

Litigation - anatomy of a court claim

Civil litigation is a process for resolving legal disputes on civil (i.e. not criminal) matters through negotiation or the court system.

Whilst you might be angry or frustrated enough to want to dive headfirst into court proceedings, litigation is extremely costly. Taking a simple County Court claim all the way to trial could set you back at least £25,000, but a complex High Court claim could be in excess of £100,000. **Litigation should therefore be avoided wherever possible.**

If negotiations have failed or urgent action is needed, you may have no option but to start court proceedings. The following are steps which may/will need to be taken:

- 1. Pre-action conduct:** You must consider and act in accordance the Civil Procedure Rules (CPR's) specified pre-action protocols or in other cases the obligatory pre-action conduct. These aim to prevent litigation and promote the exchange of clear information and use of alternative dispute resolution, provide guidance on instructing experts. They also detail the requirements for a letter to the other side (a letter before action). If you fail to comply with these protocols, the court may award costs and interest on costs against you.
- 2. Letter before action:** In most cases, such a letter will be necessary. It will give sufficient details to enable the defendant to understand and investigate the issues; list the documents on which you intend to rely; request copies of any relevant documents which you wish to see; and propose alternative dispute resolution (where applicable). This step should open the door for detailed correspondence in which the issues may be argued and hopefully settled.
- 3. Issue a claim:** If settlement via correspondence fails, you will need to issue a claim at the County or High Court. A claim form and Particulars of Claim will need to be completed, setting out concisely and specifically your cause of action, what you are claiming and the facts on which you are relying. These need to be filed together with a court fee (based on the value and type of claim) and served on the defendant.
- 4. Defence, Counterclaim, Reply, Defence to Counterclaim etc.:** These, and the Particulars of Claim, are statements of case (usually drafted with the help of a barrister who will argue the case if the matter gets to court). The defendant issues its Defence and specifies any Counterclaim it may have. The Claimant has an opportunity to submit a Reply to Defence and/or a Defence to Counterclaim. Either

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party may also submit requests for further information to enable them to assess the other's case better.

- 5. Settlement:** Although steps may be taken to achieve settlement at any stage of proceedings, once each party's case has been clearly detailed in their statements of case, each party can begin to consider what it would take for them to compromise. The two most common methods of settlement proposal are Part 36 offers and letters "without prejudice save as to costs". Neither of these, being *without prejudice*, may be referred to in the proceedings and are often an important tactical contest. A Part 36 offer (under CPR Part 36) is an offer of a payment to settle which remains open for 21 days. If the other party rejects it and fails to get a more advantageous judgment at trial, there are potential and serious costs and interest implications.
- 6. Interim applications:** There are a number of applications which may need to be made throughout proceedings, such as to amend a statement of case or for an extension of time to serve a document. It is, however, worth mentioning the following applications:

 - a. Injunctions:** it may be that your claim is for an injunction, rather than damages, to prevent the defendant from doing something or compel it to do something else. Examples might be to enforce restrictive covenants in a contract or to ensure the return of company property after termination of employment, or search and asset freezing orders. In this case, you may need an interim injunction to be granted at the start of the proceedings to protect your position until trial.
 - b. Summary judgment:** once statements of case have been served, if one party believes and can prove that the other's claim, counterclaim or part of it has no prospect of success and there is no compelling reason for a trial, it can apply to the court for a judge to confirm that decision and put an end to the proceedings.
 - c. Security for costs:** this is an application made by a defendant for a claimant to pay money into court or provide a bond or guarantee as security for costs. It may be used in specific circumstances such as against claimants abroad, insolvent companies, or where a claimant may be taking steps to dissipate its assets.

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For substantive applications, a hearing may be needed (in person or by telephone); simple applications may be dealt with on paper. Although a solicitor has a right of audience in the County Court, it is often more cost effective for a barrister to attend hearings. Costs of such applications may be decided at the hearing itself, parked until the end of proceedings, or be awarded to the winner at trial, whichever party that may be.

7. **Allocation and directions:** Once statements of case have been exchanged, each party is required to complete an allocation questionnaire and try to agree directions for the remainder of the case and file these at court. The court will then allocate the case to one of the following tracks:
 - a. **Small claims track:** claims less than £5,000;
 - b. **Fast track:** claims between £5,000 and £25,000, trial to last no more than a day, limited oral expert evidence;
 - c. **Multi-track:** claims over £25,000, trial to last more than a day, several experts to give evidence.

A fee will be payable by the claimant and, if there is a counterclaim, the defendant will need to do so too. The court will then give directions for disclosure, evidence and trial, but may also call a directions hearing or, on the multi-track, a case management conference (of which there may be several in more complicated cases).

8. **Disclosure:** Each party must then prepare a disclosure list/statement stating the documents (including electronic documents) within its control which exist or have existed and which it is willing to allow its opponent to inspect. You must list all documents relevant to the case, whether they support it or undermine it.

The documents must be listed in categories: those which you permit inspection of; those which you will not permit inspection of, such as where an obligation of confidentiality exists or the documents are protected by “*privilege*” (which entitles a party to withhold evidence from production to a third party or the court) such as legal advice, legal professional or litigation privilege; and those which are no longer in your control and why.

Once lists have been exchanged, each party may request to inspect specific documents from the other’s list, challenge the content of the other’s list and/or apply for specific disclosure of any missing or privileged document.

- 9. Witness and expert evidence:** Now comes the time to prepare detailed witness statements to support your claim, including yourself, your employees or representatives, or other witnesses of fact. There may also be the need for expert to give the court an opinion on a particular field, such as forensic IT analysis, accounting or company valuations. There may be a joint experts for the parties or separate experts on a particularly contentious field. Statements will be exchanged with the other party in accordance with the court's directions, and there may be opportunity to put questions to an expert or a requirement for separate experts to narrow the issues.
- 10. Run up to trial:** The court may require that a listing questionnaire be completed by each party giving details of its witnesses, experts and time estimate. The court may call a pre-trial review in substantial or complex cases, or where there are many issues in dispute. The claimant will be responsible for preparing the trial bundle and hopefully be able to agree this with the defendant. Each party's barrister will prepare a skeleton argument detailing the legal arguments in support of your case and exchange with the other and filed at court.
- 11. Trial:** If settlement has still not been achieved, even perhaps on the court steps, you will now have your day (or more) in court. This may include opening statements, witness evidence, expert evidence and respective cross-examination, and closing statements. The court may in simple cases give judgment immediately and allow arguments on costs, but often costs will be dealt with at a later date.
- 12. Judgment:** Judgment will usually be handed down at a short hearing in which the judge shall take the parties through the issues and the relevant evidence, what decisions he/she has made on those issues and why, and what orders he/she therefore makes, be they to uphold or dismiss the claim, counterclaim or any part of either, and what remedies are granted, whether damages, injunctions (see 6a above), specific performance (which compels a party to perform its contractual obligations), rescission (where a contract is set aside and the parties are put back into the position in which they were before the contract was made), rectification (to correct mistakes in a written agreement), account of profits (where a party must surrender profits made), delivery up (of the claimant's property or goods which infringe a trade mark) or a declaration (setting out the rights or legal position of the parties), to name but a few. It may be necessary to request permission to appeal if things have not gone your way.
- 13. Costs:** Often as big a battle as the main claim, it is important to conduct the proceedings properly so as to increase your chances of costs recovery at the end of proceedings. Generally, if you win, you should recover between 60% and 85% of

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your costs from the other party (100% is extremely rare) – costs ordered on the standard basis will attract 60-70% meaning the court will permit recovery of items which were reasonably incurred and reasonable and proportionate in amount; if on the indemnity basis, they may reach up to 85%, which will only apply for extremely unreasonable conduct, hopeless cases, or failure to accept a Part 36 offer which is not then beaten, for which only reasonableness is assessed, not proportionality.

The court may order a summary assessment of costs (immediately following the trial) or that that the matter should be referred to detailed assessment by a costs draftsman, who would scrutinise the legal files and award costs accordingly.

- 14. Appeal:** If the court's decision (on the issues or indeed costs) is wrong or if it is unjust because of a serious procedural or other irregularity, subject to applying for permission, you may be able to appeal to a higher court. The order of courts is as follows: County Court, High Court, Court of Appeal and Supreme Court (formally the House of Lords).
- 15. Enforcement:** Getting a court order is not the final step – you may need to enforce your order against the other party if they do not comply. Enforcing a money judgment opens a number of doors including:
 - a. Warrants of execution or writs of fieri facias:** sending in bailiffs or High Court enforcement officers to the other party's premises to seize and sell goods to the value of the judgment;
 - b. Third party debt orders:** debts due to the other party may be frozen and paid to you instead;
 - c. Charging orders:** a legal charge may be applied for and registered over the other's party's land or property, preventing a sale, and may allow you to force a sale in the future;
 - d. Attachment of earnings:** only available against individuals in the County Court, this allows a proportion of the other party's earnings to be deducted by their employer and paid to you until the judgment debt is satisfied;
 - e. Insolvency:** you may apply to make an individual bankrupt or a company be wound up, after which its assets will be distributed.

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You may also be able to issue a writ of sequestration for failure to comply with an injunction, allowing you to take control of property until that contempt of court has been rectified. You may also instigate committal proceedings so as to get the other party sent to prison for contempt of court for such failure.

As you can see, litigation is a long, complicated and therefore costly process. We cannot emphasise enough that it should be a last resort.

If you would like further advice on a potential dispute, whether you need to claim a debt, enforce your rights or stop someone doing something, or if a dispute has been thrust upon you by another party, or indeed whether you wish to get your house in order so as to avoid potential disputes (such as the use of well-drafted terms and conditions or agency, distribution, partnership and shareholder agreements) please do not hesitate to get in touch: **020 7440 2540** or enquiries@fortunelaw.com.