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INTRODUCTION

1.01 This book deals with the mechanics of how legal and equitable rights are asserted, determined, and enforced through the civil courts. The civil courts perform the important function of resolving disputes that cannot be resolved by agreement between the parties.

1.02 It is axiomatic that the courts exist to do justice between the parties who come to them. Justice is not simply a matter of achieving the right result. It has long been recognized that where justice is delayed justice may be denied. However, the law is often far from straightforward, and frequently the factual background to a dispute needs considerable investigation before it is ready to go to trial.

1.03 Litigants are often unable to cope with the complexities of the law on their own, and have to seek assistance from the legal profession. Litigation can be very expensive, and the important topic of funding will be considered further in Chapter 4.

1.04 The cost and delays inherent in litigation, together with the stress and management of time often involved, mean that it is invariably best if matters can be resolved amicably without resorting to court proceedings. Pre-action protocols on reasonable conduct to resolve matters before starting proceedings are discussed in Chapter 5, and alternative dispute resolution ('ADR') procedures are discussed at 1.22–1.31. However, some people simply refuse to negotiate, or ignore correspondence, or make unrealistic offers, or insist on continuing with conduct infringing another's rights. In such cases the injured party may have little option but to commence proceedings.

1.05 Court proceedings fall into two categories. Proceedings are most frequently used for resolving civil disputes. For example, it may be necessary to go to court to enforce payment under a contract, or to seek compensation for personal injuries where a reasonable offer is not forthcoming, or to seek an injunction to restrain tortious conduct which the defendant threatens to continue. In the second category, it is necessary to apply to the court for an order before certain conduct can be safely undertaken. For example, executors may seek the court's directions if the terms of a testator's will are unclear, or the court's approval may be sought where parties have agreed a settlement of a dispute where the claimant is a child.

A THE LEGAL PROFESSION

1.06 In England and Wales there is a split legal profession, with solicitors and barristers (the latter are also known as counsel). In general, solicitors provide the direct point of contact with clients, and provide from within their firms most legal services for clients. Barristers provide a referral service of specialist advisory, drafting, and advocacy services as and when instructed by solicitors. A solicitor will, therefore, have general day-to-day management of a case, conducting the correspondence and negotiations, and gathering the evidence, but may instruct a barrister for specific tasks in the course of the litigation, such as drafting the statements of case and representing the client at hearings.

1.07 Solicitors may be in practice on their own (sole practitioners), but it is rather more common for solicitors to work in partnerships or limited liability partnerships ('LLPs'). Multi-disciplinary practices and alternative business structures are permitted by the Legal Services Act 2007. These allow firms to offer a range of professional services, such as accountancy, tax and insurance services, as well as legal services, and also allow outside ownership (so that a firm providing legal services may be owned by non-lawyers). A traditional solicitors' firm will typically have a number of fully qualified solicitors as partners, and other fully qualified solicitors as employed assistant solicitors. The firm may have non-solicitor fee earners, such as legal executives (who have qualifications granted by the Institute of Legal Executives), and non-qualified fee earners, such as litigation managers and clerks. The firm may also have some trainees and para-legals (who assist the lawyers, but are not themselves legally qualified), and will have a number of administrative employees.

1.08 Barristers are sole practitioners, but are usually tenants in sets of chambers having a number of members. At the top of the profession are Queen's Counsel ('silks'), with the bulk of the profession made up of 'juniors'. Barristers completing their training are called pupils. The point of contact between solicitors and barristers is the barristers' clerk.

B LAWYERS' DUTIES

1.09 Solicitors are officers of the court (Solicitors Act 1974, s 50(1)), and consequently have duties not only to do their best for their clients, but also never to deceive or knowingly or recklessly mislead the court (see the Solicitors Regulation Authority ('SRA') Code of Conduct 2011, Outcome 5.1 (see **<http://www.sra.org.uk/solicitors/handbook/welcome.page>**)). Counsel are under similar obligations (see the Code of Conduct of the Bar of England and Wales, para 302 (see **<http://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/>**)), which provides that barristers must assist the court in the administration of justice, and must not deceive or knowingly or recklessly mislead the court.

C INITIAL INSTRUCTIONS

The first interview with the client

1.10 When a member of the public goes to a solicitor's office for the first time, the solicitor will ask about the nature of the problem and what it is that the potential client is seeking to achieve. Where the matter involves a transaction or linked transactions with €15,000 or more being paid to or by the client, the solicitor must be shown and keep a record of identification evidence, such as a passport, or photo-card driving licence, or birth certificate, proving the identity of the client (Money Laundering Regulations 2003 (SI 2003/3075),

reg 4). Most statutory instruments can be found at **<http://www.opsi.gov.uk>**. So far as possible, clients are encouraged to relate the facts of the case in their own words, so that the true problem can be identified. This will enable the solicitor to decide whether to accept instructions from the client. It will also form the basis of the client's written statement that will be used if proceedings are issued, which will usually be drawn up by the solicitor and signed by the client.

1.11 If the solicitor decides to take the case, a plan of action should be agreed with the client in relation to any further inquiries that need to be made. The client will usually be asked to provide details of any witnesses to the events in question, and the solicitor will arrange for signed statements to be taken from them. The solicitor will advise whether it will be necessary to obtain expert advice on any aspects of the case, and must advise the client on the duty to the court to preserve all relevant documents (including documents adverse to the client's case). The solicitor will usually ask to be provided with copies of all relevant documents at an early stage. The client will be advised to keep a continuing note of all relevant developments if the dispute is of a continuing nature, such as a nuisance. Where the client is suffering continuing losses, the client will be advised to keep a record of those losses. This arises, eg, if a commercial client has an ongoing loss of profits, and in many personal injuries claims, where the claimant may need continuing medical treatment and might incur expenditure on prescriptions, medical appliances, and travel, etc. Where the client is seeking to bring a claim, it is common for inquiries to be made about the financial standing of the proposed defendants to ensure that they are worth suing. During the early stages of preparation, the parties' investigations and correspondence for the purposes of litigation are protected from disclosure by legal professional privilege.

1.12 The question of payment for the solicitor's services should be discussed at the first interview. If the solicitor is prepared to conduct the case on a publicly funded basis and if the client qualifies, initial advice may be given as publicly funded legal help (see 4.21). In all cases where it appears that a client may be eligible for public funding the solicitor is under a duty to advise that it is available. Where public funding is to be applied for, the client must be advised about the payment of contributions and, most importantly, the effect of the statutory charge (see 4.40ff).

1.13 In privately funded cases, the solicitor should consider whether the case should be taken on a conditional fee basis (see 4.14ff) or on a traditional retainer with the client being liable for his or her own solicitor's costs regardless of the result. The client will need to be given an estimate of the likely costs. The client may be asked for a payment on account, and should be advised about the billing arrangements. The client should also be advised about the possible costs orders at trial. The general rule is that the loser will be ordered to pay the winner's costs, but as costs between parties are assessed on a different basis from the costs payable by a client to its solicitor, even the victorious party will usually have a net liability for costs to its solicitor (see Chapter 43). In other cases, the client may be able to rely on an insurance company or trade union to meet costs.

1.14 The solicitor may be able to advise the client about the merits of the case and its financial and other implications at the first interview. If it is not possible to give full advice at that stage, advice will be given when the necessary inquiries have been completed. In many cases solicitors will instruct counsel to give specialist advice on the merits and remedies available, such advice being given either orally in conference or in writing in the form of counsel's opinion. The initial advice on costs and other matters, such as the identity of the fee earner conducting the case and information about complaints procedures, must be confirmed in a client care letter (see figure 4.1).

1.15 The solicitor should also agree with the client the scope of the solicitor's authority in relation to the dispute. In particular, it should be agreed whether the solicitor should correspond with the other side, and whether proceedings should be instituted. The solicitor should keep the client informed of developments and of any changes in the risks of litigation.

1.16 A solicitor retained by a defendant has similar duties regarding preserving and preparing evidence, and advising on costs, funding, and the merits. It is of particular importance to advise a defendant of the possibilities of settling on reasonable terms, and of making a Part 36 offer to protect the defendant's position on costs. A Part 36 offer is a formal offer to settle the dispute on stated terms. These offers provide for an acceptance period of at least 21 days. If they are not accepted, the usual position is that, if the claimant wins the case but fails to do better than the offer, the claimant will be awarded costs only up to the 21st day after the offer was made, but will be ordered to pay the defendant's costs thereafter. Making a shrewd Part 36 offer very soon after being notified of a dispute is an extremely effective way of disposing of many claims. If the offer is not accepted, the claimant is left with double the usual pressure: not only must they win, but they must also obtain a judgment which is more advantageous than the offer if they are to recover all their costs. Pre-action offers under Part 36 are considered at 5.30ff, with the main discussion in Chapter 42.

Written instructions

1.17 Solicitors receive instructions in documentary form most frequently from established clients. Such clients may well be very familiar with the litigation process, as where a hire-purchase company has a large number of customers who fall into arrears on their instalments. In an ideal world all the necessary information and documentary evidence for the solicitor to conduct the case through its initial stages will be enclosed with the written instructions. However, written instructions are not always complete, and the solicitor may need to clarify certain matters, ensure there are no further relevant documents in the client's possession, take statements from witnesses, ensure evidence is preserved, etc.

D CONFIDENTIALITY AND CONFLICT OF INTEREST

1.18 A solicitor or barrister owes a duty of confidentiality to his or her clients. Consequently a solicitor or barrister must not disclose documents or talk about a client's case with anyone not connected with the case without the client's instructions. This duty is buttressed by the fact that documents and information in the hands of the solicitor or barrister are protected by legal professional privilege. It sometimes happens that a solicitor is approached by a prospective client in relation to a dispute with someone who is an existing client of the solicitor's firm. Where this happens, or where it subsequently appears that joint clients in fact have conflicting interests, the solicitor will, in general, have to refuse to act for one or both parties. It may be that, after receiving full advice on the potential conflict, both parties agree to the solicitor acting for them both.

1.19 A solicitor who is possessed of relevant confidential information will be restrained from acting against the former client (*Re a Firm of Solicitors* [1992] QB 959). In the case of a firm previously retained by a client, the partners and employees who are in possession of confidential information may be restrained from acting against the former client, and this extends to them if they change firms. Members and employees of the firm who never had possession of relevant confidential information are in a rather more complex position. While

they remain with the firm they will, generally, be precluded from acting against the former client of the firm, but it is possible they may be allowed to act if there is no real (as opposed to fanciful) risk that relevant confidential information might have been communicated to them (*Re a Firm of Solicitors* [1992] QB 959).

1.20 In *Bolkiah v KPMG* [1999] 2 AC 222 the claimant had retained the defendant firm of accountants in his private capacity to provide extensive litigation support services of a kind commonly provided by solicitors in relation to proceedings he was involved in. In the course of this retainer the defendants became privy to detailed information relating to the claimant's financial affairs, and no fewer than 168 of the defendants' employees were involved. Some months after the conclusion of the claimant's action, the defendants were retained by the claimant's former employer (the Brunei Investment Agency (BIA)) to investigate the location of substantial funds that had been transferred during his period of employment. Aware of a possible conflict of interest, the defendants erected an information barrier (also known as a 'Chinese wall') around the department conducting the BIA investigation. The defendants did not, however, ask for the claimant's consent to them acting for the BIA. It was held that the claimant was entitled to an injunction restraining the defendants from continuing to act in the BIA investigation. Such injunctions will be granted unless the firm produces clear and convincing evidence that effective measures have been taken to ensure that no disclosure of the former client's affairs will be made to the department acting for the new client, and that there is no risk of the former client's information reaching the department acting for the new client. Although, in some cases, Chinese walls may be sufficient protection, there is a very heavy burden on the firm to prove this, and it will be very difficult for the firm to do so unless those measures were an established part of the firm's organizational structure.

E PRE-ACTION CORRESPONDENCE

1.21 After taking instructions from a client, a solicitor will usually enter into correspondence with the other side to the dispute. It is usual in most cases to have a period of negotiations before court proceedings are commenced. Sometimes receipt of a solicitor's letter by the other side will indicate that the client is taking the dispute seriously and will encourage them to make a reasonable offer in settlement of the matter without the need to resort to proceedings. There is detailed guidance on the content of pre-action correspondence: see Chapter 5. This includes providing full details of the claim and giving the other side a reasonable opportunity, perhaps through the use of alternative dispute resolution, to come to terms before issuing proceedings.

F ADR OR COURT PROCEEDINGS

1.22 Where negotiations fail, the claimant must either drop the case, consider using an alternative dispute resolution ('ADR') procedure, or commence proceedings.

Advantages and disadvantages of ADR and litigation

1.23 Advantages claimed for ADR include:

(a) ADR procedures are more flexible than litigation;
(b) ADR procedures are usually simpler than litigation, with less demanding preparation required, and the strict rules of evidence not applying;

(c) ADR procedures can be arranged to suit the convenience of the parties, in a suitable location, resulting in a minimum of disruption to their businesses;
(d) ADR is often speedier than litigation;
(e) trials in litigation are generally in public, whereas ADR takes place in private;
(f) ADR is usually less stressful than litigation;
(g) ADR can produce solutions going beyond the strict parameters of the original dispute. A court only has jurisdiction to make orders within the confines of the issues raised by the statements of case;
(h) ADR is less confrontational, which means it provides a better prospect of enabling parties to maintain long-term relationships (eg, between businesses or neighbours. There are situations, eg, where there is a distribution contract, or a commercial lease, where the parties are tied into a long-term relationship in any event);
(i) ADR is felt to be less expensive than litigation;
(j) arbitration awards are generally final, so usually avoid the risk of the parties facing an appeal; and
(k) arbitration works well in international disputes, where arbitration awards can be easily enforced across different jurisdictions, provided the country in question is one of the more than 140 countries that are signatories to the New York Convention 1958 (see **<http://www.uncitral.org>**).

1.24 Disadvantages involved in ADR procedures can include the following:

(a) ADR procedures agreed before a dispute arose may be inappropriate for resolving the actual dispute that has arisen;
(b) where parties agree to ADR after a dispute has arisen, the parties may find it difficult to agree the details of the procedure to be followed (such as the identity of the arbitrator or mediator, payment of fees, rules to govern the ADR);
(c) in ADR procedures where the parties have to pay fees to the arbitrator or mediator, the fees may make the process more expensive than litigation;
(d) ADR can on occasion be an expensive, time-consuming diversion, particularly if one of the parties is not genuine about their participation in the procedure;
(e) a party with a strong case on the law and evidence may have to abandon their actual rights if the ADR procedure is to achieve anything;
(f) litigation may become inevitable if an arbitrator makes an error of law or jurisdiction, thereby substantially increasing the costs and delay;
(g) ADR procedures sometimes become unworkable if there are multiple parties; and
(h) enforcement of the amount determined (by agreement or by the tribunal) is easier in litigation, particularly when compared to non-arbitration ADR procedures.

1.25 Where the balance lies in any individual case depends on the circumstances. If a party needs a remedy that only a court can provide, there is no real option. If both sides to a dispute realize that each has strengths and weaknesses, mediation or conciliation can save them both from becoming embroiled in protracted litigation. Parties faced with a two-week trial may well find a day spent in mediation will save them a great deal of time and costs. Parties with a sensitive business dispute may prefer to arbitrate in order to ensure there is no public trial. Sometimes a party with a very strong case (but not sufficiently strong to seek summary judgment) will achieve a great deal by using ADR. For example, the services of a mediator might make it plain to the other side that there are substantial problems with their case, and they should be more realistic about settling the claim.

1.26 The choice between using ADR or going to court may also turn on what the client is seeking to achieve. It may be that one mode of dispute resolution is better at delivering the required result than the other. By using ADR, any of the following may be achieved:

(a) a change in the way the other party behaves, or measures to prevent a similar problem arising again;
(b) putting right a mistake;
(c) a promise that the other party will not do something;
(d) the repair or replacement of an item purchased;
(e) an apology, or an explanation; or
(f) compensation.

1.27 Court proceedings may result in:

(a) a prohibitory injunction (eg, to stop tortious conduct);
(b) specific performance of a contractual obligation;
(c) rectification of a document, or rescission of a contract;
(d) the return of property (land or goods);
(e) compensation; or
(f) a declaration from the court about the respective rights of the parties.

1.28 A client whose main interest is to obtain compensation may achieve that goal by using mediation or resorting to litigation. On the other hand, a client who is more interested in preventing the same thing happening to other people, or in getting an apology, may be best advised to use a complaints procedure followed up by a reference to the relevant ombudsman. Some matters are very urgent and important, and going to court may be the only way to safeguard the client's interests. Examples are where there is an imminent threat to the client's property, or where publication of a libel is likely to happen in the next edition of a newspaper. Further, there are some cases where court approval is essential, eg, cases involving unclear provisions in wills, and approval of compromises for clients who lack legal capacity. If limitation is about to expire, it may be necessary to issue court proceedings in order to preserve the client's rights.

1.29 A related problem is in deciding the best time to attempt some form of ADR. Premature attempts at mediation can waste costs. Delaying making a reference to ADR can mean that a case passes the point where costs already expended by both sides make a negotiated settlement almost impossible. See *Nigel Witham Ltd v Smith* [2008] CILL 2557.

Range of ADR procedures

1.30 ADR takes many forms (see table 1.1). The various commercial dispute resolution providers have put together various different dispute resolution models, together with published rules. The result is that parties have access to a range of different ADR procedures, and can choose the one which is best suited for resolving their dispute. Arbitration is intended to be a direct replacement for litigation, with an arbitrator making a decision which is binding on the parties. Other ADR procedures provide a means of finding a solution, but leave litigation open if the parties do not reach a compromise. For example, mediation can assist the parties in focusing on the issues that are causing the problem, which in turn can help them in reaching an agreement either of the whole dispute, or in relation to aspects of the dispute. If they do not reach an overall compromise, litigation is available to decide the unresolved matters.

Table 1.1 ADR procedures

Type	Main features	Suitable cases
Commercial arbitration	Determination by professional arbitrator. Complex and potentially expensive procedure. Avoids court and avoids appeals.	Commercial cases Building disputes Contracts with arbitration clauses
Adjudication in construction disputes	Speedy independent adjudication of disputes involving builders. Enables contractors to get paid without delay. Not final.	Non-payment for building work
Mediation (formal)	Mediator facilitates negotiation, but does not make decisions. Aims at negotiated settlement or narrowing of issues. Mediator often a senior professional.	Personal injuries Clinical disputes Professional negligence General litigation
Community mediation	Mediator acts as a facilitator. Usually adopts a more informal approach than in formal mediation. Mediator often respected member of the community.	Neighbour disputes Antisocial behaviour

The cost of ADR

1.31 While ADR is generally regarded as being cheaper than litigation, it can still be expensive. Much depends on the type of ADR used, and the value and complexity of the dispute. For example:

(a) community mediation is usually free. Parties may incur travel and other expenses;
(b) ombudsman schemes are free to the person complaining;
(c) family mediation services often charge an hourly rate. Some have a scale of fees, based on the financial circumstances of the client. Family mediation may be funded through the Community Legal Service;
(d) commercial mediation service providers charge according to the complexity and value of the claim. Mediation fees are calculated on the basis of an instruction fee per party (typically in the region of £250) plus an hourly mediation rate ranging from £200 per hour for junior mediators to £600 per hour for senior mediators. There may also be room hire costs and fees for other services. It is possible that the Community Legal Service fund will pay the cost of mediation for a party who is financially eligible;
(e) consumer arbitration schemes typically cost between £10 and £100, but some are free; and
(f) commercial arbitration providers may charge a Registration Fee, and/or a deposit (both of which could be £2,000 or £3,000, through to fees up to £500,000 in large commercial cases), and/or daily or hourly fees for the arbitrator or arbitrators. Some arbitrations use panels of three arbitrators. Fees and room charges are usually similar to the amounts payable for commercial mediation.

G REFERENCE TO ADR

1.32 Use of ADR is almost always voluntary, so usually rests on an agreement between the parties. Either party (or the court itself if proceedings are issued) can suggest using an ADR scheme in an attempt to find common ground. Likewise, the procedural rules governing most tribunals

(eg, the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698)) say the tribunal should bring to the attention of the parties the availability of ADR, and should facilitate the use of ADR. The standard ADR order used in the Commercial Court is shown in figure 1.1.

Figure 1.1 Commercial Court ADR Order

1. On or before [date] the parties shall exchange lists of three neutral individuals who are available to conduct ADR procedures in this case prior to [date]. Each party may [in addition] [in the alternative] provide a list identifying the constitution of one or more panels of neutral individuals who are available to conduct ADR procedures in this case prior to [date].
2. On or before [date] the parties shall in good faith endeavour to agree a neutral individual or panel from the lists so exchanged and provided.
3. Failing such agreement by [date] the Case Management Conference will be restored to enable the Court to facilitate agreement on a neutral individual or panel.
4. The parties shall take such serious steps as they may be advised to resolve their disputes by ADR procedures before the neutral individual or panel so chosen by no later than [date].
5. If the case is not finally settled, the parties shall inform the Court by letter prior to [disclosure of documents/exchange of witness statements/exchange of experts' reports] what steps towards ADR have been taken and (without prejudice to matters of privilege) why such steps have failed. If the parties have failed to initiate ADR procedures the Case Management Conference is to be restored for further consideration of the case.
6. [Costs].

Note: The term 'ADR procedures' is deliberately used in the draft ADR order. This is in order to emphasize that (save where otherwise provided) the parties are free to use the ADR procedure that they regard as most suitable, be it mediation, early neutral evaluation, non-binding arbitration, etc.

1.33 The parties can agree to use ADR either before or after a dispute arises. Contracting parties who anticipate possible problems ahead may insert an ADR clause into their contract, sometimes as part of the contract's standard terms and conditions. See table 1.2 for typical clauses. Such a clause has to be adhered to. If legal proceedings are commenced in breach of an agreement to use ADR, particularly arbitration (for which, see the Arbitration Act 1996, s 9), the court is likely to grant a stay of the proceedings or even an anti-suit injunction, and award costs on the indemnity basis (see 22.52 and 35.82).

Table 1.2 ADR Contract Clauses

Type of clause	Wording
Reference to arbitration	Any dispute or difference arising out of or in connection with this contract shall be determined by the appointment of a single arbitrator to be agreed between the parties, or failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an arbitrator, by an arbitrator to be appointed by the President or a Vice President of the Chartered Institute of Arbitrators. The seat of the arbitration shall be England and Wales.
Rules for the arbitration	The arbitration shall be governed by both the Arbitration Act 1996 and the Controlled Cost Rules of the Chartered Institute of Arbitrators (2000 Edition) ('the Rules'), or any amendments to those provisions. The Rules are deemed to be incorporated by reference into this clause.

Table 1.2 *continued*

Type of clause	Wording
Mediation	Any dispute arising out of or in connection with this contract shall, at first instance, be referred to a mediator for resolution. The parties shall attempt to agree upon the appointment of a mediator, upon receipt, by either of them, of a written notice to concur in such appointment. Should the parties fail to agree within 14 days, either party, upon giving written notice, may apply to the President or the Deputy President, for the time being, of the Chartered Institute of Arbitrators, for the appointment of a mediator.

H MAIN STAGES IN COURT PROCEEDINGS

1.34 When commencing proceedings, decisions have to be made about the appropriate court and type of proceedings to use. Generally, as discussed at 2.18ff and especially 2.22, the claimant has a complete choice between commencing proceedings in either the High Court or a county court. Broadly, however, the High Court should be used only for the most important cases (see 2.32) and those worth more than £25,000. Personal injuries cases must be commenced in a county court unless the amount claimed exceeds £50,000 (see 2.29). As a guide, the main stages in a common law claim, whether it is proceeding in a county court or the High Court, are shown in figure 1.2.

Issue of a claim form

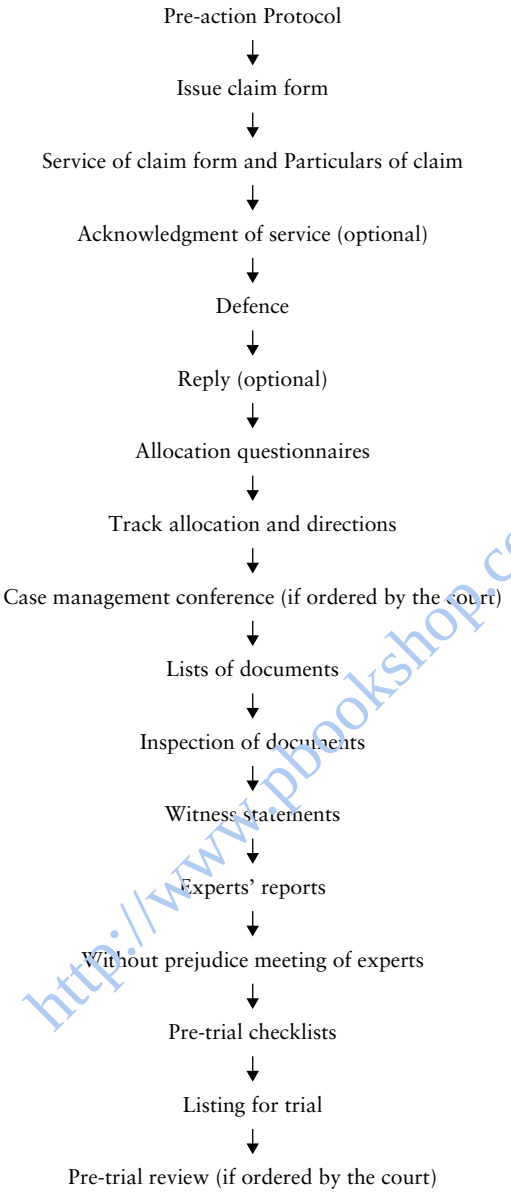
1.35 Court proceedings are commenced by issuing a claim form. This involves drawing up the document on the appropriate form (usually form N1), taking (or sending by post) copies to the court office, paying a fee, and having the claim form stamped with the court's official seal. There are specialist claim forms for use in certain types of proceedings (eg, the Admiralty and Commercial Courts), and an alternative 'Part 8' claim form for proceedings pursuant to statute and for questions of construction (see Chapter 19).

1.36 Time stops running for limitation purposes on the date proceedings are brought. Generally, a defendant has a complete defence if the relevant limitation period has expired before proceedings are brought, although in some cases the court has a discretion to allow proceedings to continue despite the expiry of the primary limitation period. Limitation is discussed in some detail in Chapter 7.

Service of process

1.37 As a general rule, the defendant must be served with the claim form together with a 'response pack' within four months after issue. In non-specialist cases service may be by the claimant or the court. Usually, the court will serve by first-class post. Where service is effected by the claimant, a number of methods of service are permitted, but the most common are by first-class post, insertion through the letterbox at the defendant's address, and delivery to the defendant in person. In general litigation a defendant is required to respond to service within 14 days after service of the particulars of claim. In the Commercial Court the defendant must respond within 14 days of service of the claim form. This is done by returning a form of acknowledgment of service (which should have been part of the response pack) to the court office, by using the forms of admission and defence and counterclaim enclosed with the response pack, or by filing a formal defence.

Figure 1.2 General sequence of events in claims under the CPR



Statements of case

In common law claims, the factual contentions advanced by both parties must be reduced into writing in formal documents known as statements of case. These are discussed further in Chapter 13. The claimant's case is contained in the particulars of claim. This sets out the facts in a structured way, and is designed to show how the legal requirements of the claimant's causes of action against the defendant are satisfied. Particulars of claim are sometimes incorporated in the claim form, and sometimes kept separate. If separate, they should be served on the defendant no later than 14 days after service of the claim form. **1.38**

1.39 The next statement of case is the defence, which is drawn up by the defendant. It responds to the allegations made in the particulars of claim, and sets up any specific defences available to the defendant. A defendant with a cross-claim against the claimant may add a counterclaim to the defence. Often, the only statements of case are the claim form, particulars of claim and defence. However, it is not uncommon for the claimant to respond with a reply, and, if the defendant has counterclaimed, with a defence to counterclaim (a claimant doing both will serve a reply and defence to counterclaim).

Track allocation

1.40 In general litigation, the court will send notices to the parties when defences have been filed giving a deadline for filing allocation questionnaires. These should provide the court with information to enable it to assess how complicated and important the claim is likely to be. On the basis of this information the procedural judge will allocate the claim to one of three case management tracks. The small claims track aims to provide a swift and inexpensive procedure for simple claims worth no more than £5,000. The fast track provides a fuller, but still streamlined, procedure for somewhat more important cases, typically with a value between £5,000 and £25,000. The multi-track is used for cases worth typically in excess of £25,000. At the same time as allocating the case to a track, the procedural judge will give directions for the further steps required to prepare the claim for final determination, with the level of preparation laid down being proportionate to the value and complexity of the case. Commercial Court claims are automatically treated as allocated to the multi-track.

Disclosure

1.41 After track allocation, in cases proceeding on the fast track or multi-track, the parties are required to serve on each other lists of documents. These list all the documents material to the case which are or have been in their possession, custody, or power. The documents are divided into those which it is accepted can be seen by the other side, those which are protected by privilege, and those no longer with the party making the list. Documents must be disclosed whether they support or undermine the case of the party holding them. After lists have been exchanged, the parties are entitled to inspect each other's documents, other than those covered by privilege. Usually this is done by providing photocopies. Disclosure is discussed further in Chapter 29.

Exchange of evidence

1.42 The parties must give full disclosure to each other of all relevant material in advance of trial. Advance disclosure is intended to serve several purposes:

(a) to allow the parties to assess the true strengths of their cases in advance of trial;
(b) to promote settlements;
(c) to prevent the parties being taken by surprise at trial; and
(d) to prevent unnecessary adjournments.

1.43 Thus, in addition to disclosing material documents, directions invariably require the parties to exchange the written reports of experts and the statements of factual witnesses they intend to call at trial. Where a party intends to adduce hearsay evidence at trial, adequate notice identifying the hearsay evidence must be served on the other side usually at the same time as witness statements are exchanged. These matters are discussed in Chapters 31 to 33.

Listing for trial

1.44 The courts try to list cases for final determination as soon as possible. In small claims track cases this is done at track allocation. In fast track cases the trial should be no later than 30 weeks after allocation. There is no set time limit for multi-track cases. In fast track and multi-track cases the court may give a fixed hearing date (a 'fixture'), or a 'trial window'. Most Commercial Court cases are given fixed trial dates. To assist the listing process, and to ensure the claim is in fact ready for trial, the court may send pre-trial checklists to the parties, and may hold listing hearings and pre-trial reviews.

Trial

1.45 At trial, witnesses will be called to give oral testimony on the facts left in contention by the statements of case, and the court will consider the contemporaneous documentation and any other relevant and admissible evidence adduced by either side. Trials are normally conducted by a judge sitting alone. After hearing the evidence and submissions by counsel, the judge will give final judgment on the issues between the parties: see Chapter 39.

Assessment of costs

1.46 After giving judgment, the judge will hear submissions on the question of costs. Normally costs follow the event, which means that the party winning at trial recovers its costs from the other side: see Chapter 43. The party awarded its costs then needs to have them quantified into a sum of money. In the absence of agreement, this is done through the process of assessment, described at 43.08.