

A new dawn : Civil Claims : England and Wales

The purpose of the following is twofold:

- (i) to provide a broad introduction to beneficial and deepseated changes which have taken place over the past decade in the conduct of civil claims in England and Wales; and
- (ii) to highlight the growing emphasis of the English Courts upon the need to look at cost-effective resolution of claims outside of trial and well before one reaches the Courtroom door.

(Naturally account must be taken of devolution to Wales of certain rights to make Welsh law; nonetheless for immediate purposes England and Wales may properly be treated as a unitary legal state.)

A little bit of recent history, if I may : since the late 1800s there had been little or no meaningful development in the way in which civil disputes in the English and Welsh Courts were prosecuted and prepared for trial.

Cursory emphasis was put on the notion of a commercial resolution; many procedures were arcane, prolix and cumbersome. Arguably there was too much importance placed to the notion of correct procedures rather than looking at the substance of the claim or question in its own right.

Such an approach led to quite unpalatable results : often the sum in dispute might at the end of the day be substantially exceeded by legal costs on both sides. This in turn meant that both parties often became *locked-in* and unable to negotiate a sensible resolution; this was due to the prohibitive legal fees racked up by each for which their opponent was unwilling or unable to pay.

Those legal fees were often the result of costly interparty skirmishing well before the trial itself.

However the 26th April 1999 was herald to a bright new dawn : dusty legal cobwebs were swept away; fresh clear breezes blew through the corridors of English justice. These comprised what we know as *The Civil Procedure Rules* [CPR].

The CPR sets great store by the following:

1. *Protocols*:

In the olden days a party could often instruct their lawyer to sue at will. Dominant and financially powerful opponents with a doubtful case would employ their financial might to bludgeon a party whose case had merits but little or no funds to fight their corner.

This approach is now frowned upon.

The CPR requires that any party to a dispute needs first of all to implement a pre-litigation protocol.

In many areas of law there are prescribed protocols. However if none is prescribed you need to use your professional imagination and invent one!

The protocol starts with a Letter of Claim. This should set out the claiming party's case. It must do so as fully as possible. It must exhibit any relevant documents relied on.

Your opponent (the intended Defendant) is normally given 90 days in which to respond by way of Letter of Answer.

(Time can be abridged by agreement or extended depending upon the weight, complexity of the case and possibly the need to look out and provide additional material.)

In the Letter of Answer your opponent is required to state what parts of the Letter of Claim it agrees and what others it disputes. It must state whether or not liability is admitted for one or part of the claims made.

If liability is disputed reasons must be given.

If liability is admitted then the only question is that of quantum. If so the parties are then required to pursue protocol exchanges to establish the right amount of money due and owing.

In contrast if a Letter of Answer should deny all liability this will ordinarily then entitle the Claimant to begin proceedings. In such a case the Claimant will be immune from judicial criticism.

2. *The overriding objective:*

For the first time in centuries the English law now states that all civil claims are to be governed by the *overriding objective*, which is that all cases are to be dealt with *justly*.

In seeking to apply the *overriding objective* the Court has regard to the following:

- (a) it has a duty to *case manage*; it has the power to impose a steer. It can make Orders of its own volition (without formal application or having heard from the parties). It may stay all or part of a case to enable negotiations to resume with a view to compromise. It can consolidate cases, try two or more claims on the same occasion or direct a separate trial of any particular question.

It can also dismiss or give judgment on a preliminary question.

The Court has an unfettered discretion and broadly can take any step that it wants in order to promote the overriding objective;

- (b) *proportionality* : when exercising its case management powers the English Court must now have regard to both the amount in dispute and the costs which the parties have incurred or which they are likely to incur.

In practice this means that a party might succeed in its case on trial yet still be punished on costs if the Court should later decide that its conduct was unreasonable or disproportionate;

- (c) *disclosure of documents* : unlike the days of old disclosure of documents the scope of disclosure is now trammelled by the following concepts:

The parties are only obliged to conduct *reasonable searches* rather than going to the ends of the earth to find documents which could be important to outcome.

Such reasonable searches are both *limited in time* and *limited to categories* of documents likely to be relevant.

There is a recent new Practice Direction for exchange of documents by way of electronic disclosure. (However that is a separate matter for another day);

- (d) *general powers* : there is a general power vested within the Court to rectify matters where there has been an error in procedure (thus avoiding the need to incur unnecessary costs and legal wrangling on peripheral issues or matters which admit of pragmatic correction);

- (e) there is a continuing emphasis on *Alternate Dispute Resolution [ADR]*.

The parties are encouraged always to be vigilant and look at imaginative, cost-effective and commercial means of trying to resolve a dispute without running all the way to a trial.

The Courts encourage an *interim stay* of proceedings to enable the parties to employ ADR.

ADR can take the form of *round table meetings without prejudice; without prejudice negotiations in correspondence or a mediation*;

- (f) *conduct* : the Court maintains an eagle eye upon the conduct of the parties and their legal advisers.

If one party has exaggerated their case or claim or been guilty of unreasonable delay in providing requisite information or documents the Court may impose a stringent peremptory timetable or prohibitive costs sanctions;

- (g) *administration of justice* : the Courts treat their time as precious resources. Given the current austere economic climate which prevails the Courts will be jealous of time spent on anything other than worthwhile matters, arguments and questions and will aim to manage their Court Lists accordingly.

3. *Negotiations and offers:*

The new rules place an emphasis upon each party and their advisers looking at ways and means to attempt a commercial resolution.

There is an entire area of the rules devoted solely to proposals made without prejudice to try and settle a claim and the costs consequences which might follow if such proposals are not given serious and substantial consideration.

4. *Costs:*

The general principle is that *costs follow the event*.

This means that following trial the successful party can usually expect to recover a contribution towards their legal fees and expenses from the losing party. (In practice this translates to approximately a 60% to 65% contribution to costs or thereabouts).

However if the Court were to decide that the winning party's conduct has in certain respects proved unreasonable disproportionate or wasteful the Court can employ a raft of sanctions e.g. depriving the successful party of all or part of their costs; awarding the unsuccessful party part of its costs; directing that a percentage only of costs be recovered or directing the payment of punitive interest.

5. *Interest:*

On a separate but related point, English Courts have perhaps yet to adopt a contemporary approach on interest. Bank base rates have been their lowest in our lifetimes. (London BBR : currently 0.5% pa).

(a) *Interest on Judgment Debts* : however interest on an English Court Judgment Debt may currently be claimed at 8% under Section 17 of the Judgments Act 1838 (to run from the date of the Judgment – unless the Court otherwise orders – until payment).

(b) *Interest on a Costs Order* : where a Costs Order has been made (but the costs themselves have yet to be quantified or assessed) it will carry interest too.

The liability for costs is treated as a judgment debt. Once more – unless the Court were to order to the contrary – the interest rate on a Costs Order is fixed by Section 44 of the Administration of Justice Act 1970 : this is currently 8% per annum (with effect from 1 April 1993 until the Costs Order has been quantified and paid). (The level of costs contribution can either be agreed or, failing agreement, assessed by a Costs Judge).

6. *Watchwords:*

The main or guiding precept is that of the *overriding objective*.

The particular emphasis of the Courts is to place the parties upon an *equal footing* as far as it can.

The Court stress the wisdom of *saving expense* (e.g. by concentrating the minds of the parties on offers to settle or limiting the time on witness evidence or documents, including resort to the use of video conferencing).

The Courts pay particular heed to *proportionality* (for example shortly following the start of legal proceedings the Court is under a duty to decide the level and complexity of a case and to allocate it to one of three alternative tracks):

small claims track : small, minor and relatively inexpensive disputes;

fast track : relatively straightforward cases but involving larger sums and with no significant points of law.

multi-track : claims likely to involve substantial amounts and containing voluminous documents or questions of factual or legal complexity.

At all times the Court will continue to emphasise clear notions of *expedition* and *fairness*.

These laudable concepts in turn require the Courts to allocate an appropriate share of their resources relative to the importance of the case before them.

These concepts also place a clear duty upon the legal advisers to each party not only (as earlier stated) to co-operate with each other in relation to the trial process but to assist the Court too on all matters of procedure to and including the listing of the case for trial.

There has been a sea change : it is incumbent upon the parties and their advisers to co-operate and engage rather than run to and adopt antagonistic or intransigent positions. In the case of the latter these matters inevitably will come to the eyes and attention of the Court.

Behaviour which runs counter to the *overriding objective* and entails wasted costs or unnecessary expense will be firmly reflected in punitive Costs Orders and consequences.

The body of Civil Procedure Rules themselves run to many pages and paragraphs.

I do hope that the foregoing provides some small flavour and recognition of the winds of change which have blown.

Any party whose case is possessed of merit - ably abetted by a conscionable and competent adviser - has nothing to fear (and indeed in many ways has now much to gain from what has proved and is proving a major watershed in English law and practice today).

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