary to seek enforcement of judgment against partners' personal assets
- ii. Sole traders – John Flagstone (trading as John's Café)
- iii. LLPs – Flagstones LLP
- iv. Companies – Rockstone Limited
- v. Trusts
 - (a) Don't add beneficiaries
 - (b) Can be by or against trustees, executors or administrators
- vi. Deceased persons
 - (a) Person may be appointed to represent estate of deceased
 - (b) If grant or probate or administration has been made, claim must be brought against persons who are PRs
 - (c) If no grant/admin has been made, claim must be brought against 'estate of' deceased; and claimant must apply to court for an order appointing a person to represent the estate of deceased in the claim
- vii. Children/protected parties
 - (a) Capacity:
 - Can person **recognise problem** they encounter?
 - Can person **explain with sufficient clarity** the problem to those from whom they seek appropriate advice?
 - Can person **understand and evaluate advice** received from an appropriate source?
 - Can person **understand effects of choosing one course** of action over another and give effect to their chosen course through instruction?
 - (b) Represented in civil proceedings by a litigation friend
 - Usually relative or person appointed by court to act on party's behalf
 - (c) **Service on children**
 - **Any document due to be served on a child or a protected party must be served on litigation friend**
 - Children and protected parties should be referred to in title to proceedings on documents

B. **Where and How to Issue a Claim**

- i. Which court?
 - (a) See above
 - (b) Value of claim is financial worth and only includes the amount in dispute (ex. PI claim worth 60,000, but D admits to 15k of the damages, then it would be valued at 45k and would need to be brought in CC, absent complexity/public importance, and ignores:
 - Interest
 - Costs
 - Any counterclaim
 - Any contributory negligence and
 - Any deduction of social security benefits
 - (c) Transfer
 - Court may transfer and claimant would pay costs of transfer
 - If brought in high court when it should have been county, penalty that any costs awarded in **claim can be deducted by up to 25%**, but this is at court's discretion

Dispute Resolution

- ii. Issuing Claim at Court
 - (a) Must send or bring all following to court
 - Copies of claim form
 - Court issue fee
 - (b) Some county court money claims can be issued using 'money claim online'; if claim is defended, it can be transferred to appropriate local county court hearing centre
 - (c) **Date of issue stops time for limitation purposes**
- C. Service
 - i. May be served either
 - (a) **By court** (always done by First class post); or
 - (b) By claimant/claimant's solicitor
 - **Claimant's solicitor must file certificate of service at court within 21 days of service if solicitor serves**
 - Personally on defendant
 - Leaving document at a permitted address
 - First class post
 - Document exchange
 - Fax – only permitted if D has indicated it will accept service by fax
 - Other electronic method – only permitted if D has indicated it will accept service by email
 - Any other method authorised by court
 - ii. Place of service
 - (a) If D gives in writing a solicitor's address in jurisdiction for service, or their solicitor does same, service must be to solicitor's address
 - (b) Otherwise, D may be served with claim form at address at which D resides or carries on business within UK and which D has given for purpose of being served with proceedings
 - (c) If neither (a) nor (b) apply:
 - Individual – usual OR last place of residence
 - Individual being sued in name of business – usual OR last place of residence; or principal or last known place of business
 - Individual being sued in business name of a partnership – usual or last known residence of individual; or principal or last known place of business of partnership
 - LLP/Company registered in E&W – principal office of partnership/company; or any place of business of partnership/company within jurisdiction which has a real connection with the claim
 - iii. Service of Claim Form in UK and Outside UK
 - (a) In UK
 - (b) Outside UK
 - Court permission not required for service of claim form outside UK if
 - ◆ made in Scotland or Northern Ireland
 - ◆ party is party to contract where Hague Convention applies or party to contract where jurisdiction is decided
 - Application to court is required for service of claim form outside UK if:
 - ◆
 - iv. Time Limitation to Claim Form Being Served
 - (a) **'relevant step' must be completed before 12.00 midnight on calendar day four months after date of issue**
 - **Relevant step:**
 - ◆ **Personal service/leaving document at relevant place – leaving claim form with defendant**
 - ◆ **First class post/DX – posting claim form/leaving it with DX service**
 - ◆ **Fax – completing transmission**
 - ◆ **Electronic method – sending email or other electronic transmission**
 - (b) Application for extension of time should be made within **4 month** period of validity of claim form, and claimant will need to show good reasons for extension
 - (c) If application is made after deadline, court will grant an extension only if
 - It is court that failed to serve claim form; or

- Claimant has taken all reasonable steps to comply; **and**
- Either way, application has been made promptly (ie, must always consider if application was made promptly)
- (d) Mistakenly serving D's insurers or solicitors when rules required service on D is unlikely to justify an extension in these circumstances
- v. Serving particulars of claim
 - (a) May include these within claim form, or can serve in form of a separate document
 - (b) If particulars of claim are contained in or served with claim form, claimant must also serve response pack along with claim form and particulars of claim. Form pack contains:
 - Form for admission
 - Form for defending
 - Form for acknowledging service
 - (c) If not contained with claim form, must be served within **14 days of service of claim form, and also within period of validity of claim form, ie within 4 months of issue**
 - (d) Once served, claimant must file copy at court within 7 days of service
 - (e) How to serve
 - Personal service
 - Delivering to or leaving at permitted address
 - First class post/document exchange
 - Fax or other electronic method
- vi. Deemed date of service
 - (a) Claim form
 - **Second business day** after completion of 'relevant step'
 - Business day = any day except Sat, Sun, bank holidays, Good Friday or Christmas Day
 - (b) Particulars of Claim
 - If contained in claim form, then is part of claim form and deemed served same day as claim form
 - If attached to or served with claim form in a separate document and contained in same envelope, then there is some ambiguity in rules as to whether rules and time limits apply to particulars
 - If served separately (within 14 days after service of claim form), then rules are as follows for particulars of claim and any other documents served:
 - ♦ **Instant methods** (personal service, fax, email, delivering/leaving at a permitted address)
 - * **If done before 4.30 pm on a business day – served same day**
 - * **Otherwise – next business day**
 - ♦ **Not instant methods**
 - * **Second business day after posting/giving to DX provider if on a business day**
- vii. Alternative service
- viii. Under CPR 6.15(2), the court has discretion to validate service retrospectively if reasonable steps were taken to bring the claim to the defendant's attention and if good reason exists to do so.
 - (a) If persons acts under a genuine mistake regarding the service time frame, which the court may consider justifiable
 - (b) This action seeks formal validation from the court, essentially 'curing' the procedural misstep without unnecessary dismissal of the claim
- 5. **Responding to proceedings**
 - A. Acknowledging service – not compulsory, can instead defend straight away
 - i. 14 days after service of particulars of claim (if claim form states particulars are to follow)
 - ii. 14 days after service of claim form/particulars of claim if served together
 - iii. Extends time for filing defence
 - (a) If no acknowledgment is filed – must file and serve defence within **14 days of deemed date of service of particulars of claim**
 - (b) If filed indicating intention to defend claim – extends deadline for serving defence to **28 days after deemed date of service of particulars of claim**
 - B. Defending claim
 - i. Must be filed as set forth above in iii(a)-(b) unless certain circumstances provide for longer period:
 - (a) Parties may agree to extend time up to **28 days** (thus, possible to have up to 56 days), of which extension **must be notified to court in writing**
 - (b) Application to court

- (c) Response of 'money paid' – court will send notice to claimant, and claimant must respond within 28 days and claim is stayed if they do not do so
 - (d) Where claim form is service out of jurisdiction, longer periods apply depending on country involved
 - (e) No need to file before court hears application disputing court's jurisdiction
 - Needs to file an Acknowledgment of Service and on that form D must indicate that they intend to dispute jurisdiction (CPR 10.1(3)(b)). The Defendant then has 14 days after filing their Acknowledgment of Service to make an Application to the Court to challenge the jurisdiction.
 - (f) If claimant files for summary judgment before D has filed acknowledgment of service:
 - Court must give permission
 - Must be related to specific performance, forfeiture
 - (g) If claimant files for summary judgment after acknowledgement of service, D need not file before hearing for MSJ
 - (h) Where court makes order for service of a claim form on an agent of a principal who is overseas, court will specify period
- C. Admitting Claim
- i. Admitting specified claims
 - (a) D will state amount of claim that is admitted, and balance will remain in dispute
 - ii. Requesting time to pay – D may make a request for time to pay; if claimant doesn't accept, court will determine rate of payment taking into account info supplied by D and objections raised by claimant
 - iii. Entering judgment following claim being admitted –
 - iv. **D may request time to pay, and if claimant does not accept proposal, court will determine rate of payment taking into account all info**
- D. Counting Time
- i. **Clear Days: day on which period begins**
 - (a) Any reference in CPR is to clear days
 - (b) Ex. Period for filing a defence is 14 days after service of particulars of claim
 - (c) Day on which period begins is never included – start counting on following day (ex. Day you serve is day 0)
 - ii. Clear days: end of period defined by reference to event
 - (a) Ex. Notice of an application must be served at least 3 days before hearing
 - (b) End of period of time is defined by reference to an event, so day of hearing would not be included when counting
 - iii. Clear days: days which do not count
 - (a) **Where specified period is 5 days or less – Saturdays/Sundays/bank holidays, Christmas day or Good Friday do not count**
 - iv. Deadlines on days on which office is closed
 - (a) When deadline relates to doing any act at court office; and applying first 3 rules, deadline for act ends on a day on which court office is closed, then act is treated as on time if done on the **next day** on which court office is open
- E. Default Judgment (Part 12: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part12>)
- i. Applying for judgment to be granted in claimant's favour without a trial if D has not responded to claim by either serving an acknowledgment of service or a defence within prescribed time limits
 - ii. Conditions that must be satisfied:
 - (a) At date on which judgment is entered, time has expired for filing acknowledgment of service; AND
 - (b) Claim has not been admitted or satisfied by defendant; AND
 - (c) No application for summary judgment or strike out has been made by D
 - iii. Setting aside default judgment (Part 13)
 - (a) Court **must set aside** judgment where judgment was wrongly entered:
 - Time limit not expired; or
 - Acknowledgment filed on time; or
 - SJ or strike out had been applied for before judgment was entered; or
 - D had satisfied whole of claim before judgment was entered or admitted claim or required time to pay
 - (b) Court **may set aside judgment** if judgment was correctly entered, but:
 - D has **real prospect of successfully defending claim**; or

- It appears to court there is **some other good reason** why judgment should be set aside or varied or D should be allowed to defend

(c) **Court must consider how promptly D made application to set aside**

6. **Statements of Case**

A. **Must have statement of truth**

B. **Claim Form** is first statement of case

- Must contain parties, addresses, claim details (brief details of claim)
- Brief summary of type of claim
- Remedy sought by claimant
- Not required to expressly include a claim for costs or remedy sought**
- where claimant is making a claim for money, claim form must include a statement of amount claimed
- if particulars of claim is amended, the claim form must also be amended in same time frame and vice versa*

C. **Particulars of Claim**

- Must include a concise statement of facts on which claimant relies
- Specific rules:
 - Set out claim for aggravated damages, exemplary damages and/or provisional damages, giving grounds for claiming them
 - In PI claims, particulars should include claimant's date of birth, details of his/her injuries, and attached a schedule of past and future expenses losses and report of any expert medical practitioner which is relied on
 - Must identify land and make clear whether it includes residential premises if claim is in relation to possession, occupation, use or enjoyment of land
 - Written agreement should be attached if claim is based on such

D. **Defence & Reply**

- Every defence must include D's address for service in the jurisdiction and where D resides or carries on business if claim form does not contain such information
- Must admit, deny, or ask for proof of each allegation; cannot blanket/bare denial without giving reasons**
- Defendant should admit anything that is not disputed or non-controversial in order to narrow the issues and save costs and time (CPR 44.2(5)(b))**
- Defence should be filed with directions questionnaire – parties are given at least **14 days'** notice of deadline for doing this**
- Contents required**
 - If disputing limitation, must state the date of expiry
 - Disputing statement of value
 - In PI – dispute of medical evidence
 - Any matters re: mitigation or reduction of damages
 - Set-off entitlements
 - Human rights arguments relied upon or relief sought
- A party may not file or serve any statement of case after a reply to defence without the permission of the court.**

E. **Counterclaims**

- Counterclaim by D against claimant – normally made at same time as filing defence; **if made after, permission of court is needed**
- Counterclaim may or may not have anything to do with claimant's substantive cause of action against D, court can order counterclaim be struck or heard separately**

F. **Additional Claims**

- Classic counterclaim
 - Only need permission from court if filed **after defence**
- Counterclaims against a person other than claimant**
 - Permission always required to file**
- Claims for contribution or indemnity from an existing party
 - If filed and served at same time as defence, or if additional claim is made against a party added to main/substantive claim at a later date – **if within 28 days after that party files its defence, no permission required from court; any other time, permission is required**
- Other additional claims
 - If additional claims is issued before or at same time as defence, no permission required
 - Any other time, need permission

- (c) Must be served on person against whom it is made within **14 days of it being issued if made without court's permission; if court's permission is required, court will give directions as to when notice should be served**

G. Amending Statements of Case

- i. Can amend without permission or consent any time before it is served
- ii. If a party has amended their statement of case where permission of the court was not required, the court may still disallow the amendment (17.2)
- iii. Can be amended any time with written consent of all parties, or if consent is not given, with court's permission
- iv. Amended SoC should be filed within **14 days of date of order granting amendment**
- v. If wanting to add, remove or substitute a party: (CPR 19.1/19.2(2))
 - (a) Amendment must be desirable so that court can resolve all matters in dispute in the proceedings; **OR**
 - (b) There is an issue involving new party and existing party which is connected to matters in dispute in the proceedings;
- vi. Court will mind policy objective of enabling parties to be heard if their rights may be affected by a decision in the case, and the overriding objective
- vii. Requires consent of party being added as claimant
- viii. After limitation period expires:
 - (a) Not allowed, with exceptions:
 - Amendments in relation to PI claims/adding cause of action
 - ◆ When court directs limitation period will not apply in a PI action
 - ◆ New cause of action is an original set-off or counterclaim
 - ◆ New cause of actions arises out of same facts or substantially same facts as are already in issue in original claim
 - Amendments generally
 - Amendments which add or substitute a party – only if deemed **necessary**
 - ◆ Correcting mistake as to name of party – only if new party is to be substituted for one that was named in claim form in mistake for new party
 - ◆ Claim cannot properly be carried on/by/against original party unless new party is added or substituted; or
 - ◆ Original party has died or had a bankruptcy order made against him and his interest or liability has passed to new party
 - **Name of party might be allowed to change, but those relating to someone with an entirely new identity will generally not be allowed**

H. Request for Further Information

- i. Expectation is to make voluntary requests for further info before involving court
- ii. Request should be concise and confined to matters which are reasonably necessary and proportionate to enable requesting party to prepare its own case
- iii. Response must be written, dated and signed by party or legal representative and include a statement of truth
- iv. Response must be sent to other party and filed at court

I. Request to court for further info

- i. Application should be made as an interim application, if other party has not responded after 14 days, application can be made without notice to opponent and court can deal with application without a hearing

7. **Interim applications**

- A. Applications for orders or directions made to court, usually in 'interim' period between commencement, such as
 - i. Extending time period for taking a particular step in proceedings
 - ii. Applying to amend statement of case
 - iii. Requiring other party to provide further info
 - iv. Requesting specific disclosure of a document
 - v. Seeking permission to rely on expert evidence

- B. Parties are under obligation to 'bunch' interim applications
- C. Application notice, note from court indicating date and time of hearing, evidence and draft order must be served on other party after application has been issued by the court
- D. If application deals with service, further evidence, or a hearing, application must be made as soon as practicable but not less than **3 clear days before application is to be heard (CPR 23.7)**
- E. Statement of costs in relation to application should be filed and exchanged not less than 24 hours before hearing
- F. Without notice requirements, permitted only if:
 - i. There is exceptional urgency; OR
 - ii. Overriding objective is best furthered by doing so; OR
 - iii. All parties consent; OR
 - iv. Court gives permission; OR
 - v. Court order, rule or practice direction permits; OR
 - vi. Date for a hearing has been fixed, a party wishes to make an application at that hearing, and party does not have sufficient time to make application at that hearing
 - vii. **Procedural safeguards:**
 - (a) Application must explain why no notice is given
 - (b) Applicant must draw to court's attention arguments and evidence in support of the respondent's position
 - (c) Applicant must serve respondent as soon as possible after hearing, whether or not court has granted relief sought
 - (d) Court order must contain statement of respondent's right to make an application to set aside or vary the order. Any application to set aside must be made within 7 days of order being served on other party
- G. Interim payments (CANNOT BE USED FOR COSTS)
 - i. Payment on account of damages, debt or other sum (except costs) which defendant may be held liable to pay to a claimant
 - ii. Service must be at least **14 days before interim hearing**
 - iii. Must be of no more than a reasonable proportion of a likely final judgment
 - iv. **Conditions:**
 - (a) D admits liability to pay damages; OR
 - (b) Claimant has obtained judgment against D for damages to be assessed; OR
 - (c) If claim went to trial, court is satisfied that claimant would obtain judgment for substantial amount of money against D from whom he is seeking an order for an interim payment, whether or not that D is the only D or one of a number of Ds to the claim
- H. Security for costs – application made by D who is concerned claimant will not be willing/able to pay D's costs should claim be successfully defended
 - i. **Relates to costs of claim, not level of damages**
 - ii. **Grounds:**
 - (a) Having regard to all circumstances of the case, it is just to make an order; AND
 - (b) One or more of prescribed conditions are satisfied:
 - C is resident out of jurisdiction and is not resigned in state bound by Hague Convention
 - C is company and there is reason to believe it will be unable to pay D's costs if ordered to do so
 - C has taken steps in relation to its assets that would make enforcement of a cost order against it difficult
 - C has changed addresses since claim was commenced with a view to evade consequences of litigation
 - C failed to give address in claim form
 - C is acting as a nominal claimant and there is reason to believe it will be unable to pay D's costs if ordered to do so
 - iii. **Mareva Injunction** (freezing injunction – typically done ex-parte, where claimant must give all material facts)
 - (a) The court has (i) jurisdiction to hear a substantive claim against the respondent in England and Wales, or (ii) a statutory power to grant the order (for example, the court has the power to grant interim relief in support of foreign court proceedings or arbitration proceedings);
 - (b) They have proof that the respondent might try to hide or dissipate their assets;
 - (c) The order is fair and appropriate in all the circumstances; and
 - (d) They have a 'good arguable case' against the respondent.

- (e) Court has discretion to make solicitors give undertakings
- I. Interim injunctions
 - i. May be granted where it is **just and convenient**
 - (a) Is there a serious question to be tried?
 - Must be satisfied that this is not frivolous or vexatious and that there is a serious question to be tried
 - (b) Would damages be adequate remedy for a party injured by court's grant of, or failure to grant, an injunction
 - Damages for applicant?
 - Damages for respondent?
 - (c) Where does balance of convenience lie?
 - The third stage of the test is for the court to weigh the respective inconvenience or loss to each party dependant on whether or not the interim injunction is granted. The competing factors and weight to be attached to each, varies from case to case and cannot easily be listed but they have been found to include the deprivation of employment; the importance of preserving confidential information; damage to the goodwill of the business and the attitude and conduct of the defendant. As stated by Staughton LJ "*the main question is then one of lesser evil: will it do less harm to grant an injunction which subsequently turns out to be unjustified, or to refuse one if it subsequently turns out that an injunction should have been granted...*" otherwise referred to by May LJ as "*the balance of the risk of doing an injustice...*"
 - ii. Applicant must have pre-existing cause of action
 - iii. Equitable principles apply:
 - (a) An injunction will not be obtained when it would serve **no practical purpose**
 - (b) Court might refuse to grant an injunction if applicant has not come to court with '**clean hands**'
 - (c) Excessive delay may lead to a refusal to application
 - iv. Court usually refuses unless applicant undertakes to pay damages to respondent if it transpires the injunction should not have been awarded
 - v. Can be made without notice if justified:
 - (a) Will be granted for limited period and court will fix 2nd hearing to give respondent notice and opportunity to make representations. Court can then either
 - Maintain order
 - Discharge injunction
 - Enforce undertaking in damages if it transpires that injunction should not have been granted
 - ◆ Ex. Undertaking to pay damages for losses if subsequently held that it should not have been granted
 - (b) In exceptional circumstances, **can apply for interim injunction before claim form has even been issued:**
 - Urgent or otherwise desirable to do so in interests of justice
- J. Summary Judgment
 - i. Either
 - (a) Claimant has **no real prospect of succeeding on** claim or issue; OR
 - (b) D has **no real prospect of successfully defending claim or issue**; AND
 - ii. There is no other compelling reason why case or issue should be disposed of at trial
 - (a) Compelling reasons:
 - D needs more time to investigate
 - Expert evidence is required
 - Multi-party litigation
 - Scrutiny of key documents is required
 - D has right to trial by jury eg fraud
 - iii. C can apply after D has filed acknowledgment of service or defence (or earlier with court's permission)
 - iv. D can apply any time after proceedings have commenced
 - v. Service of application notice must be at least **14 days before summary judgment hearing**
 - vi. Application notice must:
 - (a) Include a statement that it is an application for summary judgment; and
 - (b) Direct respondent's attention to CPR which require respondent to file and serve any evidence at least **7 days** before summary judgment hearing

- K. Undertaking (enforceable promise made by a solicitor to someone who reasonably places reliance on it that they, or a third party will do something or cause something to be done, or refrain from doing something, may be given orally or in writing, and need not include the word 'undertake' or 'undertaking'. It must be fulfilled within an agreed timescale or if no timescale has been agreed then within a reasonable amount of time (Part 1.3 of SRA Code of Conduct)

8. **Cases and costs management**

- A. Court's general case management powers
- i. Court may terminate case without either party taking a step
 - ii. Discretionary powers to
 - (a) Extend/shorten time for compliance with any rule, practice direction or court order
 - (b) Adjourn hearings or bring them forward
 - (c) Require a party or their legal representative to attend court
 - (d) Stay whole or part of proceeding or judgment either generally or until a specified event
 - (e) Order any party to file and serve a costs budget
 - iii. If not specified, an application to set aside, stay or vary the order should be made within 7 days of date on which order was served on party making application
 - iv. **Power to strike out**
 - (a) May be used on its own initiative or on application of a party
 - (b) Used sparingly
 - (c) Grounds:
 - Statement of case discloses no reasonable ground for bringing or defending claim
 - Statement of case is an abuse of court's process or otherwise likely to obstruct just disposal of proceedings
 - There has been a failure to comply with a rule, practice direction or court order
- B. Allocation to Track
- i. **Small claims**
 - (a) **Generally:**
 - Value of less than GBP 10,000
 - Claims by tenant of residential premises against a landlord for repairs where neither repairs nor any claim for damages total more than GBP 1,000
 - PI
 - ◆ Road traffic claim – accident occurred before 31 may 2021 or claimant is a child or protected party, or claimant was riding a motorcycle, damages for personal injuries are valued at not more than GBP 1,000
 - ◆ In relation to other road traffic claims, damages for PI are valued at not more than GBP 5,000
 - ◆ In any other personal injury claim, damages for PI are valued at not more than GBP 1,500
 - (b) Other dates
 - Parties to file and serve documents no later than **14 days before main hearing**
 - **Notice of hearing date (at least 21 days' notice usually given)**
 - Original documents brought to hearing
 - Notice of hearing date and time allowed for hearing
 - ii. **Fast track**
 - (a) Claims up to **GBP 25,000**, so long as:
 - Trial is likely to last no longer than one day (five hours); and
 - There will only be oral expert evidence from one expert per party in each of no more than two expert fields
 - (b) Abbreviated directions
 - Disclosure – within 4 weeks of notice of allocation
 - Exchange of witness statements – within **10 weeks** of notice of allocation
 - Exchange of experts' reports – within **14 weeks**...
 - Filing pre-trial checklists at court – within **22 weeks**...
 - Trial date/period fixed or trial – within **30 weeks**...
 - iii. **Multi-track**
 - (a) Normal track for all other cases

(b) Case management conference – used to ensure real issues are identified and understood by parties

- Court will consider
 - ◆ Whether claim is clear
 - ◆ Whether any statements of case need to be amended
 - ◆ What disclosure if required, if any
 - ◆ What expert evidence is required, and how and when it should be obtained;
 - ◆ What factual evidence should be provided for;
 - ◆ Whether any further information is required; and
 - ◆ Whether it will be just and will save costs to order a split trial or the trial of one or more preliminary issues
- **Disclosure report**
 - ◆ to be provided not less than **14 days** before first CMC
 - ◆ not required for claim including PI
 - ◆ briefly describes what documents exists, or may exist
 - ◆ describes where, and with whom, those documents are, or may be, located
 - ◆ describes how any electronic documents are stored
- At least 7 days before any CMC: must file draft directions
- iv. Notice of proposed allocation will be given, which will require parties to:
 - (a) File and serve directions questionnaire
 - (b) On fast track/multi-track, file proposed directions; and
 - (c) For claims under costs management regime, file and serve costs budget and an agreed budget discussion report
- v. Directions questionnaire:
 - (a) Parties must confirm in DQ whether they have complied with pre-action protocols
 - (b) Settlement
 - If all parties request a stay, it will be stayed for **a month**, if any other circumstance, it's up to court
 - Solicitor needs to explain to client considerations for settling and that there could be costs consequences against them if client unreasonably refuses to try to settle
 - (c) Disclosure – exchange of documents
 - (d) Witnesses – there is no property in a witness
 - (e) Expert evidence – needs court permission
 - (f) **Must estimate time needed for trial**
 - (g) Must file cost budgets in multi-track cases
- vi. Allocation hearings are rare
 - (a) Court can consider
 - Financial value of claim
 - Nature of remedy sought
 - Likely complexity of facts, law or evidence
 - Number of parties or likely parties
 - Value of any counterclaim or other additional claim
 - Amount of oral evidence which may be required
 - Importance of claim to any persons who are not parties
 - Views expressed by parties
 - Circumstances of parties
 - (b) Once allocated, court will sent notice of allocation to parties together with copy of DQs

C. Costs management

- i. **Party cannot recover a greater sum for costs from an opponent than it has in fact incurred**
- ii. Applies to all cases except
 - (a) Small claims track or fast track claims

- (b) Claims commenced after 22 April 2014 where amount of money claimed as stated is GBP 10 million or more
- (c) Claims commenced after 6 April 2016 made by or on behalf of a person under age of 18
- iii. Filed and exchanged of cost budget:
 - (a) If claim is less than 50k, filed with parties' directions questionnaires
 - (b) Any other case, 21 days before first CMC
- iv. Failure to file cost budget will have court automatically treat them as having filed a costs budget comprising of only applicable court fees unless court otherwise orders
- v. Solicitor may charge more than is in budget for each stage of litigation and that's fine
- vi. The rule that a party will only recover budgeted costs unless there is good reason does not apply to costs incurred prior to the production of the costs budget
- vii. **Costs management conference –**
 - (a) Generally takes place at first CMC
 - (b) Budget becomes a 'cap' on what can be recovered
 - (c) If no costs management order – if there is a difference of 20% or more between the costs claimed by a receiving party on detailed assessment and the costs shown in a budget filed by that party, the receiving party must provide statement of reasons for difference with the bill costs, and court may reduce recoverable sum
 - (d) If significant developments occur, an amended budget may be submitted to parties for agreement and then to court for consideration
 - Used for sig dev, not for correcting mistakes or inadequacies

D. Sanctions & Relief from Sanctions

- i. Court may:
 - (a) Impose sanction immediately; or
 - (b) Make an unless order (automatic sanction in event of non-compliance with order, of which order must specify date and time within which act must be done)
- ii. Sanctions imposed by CPR
 - (a) Failure to disclose expert report prevents party from using that report at trial
 - (b) Failure to file a costs budget will be treated as only filing a costs budget of applicable fees
 - (c) Exception: time for doing act may not be extended by agreement between parties except that parties can agree an extension of time by prior written agreement for a max of 28 days provided this does not put at risk any hearing date
 - (d) Sanction takes effect unless party applies for and obtains relief from that sanction
- iii. Relief from sanctions
 - (a) Court takes strict approach
 - (b) Court can consider need:
 - For litigation to be conducted efficiently and at proportionate cost
 - To enforce compliance with rules, practice directions and orders
 - (c) Application for relief takes 3 stages (Denton and others v TH White and another...2014)
 - Identify and assess **seriousness and significance** of failure to comply with relevant rule, practice direction or court order. If breach is **neither serious nor significant** then relief should be granted
 - If breach is serious or significant, consider why default occurred
 - Having considered reason for default, court should then evaluate all circumstances of case

9. **Disclosure and inspection**

A. Disclosure – stating that document exists or has existed

- i. At CMC, court uses disclosure report and other info available to consider if standard disclosure is too expensive and to consider what disclosure order to make
 - (a) Small claims: directions are given on allocation; usually 14 days before date fixed for final hearing, each party must file and serve on every other party copies of all documents on which he intends to rely on at hearing
 - (b) Fast track: directions are given on allocation; broadly involves search for relevant documents and also an obligation to disclose documents which are adverse to disclosing party's case
 - (c) Multi-track:
 - Complete disclosure report to be served and filed not less than **14 days** before first CMC
 - Not less than **7 days** before first CMC, consider issues in case and enter into discussion to seek to agree a **draft disclosure order** which they will then ask court to make
 - (d) No need to disclose every copy of a document

- Only if they contain modification, obliteration or other marking or feature which itself satisfies test for standard disclosure; or
 - Party has never had original or no longer has original in its control
 - (e) Parties are under a continuing obligation of disclosure until proceedings are concluded
- B. Standard Disclosure
- i. Requires party to disclose only
 - (a) Documents on which he relies; and
 - (b) Document which
 - Adversely affect his own case;
 - Adversely affect another party's case; or
 - Support another party's case; and
 - The documents which he is required to disclose by a relevant practice direction
 - (c) **Document:** includes digital recordings, emails, photographs, text messages, voicemails, metadata
 - (d) **In a party's control:**
 - Document is or was in physical possession;
 - Party has or had right to possession of document or
 - Party has or has had a right to inspect or take copies of document (example business records?)
 - (e) **"reasonable search"**
 - Number of documents involved
 - Nature and complexity of proceedings
 - How difficult/expensive it is to retrieve any document
 - Significance of any document likely to be found
- C. Inspection – looking at document (right to request copy of document if right to inspect)
- i. A party wishing to inspect documents must send written notice of desire to do so and the other side must allow inspection within **seven days** of receipt of notice
 - ii. Party has right to inspect a disclosed document except where:
 - (a) No longer in control; or
 - (b) Disproportionate (rare); or
 - (c) Right/duty to withhold inspection (eg privilege)
 - Legal advice privilege (general legal advice purpose and not just for present litigation)
 - ◆ Document which is a confidential communication between a lawyer and a client and was prepared for **dominant purpose** of giving or receiving legal advice
 - ◆ Must be giving advice through 'legal spectacles'
 - ◆ Unlikely to attach to communications with individuals who are qualified lawyers but who are not employed in a legal role (ex. Compliance?)
 - Litigation privilege
 - ◆ Document which is confidential communication which passed between lawyer and client or between one of them and a third party (example – forecasts, audits), where dominant purpose in creating document is to obtain legal advice, evidence or information for use in conduct of litigation which was at the time reasonably in prospect
 - * Document must be in relation to litigation/dispute in question, not another dispute that may be being litigated in another court or under a separate case
 - ◆ Test is one of **dominance and not exclusivity**
 - ◆ **General apprehension of future litigation is insufficient**
 - ◆ **Expert witness instruction is not privilege!**
 - iii. Redaction

- (a) Allowed for irrelevant or privileged information (commercially sensitive, irrelevant, etc.)
- iv. Waiver of privilege allowed – waiver of privilege in part will lead to waiver of privilege over remainder of document unless it deals with entirely different subject matter; party cannot cherry pick certain parts of document to reveal
- v. Privilege
 - (a) 'once privileged, always privileged'
 - (b) Burden of proof is on party claiming privilege to establish it
- vi. Disclosure statement (part of disclosure list) must include details of any document the inspection of which the party considers disproportionate, and must be signed by disclosing party
- vii. Supplemental lists may need to be disclosed
- D. Specific Disclosure, Specific Inspection and Pre-Action Disclosure
 - i. Specific disclosure & specific inspection
 - (a) Order that a party must do one or more of the following:
 - Disclose documents/classes of documents specified in the order;
 - Carry out a search to extent stated in order;
 - Disclose any documents located as a result of that search
 - ii. Pre-action disclosure (application must specify order sought, including listing of documents sought, and must be supported by evidence)
 - (a) May be ordered where:
 - Respondent is likely to be a party to subsequent proceedings; and
 - Applicant is also likely to be a party to those proceedings; and
 - If proceedings had started, respondent's duty by way of standard disclosure would extend to documents or classes of documents which applicant seeks; and
 - Pre-action disclosure is desirable in order to (i) fairly dispose of anticipated proceedings; (ii) assist dispute to be resolved without proceedings; or (iii) save costs
 - (b) applicant typically pays this cost
- E. Non-Party Disclosure and Norwich Pharmacal Orders
 - i. Non-party disclosure allowed where:
 - (a) Documents are likely to support applicant's case or adversely affect case of one of the other parties to the proceedings; and
 - (b) Disclosure is necessary in order to dispose fairly of claim or to save costs
 - ii. 'alternative' disclosure – Norwich Pharmacal orders
 - (a) Provides a solution where court proceedings cannot be commenced because identity of D is unknown
 - (b) It orders respondent, who is not D, to disclose info allowing claimant to sue right defendant
 - (c) 3 conditions:
 - 1. A wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer (fraud, IP breach, etc)
 - 2. There must be need for an order to enable action to be brought against ultimate wrongdoer
 - 3. Person against whom order is sought must be more than a mere witness/bystander and is likely to be able to provide necessary information
 - (d) Court has discretion, and will consider factors such as:
 - the strength of the victim's potential claim;
 - the public interest in allowing the victim to vindicate his legal rights;
 - whether making the order will deter future wrongdoing;
 - whether the information could be obtained from another source;
 - whether the respondent knew or should have known that he was facilitating wrongdoing;
 - whether complying with the order might reveal the names of innocent people;
 - the degree of confidentiality of the information sought;
 - the privacy and data protection rights of any individuals whose identity is to be disclosed;
 - the public interest, for example in maintaining the confidentiality of journalistic sources; and
 - how onerous complying with the order will be.

10. **Witness and expert evidence**

- A. If party served witness statement of a witness and wishes to rely on it, party must call witness to give oral evidence at trial or put in statement as hearsay evidence in accordance with procedure required by rules
- B. Parties can agree in writing extensions up to **28 days** for serving of witness statements without court approval, provided any such extension does not put a hearing at risk

- C. If no extension is agreed and witness statements are served late, an application would need to be made for relief from sanctions (CPR 3.9)
- D. Generally, opinions of witnesses are not admissible, except:
 - i. Perceived facts
 - (a) Ex. The car was driving fast – admissible
 - (b) Ex. Leanne was drunk – admissible
 - (c) Witness can refer to documents, which should be verified and remain separate from statement
 - (d) Witness statement should end with statement of truth and signed by witness
 - (e) May be used for interim hearings
 - (f) For business and property courts:
 - Must include a signed confirmation that witness understands purpose of statement is not to argue case nor to take court through documents in case
 - Must have statement that rules have been explained to witness and witness believes he's complied with them
 - (g) Giving evidence via affidavit = deponent, not witness
 - ii. Expert opinion (<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35#IDASLICC>)
 - (a) Highly skilled or knowledgeable individual whose role is to advise court impartially on matters within their expertise
 - (b) Court order is required if a party wishes to adduce expert evidence at trial
 - (c) Court decides who's an expert – court has duty to restrict expert evidence to that which is reasonably required to resolve the proceedings
 - (d) More likely to restrict in small claims track and fast track
 - One expert per party and expert evidence in two expert fields
 - (e) Applying for permission
 - Must provide estimate of costs
 - Must identify field in which expert evidence is required and, if practicable, name of proposed expert
 - (f) Duty of expert: help court on matters within their own expertise and this overrides any obligation to party instructing the expert (*National Justice Compania Naviera SA v Prudential Assurance*)
 - Expert evidence should be independent product of expert, uninfluenced as to form or content by pressures of litigation
 - Independent assistance should be provided to court by way of objective, unbiased opinion regarding matters within expertise of expert witness
 - Expert witness should state facts or assumptions on which their opinion is based, do not omit material facts
 - Photographs, plans, survey reports and other docs referred to in expert evidence must be provided to other side at same time as exchange of reports
 - (g) **Letter of instruction to expert is not privileged!**
 - (h) Expert evidence is to be given in a written report unless otherwise directed by court
 - Must be addressed to court, not instructing party
 - Set out qualifications and details on any material relied on
 - Set out substance of all facts and instructions given
 - Contain summary of conclusion
 - (i) Expert reports must be exchanged with other side in order to be used at trial
 - (j) Parties can agree to appoint single joint expert
 - (k) Parties may put together written questions to other party's expert, **must be submitted within 28 days of service of the report**
 - (l) Experts may submit written requests for direction to court to help them carry out tasks:
 - Expert must provide to party instructing expert a copy of any proposed request for directions at least **7 days** before filing it at court; and
 - Provide copy to all other parties at least **4 days** before filing it at court
 - (m) Experts may have discussions amongst themselves
 - (n) Unfavourable expert reports:
 - Seek advice from another expert advisor
 - ◆ If expert's advice differs substantially from what party was expecting, party may seek permission to call another expert, but is difficult and costly

- ◆ If party is not given permission to call another expert, that party can use expert advisor to assist in preparing questions for cross-examination

E. Civil Evidence – Hearsay and Admissibility

- i. All evidence that is relevant to facts is admissible in civil proceedings
- ii. Hearsay: an oral or written statement, made out of court, which is being adduced in court to prove the TOTMA
 - (a) **Admissible**
 - (b) If party intends to use hearsay, must give notice to other parties that it intends to do so at notice of witness statements. If no notice is given, still admissible, but weight that court attaches to it is likely to be less and offending party may be penalised in costs. If hearsay is being used via person who is not being called to give oral evidence, party must (a) inform the other parties that the witness is not being called to give oral evidence; and (b) give the reason why the witness will not be called.
 - (c) 4 options on receipt of notice of intention to rely on hearsay:
 - Request particulars of hearsay that are reasonable and practicable for purpose of enabling it to deal with any matters arising from evidence being hearsay
 - Call for cross-examination: application must be made no later than **14 days after hearsay notice** was served on applicant
 - Challenge weight of hearsay evidence: receiving party must notify adducing party of its intention to do this no later than **14 days after hearsay** notice was served
 - (d) Hearsay in plans, photographs and models – no notice rules for such evidence
 - (e) **Convictions as evidence in civil proceedings**
 - Fact that a person has been convicted of an offence in a UK court is admissible in evidence to prove that he committed the offence
 - Must be relevant to issue in proceedings

11. **Settlement**

- A. Court and CPR encourages parties to settle (Part 36)
- B. **Calderbank offer**: an offer, usually communicated in writing, and written 'without prejudice save as to costs', such that it cannot be referred to the judge until costs are considered after trial, but at that point can be relied upon. Offer does not need to comply with Part 36. **Usually made inclusive of costs.**
- C. Part 36 Offer (**not applicable in small claims or arbitration!**)
 - i. Can be made at any stage of proceedings, including before proceedings are issued; can be made by either party
 - ii. Requirements:
 - (a) Be in writing
 - (b) Make clear it is pursuant to Part 36
 - (c) Specify a period of not less than **21 days** within which D will be liable for claimant's costs if offer is accepted (called the 'relevant period')
 - (d) State whether it relates to the whole or part of the claim; and
 - (e) State whether it takes into account any counterclaim
 - (f) For D's offers only:
 - Offer to pay a sum of money in settlement of a claim must be an offer to pay a single sum of money
 - D's offer that includes an offer to pay all or part of the sum at a date later than **14 days** following date of acceptance will not be treated as a Part 36 offer unless offeree accepts offer
 - iii. Made when served on offeree
 - iv. **Rules of service apply**
 - v. Offeree can seek clarification of terms of the offer
 - vi. If offer has been accepted, it cannot be withdrawn, or its terms changed
 - vii. **If trial has already started, court's permission is required to withdraw offer**
 - viii. Offer can be withdrawn or its terms changed without court's permission if relevant period has expired
 - ix. Offer can be withdrawn automatically if its terms state so
 - x. Accepting Part 36 Offer
 - (a) Serve written notice of acceptance on offeror
 - (b) **If case is issued the acceptance also needs to be filed at court**
 - (c) Consequences

- Claim will be stayed
- D has 14 days from acceptance to pay settlement amount agreed unless otherwise agreed in writing
- If accepted before expiry of relevant period, claimant is entitled to its costs of proceedings up to date the **notice of acceptance was served on offeror**
- If accepted after expiry of relevant period, then
 - ◆ Court will determine liability for costs unless parties agree to them; BUT
 - ◆ Court must, unless it consider it unjust to do so, order that
 - * Claimant be awarded costs up to date the relevant period expired; and
 - * **Offeree** pays offeror's costs for period from **date of expiry of relevant period to date of acceptance**
- xi. Accepting Part 36 Offer which relates to only part of a claim
 - (a) If at time of acceptance the claimant abandons remainder of claim, claimant will only be entitled to costs relating to part of claim contained in offer, unless the court orders otherwise
 - (b) If, at time of acceptance, claimant does not abandon remainder of claim, liability for costs will be determined by court, unless parties can reach an agreement about liability
- xii. Consequences of unaccepted Part 36 offers
 - (a) If a claimant fails to obtain a judgment more advantageous than a D's part 36 offer, court must order, unless it considers it unjust to do so, that
 - Claimant pays D's costs from date relevant period expired; and
 - Interest on those costs
 - (b) If judgment against D is at least **as** advantageous to claimant as the proposals contained in a claimant's Part 36 offer, then court must order, unless it considers it unjust to do so:
 - **Interest** on award at a rate not exceeding 10% above base rate for some or all of the period **from expiry of relevant period**
 - Costs + interests from end of relevant period are to be assessed on indemnity basis. Any assessment on indemnity basis can result in significantly more costs being awarded to claimant (just reasonable, does not need to be proportionate)
 - ◆ Interest on those costs at a rate not exceeding 10% above base rate
 - An additional amount based on a % of the award, with % being 10% up to 500,000 and 5% above 500,000. Total amount capped at 75,000
 - (c) 'unjust to do so' – court to consider
 - Terms of any offer
 - Stage in proceedings when offer was made
 - Info available to parties
 - Conduct of parties in relation to giving/refusing info for purposing of enabling offer to be made/evaluated; and
 - Whether offer was a genuine attempt to settle
 - (d) No consequences if:
 - Offer not accepted but offer was within 21 days of trial
 - Part 36 offer was withdrawn
 - Part 36 offer was changed so that its terms are less advantageous to offeree and offeree as beaten less advantageous offer
 - (e) Claimant and d have part 36 offers at same time
 - Consider each offer in turn
- D. Orders following settlement
 - i. Consent orders
 - (a) Consent order based on contract – *Tomlin Order*
 - 2 parts, one kept confidential
 - ◆ Order – looks like consent order
 - ◆ Schedule – generally confidential
 - (b) Consent order not based on contract – may be altered or varied by court
 - (c) Parties can usually agree of extension up to 28 days without need to apply to court
 - ii. Discontinuance

- (a) Only claimant can discontinue a claim
- (b) Can discontinue part of claim rather than whole claim
- (c) Claimant must pay D's costs up to point of discontinuance, unless court orders otherwise
- (d) Discontinuance takes effect from date of service

12. **Trial, enforcement and appeals**

A. Preparation for Trial

- i. Pre-trial checklist/listing questionnaire
- ii. Listing directions and/or hearing
 - (a) Court will fix trial date, give time estimate for trial, and fix place of trial
 - (b) Court may provide direction on evidence, trial timetable, preparation of trial bundles, and any other matters required to prepare for trial
- iii. Trial bundle
 - (a) Must be filed no more than 7, no less than 3 days before trial begins
 - (b) Burden is on claimant to make these
 - (c) Should be filed with court and should supply identical bundles to each of the parties to the proceedings

iv. Skeleton arguments must be prepared for HC trials, along with list of authorities submitted by **5pm the day before hearing**

- v. Notice to admit facts/documents

B. Judgments – **effective from date given/made, not when served!!**

- i. Effective from date it is given or made, not when it is served
- ii. Interest starts to run on amount from date on which judgment is given, set at **8%**
- iii. Court has discretion to allow stay of execution of judgment or order
- iv. Debt respite scheme
 - (a) Allows individual debtor (not company) to approach debt service provider to ask for 'breathing space' of 60 days
 - (b) Any judgment for damages for death or personal injury caused to someone else is excluded from scheme

C. Enforcement

- i. Once judgment is obtained, winner can involve court in obtaining info directly from debtor about their assets
- ii. Order to attend court must be served personally on person ordered to attend court not less than 14 days before hearing
- iii. Writs/warrants of control/Taking control of goods
 - (a) Any amount over 5,000 GBP must be enforced in High Court
 - (b) Up to 600 – county court
 - (c) Between 600 and 5000 – high court or county court
 - (d) Must give **7 clear days** before taking control of any goods
 - (e) May use reasonable force to enter premises, must be between hours of 6am and 9pm, not at premises when a child or vulnerable person is only person present
 - (f) **Cannot be used for:**
 - **Tools of debtor's trade up to GBP 1,350**
 - **Basic domestic items, such as clothing, bedding, furniture and essential household items**
- iv. Charging orders
 - (a) Can then force sale process rather than waiting to obtain final charging order
- v. Third party debt orders
- vi. Attachment of earnings orders
 - (a) Available when judgment debt is not less than **GBP 50**
- vii. Insolvency proceedings
 - (a) Petition for bankruptcy against individual can be issued when judgment debt is more than GBP 5,000
 - (b) Petition to wind up company can be issued when judgment debt against it is more than GBP 750
- viii. Statutory demand
 - (a) Need to make before insolvency proceedings and served before insolvency
 - (b) So long as debt remains unpaid for 21 days after service of demand

D. Appeals

- i. Allowed if decision of lower court was either
 - (a) Wrong; or
 - Error of law

- Error of fact
- Error in exercise of court's discretion
- (b) Unjust because of a serious procedural or other irregularity in the proceedings in the lower court
- ii. Standard to permit:
 - (a) the court considers that the appeal would have a **real prospect of success**; or
 - (b) there is **some other compelling reason** for the appeal to be heard.
- iii. Permission – must be made within **21 days** of date of lower court's decisions, unless otherwise ordered and must be served on respondent as soon as practicable and in no event no later than **7 days** after it's filed.
 - (a) Apply for permission from lower court at time when decision to be appealed is made
 - Done orally
 - Saves time for court and parties
 - Does not prevent later application to appeal court
 - (b) Make application later
 - Done in writing
 - (c) Will be granted if appeal has a **real prospect of success** or there is **some other compelling reason** why appeal should be heard
 - (d) Appeal court may (a) limit the issues to be heard; and it may (b) be made subject to conditions.
- iv. When appeal court is court of appeal
 - (a) Will be determined on papers along unless judge considers matter should be dealt with orally
 - (b) Any oral hearing will be listed within 14 days
 - (c) Standard for second appeal to CA is that it will not give permission unless it considers that, in addition to first appeal standard, it would raise an important point of principle or practice:
 - (a) the appeal would—
 - ◆ (i) have a **real prospect of success**; **and**
 - ◆ (ii) **raise an important point of principle or practice**; **or**
 - (b) there **is some other compelling reason** for the Court of Appeal to hear it.
- v. When appeal application is for permission to appeal to CC or HC:
 - (a) Appeal court will consider on paper without an oral hearing
 - (b) If refused, may request an oral hearing, which request must be made within 7 days of service of notice of refusal
- vi. Appeals from...
 - (a) CC DJ □ CC CJ
 - (b) CC DJ dealing with non-insolvency proceedings brought pursuant to Companies Act □ HC
 - (c) CC CJ □ HC J
 - (d) High Court Master □ HC J
 - (e) HC J □ Court of Appeal □ Supreme Court
- vii. Appeal Court can...
 - (a) Affirm, set aside or vary an order
 - (b) Refer any claim or issue for determination by lower court
 - (c) Order new trial or hearing
 - (d) Make order for payment of interest
 - (e) Make costs order

13. **Jurisdiction and conflict of laws**

- A. Jurisdiction – Hague Convention on Choice of Court Agreements (after 1 Jan 2021)
 - i. Courts of E&W will determine disputes over matters occurring in E&W
 - ii. **Civil and commercial matters only** (not employment, public law and criminal)
 - iii. Only applies where parties have chosen a Contracting State as the court that will have jurisdiction (UK, EU, Mexico, Singapore and Montenegro)
 - iv. Only applies to clauses which give exclusive jurisdiction to a particular country
 - v. Only applies if jurisdiction agreement is in writing, or evidenced/documentated in writing
 - vi. Consequences
 - (a) Court indicated will have jurisdiction and cannot decline
 - (b) Any other court must refuse to hear proceedings
- B. Jurisdiction – Common Law
 - i. E&W will have jurisdiction if:
 - (a) It's possible to serve proceedings on D in E&W – D is present in jurisdiction; or

Dispute Resolution

- (b) Court gives permission to serve proceedings on D outside jurisdiction; or
 - (c) Courts of E&W are given jurisdiction by a clause in a contract
- C. Serving Claim Form outside Jurisdiction
 - i. Period for service is **6 months** where claim form is to be served outside jurisdiction
 - ii. Do not need to seek court's permission to serve proceedings out of jurisdiction if Courts of E&W have jurisdiction because of the Hague Convention or a contract contains a term to the effect that Courts of E&W shall have jurisdiction to determine the claim
 - iii. File Form N510 to serve English claim form abroad without permission when it issues and files its claim form
 - iv. If serving abroad with permission, this will be an interim application
 - v. Methods for service outside E&W:
 - (a) Service in accordance with agreed regulation, convention or treaty
 - (b) Service through government of destination country
 - (c) Service by other permitted by law or destination country
- D. Court may make order allowing alternative service where it is impossible to serve effectively through usual methods
- E. Court may dispense with service where it is clear that other side is already aware of documents
- F. Conflict of Laws
 - i. Rome I Regulation
 - (a) If parties have chosen which law should apply – country's law will apply
 - (b) If contract relates to one of cases specified below, then those articles will apply
 - Sale of goods – seller's habitual residence
 - Provision of services – service provider's habitual residence
 - Contract relating to land – where land is situated
 - Distribution contract – distributor's habitual residence
 - (c) If not (b), applicable law is that of country where 'characteristic performer' has its habitual residence
 - (d) Must determine if contract is manifestly more closely connected with another country
 - ii. Tort
 - (a) After tortious event, parties may choose which country's laws apply
 - (b) Before tortious event, parties are free to choose only if both pursuing a commercial activity and choice is freely negotiated
 - (c) If both parties live in same country – those laws apply
 - (d) If not law of country in which damage occurs applies
 - iii. Within UK
 - (a) Disputes about land must be heard in part of UK where land is
 - (b) If parties have agreed which part of UK has jurisdiction, that agreement will be upheld
 - (c) If party submits to jurisdiction of a particular part of UK, it will have jurisdiction
 - (d) If none of the above apply, very generally D must be sued in either (a) part of UK where they are domiciled, or (b) part of UK where goods were to be delivered/services provided/harmful tortious event occurred