MACFARLANES

LITIGATION AND DISPUTE RESOLUTION

BRIEFING

CIVIL PROCEEDINGS IN ENGLAND AND WALES

INTRODUCTION

This note is a brief introductory guide to the Court system in England and Wales and the procedure which operates in civil (as opposed to criminal) cases. It gives an indication as to how a simple case might proceed. It is not a substitute for specific advice in particular cases.

THE COURT SYSTEM

The law and procedure which are described in the following pages operate in England and Wales. For historical reasons, Scotland has its own separate legal system and Court structure.

The law in England and Wales is derived from a number of sources:

- Statutes, enacted by Parliament.
- The decisions of Judges in decided cases.
- European legislation, which is increasingly important, and decisions on the interpretation of European legislation from the European Court of Justice.

There is no Civil Code or anything equivalent to it.

The two main Courts dealing with civil claims are the High Court and the County Court. On the whole, the High Court deals with major disputes. In London, the High Court operates from the Royal Courts of Justice in the Strand, while outside of London, District Registries form the local branches of the High Court. The County Court deals with more minor matters (most claims under £50,000) and also landlord and tenant applications. Most (although not all) of Macfarlanes' work is in the High Court.

The High Court is split into three divisions. Most commercial and contractual work is undertaken in the Queen's Bench Division, which has a number of specialist subdivisions including the Commercial Court and the Admiralty Court. The Queen's Bench Division also deals with employment and personal injury claims. The Chancery Division deals principally with company matters, trusts, wills, some land related matters and intellectual property, and includes the Companies Court, Patents Court and Bankruptcy Registry. The Family Division is responsible for divorces and decisions on the custody of children – Macfarlanes does not normally undertake work in this Division except in trust related proceedings. The Technology and Construction Court is a specialist court dealing with disputes in the building and technological industries.

High Court cases are heard by a single Judge, with an appeal (provided permission is given) to the Court of Appeal. It is sometimes possible to make a further appeal to the Supreme Court of the United Kingdom (which replaced the House of Lords in October 2009). Applications which arise prior to the full High Court trial are often dealt with by a Master, who is an officer of the Court. The Commercial Court, the Patents Court and the Technology and Construction Court are exceptions to this general rule – in these Courts the Judges oversee cases from start to finish.

The legal profession in England and Wales is divided between barristers and solicitors. In broad terms, solicitors are responsible for the initial advice, all of the detailed preparation of the case, liaison with the client, any negotiations towards a settlement of the dispute and for selecting and instructing the most appropriate barrister or barristers.

Barristers (who are also known as Counsel) are specialists in Court work. They provide further specialist advice and, because they present the case in Court, usually prepare the formal written claim and defence documents. Senior barristers become Queen's Counsel or QCs, as a reflection of their skills and experience. Barristers practise individually, even though they are grouped together in "chambers". It is therefore possible to have barristers from the same chambers working on different sides of a case but strict rules of professional ethics ensure that all matters remain confidential.

THE CIVIL PROCEDURE RULES

The Civil Procedure Rules (the Rules) govern procedure in both the High Court and the County Court. More detailed guidance to supplement the Rules is published in Practice Directions.

The Rules have the 'overriding objective' of enabling the Court to deal with cases justly. The Court is required to deal with cases in a way which is proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party. Different rules and procedures apply to cases of different value or complexity. There are stream-lined faster procedures for lower value or less complicated cases. Each case will be allotted an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

The parties are expected to co-operate with each other and the Court to help the Court to further the overriding objective. The Court can limit the amount of costs that a party can recover even if it is successful in a case; only a 'proportionate' amount will be recoverable. The Court may also examine the conduct

of the parties before proceedings were commenced and the manner in which proceedings have been conducted and take this into account when awarding costs.

The Rules have been designed to encourage the parties to use Court litigation only after other means of settling their dispute have been exhausted. At an early stage in proceedings, the parties have to inform the Court whether they wish to attempt settlement of the dispute by any method of alternative dispute resolution (see below), in which case the Court may stay (suspend) the proceedings to allow the parties to hold such settlement discussions.

THE COURT'S CASE MANAGEMENT POWERS AND DUTIES

Under the Rules, the Court is under a duty to further the overriding objective by 'actively managing cases'. The Court has the power to regulate timetables, promote alternative dispute resolution and consider the cost implications of steps along the way, leading to a tighter judicial control of the progress of a case, reduction in delay and regulation of costs.

A mainstay of the Court's case management powers is the allocation of a case to the relevant track, which is done on the filing of a defence to a claim. There are three 'tracks', which are sets of procedural rules and timetables governing a case depending (primarily) on its financial value:

The Small Claims Track

This is the normal track for claims with a financial value of not more than £5,000. The matter is heard by a District Judge in the County Court and the procedure is intended to be fast, cheap and relatively informal.

The Fast Track

This is the normal track for claims not falling within the small track, but with a financial value of not more than £15,000. In addition, the trial of the matter must be expected to last not more than one day. Directions will be given by the Court for the conduct of the matter up until trial, including a timetable for the progress of the claim. The costs which may be recovered by the successful party are limited.

The Multi Track

This is for claims of greater value (over £15,000) or complexity. It is on this track that there will probably be the most interaction between the parties and the Court on the progress of the case. In particular, the Court may at an early stage hold a case management conference (see below) to set out a timetable for the conduct of the matter up until trial.

COURT PROCEDURE UNDER THE RULES

Pre-Action

As part of the overriding objective, parties are expected to provide each other with as much information as possible in relation to their claims and defences so that the other side knows what case it has to answer. For this purpose, separate "Pre-Action Protocols" exist for construction and engineering, defamation, personal injury, clinical disputes, disease and illness claims, professional negligence claims, housing disrepair disputes, possession claims based on arrears of rent and for judicial review, setting out what information should be included in a letter of claim and what information the defendant should include in his response. There is also a Practice Direction on Pre-action Protocols which applies to general commercial claims. The Courts have power to award a costs order against a party who has not complied with the relevant Pre-action Protocol, or who has otherwise acted unreasonably before commencement of proceedings.

Commencing a Claim

Proceedings are commenced when the Claimant issues a Claim Form. The Claim Form is sealed by the Court and the Court keeps a copy. It is addressed to the Defendant and sets out, sometimes very briefly, the nature of the claim being made. It is then served on the Defendant, together with an Acknowledgement of Service form (see Acknowledging Service below), within four months of issue (six months if it is to be served outside the jurisdiction). Service is usually effected by post if the Defendant is in England and Wales. Special service rules apply when the Defendant is abroad. A number of Claimants or Defendants can sue or be sued in the same proceedings, where there is a sufficient link between the claims.

Acknowledging Service

The Defendant, following service on it of the Claim Form containing Particulars of Claim (see below), or of the Particulars of Claim if served separately, has 14 days in which to decide between four main options:

- Send an Admission Form to the Court admitting all or part of the claim; in that Form the Defendant may also ask for further time to make payment.
- Send an Acknowledgment of Service Form to the Court, giving notice that he intends to defend all or part of the claim.
- Send an Acknowledgment of Service Form to the Court, indicating that he intends to contest the Court's jurisdiction.

- Do nothing, in which case the Claimant is entitled to enter default judgment against him. In a straightforward action for damages, subject to proof that the Claim Form was properly served, no further formalities are required and the Claimant obtains judgment. Depending on the circumstances, there may have to be a further hearing in order to assess the damages payable.

Filing an Acknowledgement of Service form also has the effect of extending the time for service of a Defence by a further 14 days.

Statements of Case

Statements of case are the formal Court documents in which the parties set out the claim, the defence to the claim and any counterclaim which the Defendant may have. They are a concise statement of the essential factual contentions made by each side. They do not set out the legal argument nor the detailed evidence on which the factual contentions are based. They should, however, be verified by a 'statement of truth' (see below), signed by the party or its solicitor, confirming that the contents are true.

The Claimant's statement of case is contained in a document known as the Particulars of Claim. This must either be contained in the Claim Form, served with the Claim Form or served within 14 days of service of the Claim Form. The Defendant responds by serving a Defence within 14 days of the service on him of the Particulars of Claim (or 28 days if he has filed an Acknowledgement of Service) and, where appropriate, a Counterclaim. The Claimant may reply to the Defence by serving a Reply and must serve a Defence to any Counterclaim. Time limits are specified by the Rules for the service of each statement of case and may be extended by written agreement. The time for service of the Defence may be extended by no more than 28 days by this method, otherwise an application to the Court is required and it should not be assumed that an extension will be obtained. It should be noted that the Court may, on its own initiative, shorten agreed time limits. Further details of any statement of case may be requested and, if necessary, ordered by the Court.

Statements of case are public documents and details of their contents can be published by the press. However, it is possible to apply for an order restricting public access to statements of case. Consideration should be given to making such an application when statements of case contain sensitive and confidential information.

Statements of Truth

These are short statements verifying the truth of facts and matters set out in the document to which the statement attaches. Such a statement should appear on the claim form, statements of case, a reply to a request for further information and any witness statement.

Statements of truth have to be signed by the party itself, or its solicitor on its behalf. Witness statements must be signed by the witness himself. Proceedings for contempt of court may be brought against a person who makes a false statement in a document verified by a statement of truth without an honest belief that the statement is true.

Discontinuance

The Claimant may abandon the claim by filing and serving a notice of discontinuance on every other party to the proceedings, in most cases without the permission of the Court. However, the Claimant will be liable for the costs incurred by the Defendant up to the date the notice of discontinuance was served, unless the Claimant can show the Court a good reason why the claim should be discontinued without costs.

Security for Costs

Where the Defendant is concerned that, for one reason or another, it may be difficult to recover costs from the Claimant, should the claim ultimately prove unsuccessful, it may apply to the Court for an order for security for costs. Such an order compels a Claimant to give security, often by depositing money into court or a form of guarantee, for the Defendant's costs before it is allowed to continue with its claim. The circumstances in which such an order is available are limited. The most usual ground for the requirement to provide security is that the Claimant is resident outside the jurisdiction (England and Wales) or has changed its address to evade the consequences of litigation. Due to reciprocal arrangements for the enforcement of judgments within the European Union, security for costs is not usually available against EU Claimants on the ground that they are resident outside the jurisdiction alone.

Summary Judgment

A Claimant or a Defendant may apply for summary judgment on the whole claim or a particular issue on the ground that:

- the Claimant has no real prospect of succeeding on the claim or issue; or
- the Defendant has no real prospect of successfully defending the claim or issue; and
- there is no other reason why the matter should proceed to a full trial.

As a general rule, the Claimant may not apply for summary judgment unless the Defendant has filed either an Acknowledgement of Service or a Defence. If the case is a very simple one, the relevant evidence may be contained in the application form itself, provided that it is verified by a statement of truth. In more complicated applications it may be necessary to serve a witness statement, which must also be verified by a statement of truth. The respondent to the application will have an opportunity to file written evidence to contest the application. The Court may also fix a summary judgment hearing of its own initiative if it considers that either party has no reasonable prospect of succeeding in all or part of its claim or defence.

Case Management

Shortly after all Statements of Case have been served, the Court will give directions (i.e. the timetable) for trial. On the multi-track, the parties are encouraged to agree the directions, including the dates when documentary evidence and witness statements will be exchanged, whether or not expert evidence will be required and how long the trial is likely to take. If the parties are able to agree directions and the Court considers that the proposals are suitable, the Court may simply approve the agreed directions. Otherwise, it may be necessary for a case management conference to be held. During the remainder of the action, if specific issues arise, the Court may fix a case management conference or a pre-trial review at any time.

DISCLOSURE

A party may apply to the Court for disclosure of documents. This will normally be dealt with when the Court gives directions, although an order for disclosure may be obtained even before proceedings are commenced if that disclosure would (i) help to dispose fairly of the anticipated proceedings, (ii) assist the dispute to be resolved without proceedings or (iii) simply save costs.

The normal procedure is “standard disclosure”, by which the parties are obliged to disclose to each other the documents which they control and upon which they rely or which adversely affect their respective cases or assist another party’s case. Disclosure takes place by the exchange by the parties of lists of their respective documents. A party must make a reasonable search for all documents (there are detailed rules governing the disclosure of electronic documents) falling within these categories, and must give details of the extent of the search in a disclosure statement. This search must be “proportionate”, ie reasonable, in the circumstances of the case.

The opposing party is then usually entitled to inspect and have copies of the documents which have been disclosed, save for certain categories of privileged documents. Privilege applies to confidential communications between a client and its solicitors for the purpose of obtaining legal advice, or communications between a client or its solicitors and third parties in the context of obtaining evidence or conducting litigation. The information and copy documents which are obtained on inspection may only be used for the purposes of the litigation unless the court or the party that disclosed the document give their permission or the document has been read by or referred to the court at a public hearing.

The obligation to disclose documents means that parties must retain all documents relating to the case from the outset. The obligation to disclose is a continuing one and newly located or newly created documents which fall into one of the categories above will have to be disclosed even if lists of documents have already been exchanged. Therefore new documents should not be created which may potentially be disclosable.

Evidence

The parties’ solicitors will prepare written statements setting out the evidence of the witnesses who have knowledge of the facts in the matter and who are to give evidence at trial. These must be verified by a statement of truth and are served on the other parties in advance of the trial.

Where there are issues which require technical evidence or expert opinion, the Court may appoint a single expert to assist it. The parties may make representations and address questions to the expert. The amount of expert evidence must be reasonable and proportionate to what is at stake in the case.

In other circumstances, the parties may apply for permission to instruct their own experts. Experts are required to give independent evidence to assist the Court and should not be advocates on behalf of the party instructing them. All material instructions between a party and its expert must be disclosed in an expert’s report – so clients must be careful when instructing an expert to investigate a potential claim. The experts’ reports obtained by each side will be exchanged before trial. The Court may order a meeting of the experts to be held before trial with a view to narrowing the extent of any disagreement between experts, and may direct the experts to produce a statement of matters which are agreed between them and an explanation of any disagreements.

Preparing for Trial

By the conclusion of the disclosure process, and after service of witness statements and expert reports, each party should know the relevant elements of the other party’s case. The matter can then proceed to trial.

The documentary evidence to be used in Court will be derived from the disclosed documents. The parties will normally agree on the content and organisation of the documents which are lodged with the Court in advance and made available to the Judge.

The Court may order a pre-trial review to be held some weeks before the trial is due to begin. At this review the Judge who is to hear the trial will check that all previous Court orders have been complied with and obligations on the parties have been fulfilled.

The Trial

The trial date depends on the track on which the case is proceeding and the Court's other commitments. For fast track cases, the Court will fix the trial date or trial period on the first occasion that the Court gives directions for the management of the case. The standard period between the giving of directions and the trial on the fast track will be not more than 30 weeks. Multi-track proceedings may take longer to reach a trial date, due to the additional preparation needed in more complex cases and also the need to find a longer available period in the Court's calendar in which to hear the trial. However, one of the stated purposes of the Rules is to deal with litigation as expeditiously as possible, and parties and the Court are all under a duty to progress the matter as swiftly as possible.

The Claimant's Counsel will open (start) the case by summarising the facts and the opposing arguments for the benefit of the Judge. He will then call the Claimant's witnesses to give their evidence in support of the Claimant's case. The witnesses will be cross-examined by the Defendant's Counsel and may be re-examined on behalf of the Claimant. Relevant documents may be referred to during the course of the evidence. The opening comments by Counsel and the evidence of the witnesses constitute the case for the Claimant. The Defendant's Counsel then calls his witnesses, after any opening comments, and they are subject to cross-examination and re-examination.

Finally, Counsel for the Defendant and then the Claimant make their submissions to the Judge on the evidence and the law. The Judge does not, as in some other jurisdictions, make any independent inquiry into the case. He depends upon the parties to present the factual evidence and to draw his attention to the relevant legal principles. His judgment is based on the case as presented to him. In straightforward cases judgment will be given immediately. In more complex matters the Judge may reserve judgment to a future date.

INJUNCTIONS

In certain limited circumstances, where the matter is urgent and a Claimant's claim would otherwise be frustrated by the time the case reached trial, the Court will grant an injunction early in the action (known as an "interim injunction") to preserve the Claimant's position by restraining the Defendant from doing or continuing to do a particular act. Another common order of this type, in commercial proceedings, is the freezing injunction. Where there is a real risk that the Defendant will dissipate his assets in order to prevent the Claimant enforcing its claim against him, the Court may grant a freezing injunction preventing the Defendant from dealing with those assets. Breach of an injunction is a contempt of Court, for which a person may be fined or even imprisoned.

An application for an injunction is made to a High Court Judge, supported by evidence. In cases of real urgency an order can be obtained within a very short period – sometimes within a few hours.

COSTS

Recovery of Costs

The general rule is that the successful party in the litigation will ordinarily be entitled to be paid its costs by the unsuccessful party but this is subject to the successful party conducting itself reasonably, both before and during proceedings. The amount of costs which can be recovered will, in the absence of agreement, be assessed by the Court after the trial. For specific hearings or applications which take less than one day, the Court has the power to summarily assess the costs of the hearing or application to be paid within 14 days. A number of factors are taken into account by the Court in deciding the amount of costs to award, including the conduct of the parties and whether or not the costs incurred are proportionate to the value of the action. The Court's rules for assessing costs do not reflect the service provided and the overheads borne by most City law firms. The costs recovered from the unsuccessful party following an assessment by the Court will therefore only be a proportion (as a general rule of thumb, two-thirds) of the costs actually incurred by the successful party.

Part 36 Offers

A procedure exists whereby litigants can attempt to protect themselves from adverse cost consequences to a degree. Either side can make a "Part 36 Offer" (named after the relevant section of the Rules) to settle all or part of the proceedings. This normally takes the effect of a Claimant offering to accept, or a Defendant offering to pay, a specified sum of money in settlement of the Claimant's claim.

A Claimant who rejects a Part 36 Offer, but who then fails at trial to achieve a more advantageous judgment, will usually be ordered to pay the Defendant's costs from the date 21 days after the offer was made and interest on those costs. If a Defendant rejects a Part 36 Offer, and judgment at trial is at least as favourable to the Claimant as the Part 36 Offer, the Defendant will usually be ordered to pay a higher proportion of the Claimant's costs together with interest on those costs and the principal sum awarded from the date 21 days after the offer was made.

ENFORCEMENT

If the Claimant is successful in obtaining a money judgment and the Defendant does not then pay voluntarily, there are a number of methods by which the Claimant may seek to enforce its judgment. The main methods are:

- A Third Party Debt Order. This is a procedure by which the Claimant may obtain an order which directs a person who owes a debt to the Defendant to pay the Claimant instead. The procedure is most commonly used to recover a credit balance on a bank or other similar account held by the Defendant.

- A Charging Order. The Claimant may obtain a charge on certain of the Defendant's assets, particularly property and stocks and shares, and may then obtain an order that those assets be sold and the proceeds paid to reduce the judgment debt.

- An Attachment of Earnings Order. If the Defendant is in employment, the Claimant can obtain an order requiring the Defendant's employer to deduct from his monthly salary a specific sum each month until the judgment debt is paid.

- A Writ of Execution. A Court Officer attends at the Defendant's home or premises and seizes the Defendant's goods. These are then sold and the proceeds paid (after costs) to the Claimant.

In addition or as an alternative, the Claimant may take steps to bankrupt an individual Defendant or to wind up a corporate Defendant.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

Litigation in the Courts is only one way to resolve disputes. Alternative methods are also available and, under the Rules, are actively encouraged. In an arbitration the parties are free to choose their own methods and procedures for conducting the matter, which is heard and determined by an appointed arbitrator, while conciliation and mediation rely on the assistance of a third party to help bring the parties to a settlement agreement. The Court may permit or even require a break in the litigation, in order to allow the parties to pursue one or other of these alternative methods.

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JANUARY 2012

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It is not intended to be comprehensive nor to provide any specific legal advice and should not be acted or relied upon as doing so. Professional advice appropriate to the specific situation should always be obtained.

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