1

INTRODUCTION

A THE LEGAL PROFESSION 1.06
B LAWYERS' DUTIES 1.09
C INITIAL INSTRUCTIONS 1.10
D CONFIDENTIALITY AND CONFLICT OF INTEREST. 1.18
E PRE-ACTION CORRESPONDENCE 1.21
F MAIN STAGES IN COURT PROCEEDINGS 1.22

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. **1.01**

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. In recent times there has been a growing concern that for many people access to justice might also be denied unless litigation can be conducted at proportionate cost. However, the law is often far from straightforward, and frequently the factual background to a dispute needs considerable investigation before it can be resolved by negotiation or at trial. **1.02**

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 2. **1.03**

The cost and delays inherent in litigation, together with the stress and 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 in Chapter 10. 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. **1.04**

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. **1.05**

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'). Multidisciplinary 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 necessarily 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 2013, 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. 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 Where the matter involves a financial or real property transaction, the solicitor must apply customer due diligence measures when establishing a business relationship with the client (Money Laundering Regulations 2007 (SI 2007/2157), regs 3, 5, and 7). There is a similar obligation when an occasional transaction is to be entered into with a value of €15,000 or more. Customer due diligence means identifying the customer and verifying the customer's identity on the basis of documents, data, or information obtained from a reliable and independent source, such as a passport, or photo-card driving licence, or birth certificate, and keeping a record of the identification evidence. Most statutory instruments can be found at **<http://www.opsi.gov.uk>**.

1.12 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 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 further 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.

1.13 The question of payment for the solicitor's services should be discussed at the first interview. This is considered more fully in Chapter 2. Under a traditional retainer the client agrees to pay the solicitors' charges and disbursements, usually with an initial payment on account and monthly or quarterly billing thereafter. Hourly rates are based on the seniority of the fee earner and the charge out rates of the firm (which are connected with the geographical location of the firm). Disbursements cover expenses such as court fees and fees for counsel and any experts. Solicitors have a professional obligation to ensure the fee agreement with their client is legal, suitable, and in the client's best interest (SRA Code of Conduct Outcome 1.6). It is necessary therefore to consider with the client other forms of fee arrangement. Options include:

(a) public funding under the legal aid scheme;
(b) conditional fee agreement ('CFA'), which are commonly called 'no win, no fee' agreements;
(c) damages-based agreement ('DBA'), which is a type of contingency fee agreement under which the lawyer is paid by a percentage of the amount recovered in the proceedings;
(d) before the event litigation expenses insurance ('BTE'), which the client may have for example under a motor or household insurance policy;
(e) after the event litigation expenses insurance ('ATE'), which is an insurance policy taken out after a dispute arises, typically to cover the risk of paying the other side's costs;

(f) third party funding, under which an outside investor pays the solicitor's charges for a share in any sum recovered in the proceedings; and
(g) funding by an organization connected with the client, such as their employer or trade union.

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, which will include advising on the risk of having to pay the costs of the other side if the case is unsuccessful, 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 2.1).

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 36.

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 continues even 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 dispute 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 processes, to come to terms before issuing proceedings.

F MAIN STAGES IN COURT PROCEEDINGS

1.22 When commencing proceedings, decisions have to be made about the appropriate court and type of proceedings to use. Generally, as discussed at 3.18ff and especially 3.22, 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 3.32) 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 3.28). 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 1.1.

Issue of a claim form

1.23 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 8).

1.24 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 21.

Service of process

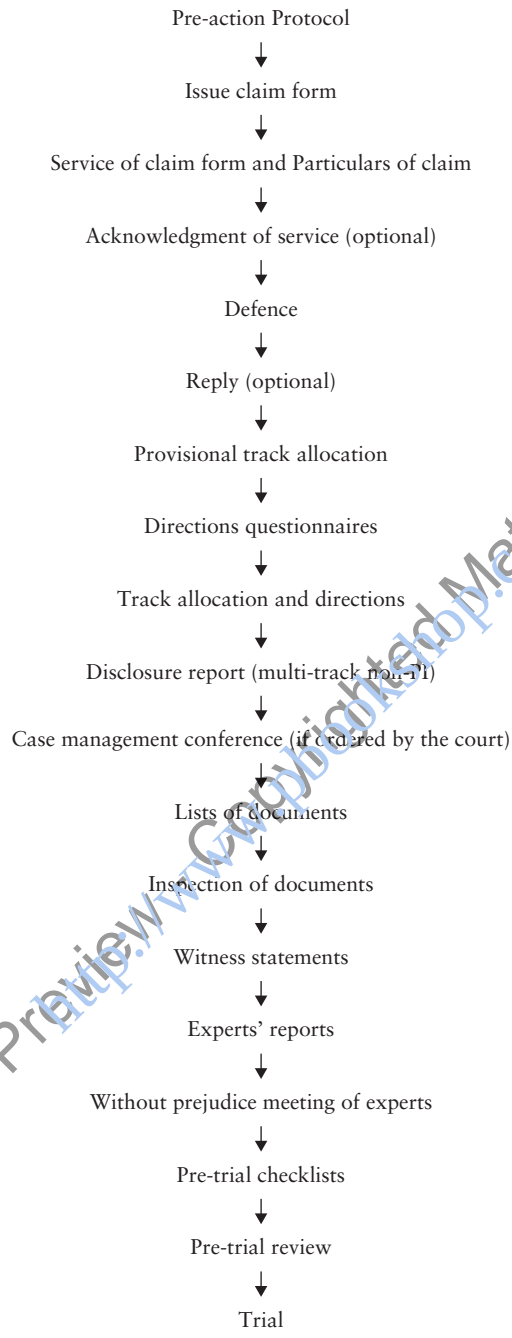
1.25 As a general rule, the defendant must be served with the claim form together with a 'response pack' within four months after issue. In non-specialist cases service may be by the claimant or the court. Usually, the court will serve by first-class post. Where service is effected by the claimant, a 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.

Statements of case

1.26 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 14. 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.

1.27 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

Figure 1.1 General sequence of events in claims under the CPR



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

1.28 In general litigation, the court will send notices to the parties when defences have been filed making a provisional allocation of the case to one of the case management tracks, and giving a deadline for filing directions questionnaires. These should provide the court with information to enable it to assess how complicated and important the claim is likely to be, and provide the basis for making a formal track allocation decision. The small claims track aims to provide a swift and inexpensive procedure for simple claims worth no more than £10,000. The fast track provides a fuller, but still streamlined, procedure for somewhat more important cases, typically with a value between £10,000 and £25,000. The multi-track is used for cases worth typically in excess of £25,000. Some specialist claims, such as Commercial Court claims, are automatically treated as allocated to the multi-track. 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.

Disclosure

1.29 After track allocation, in cases proceeding on the fast track or multi-track, the parties are required to disclose documents which support or undermine the case of the party holding them. In most multi-track claims the parties must first prepare disclosure reports, which are designed to ensure disclosure takes place in a cost-efficient manner. In most fast track and multi-track claims the parties disclose the documents material to the case which are or have been in their possession, custody, or power by describing them in a list of documents. The list is divided into documents 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. 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 31.

Exchange of evidence

1.30 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.

1.31 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 32 to 35.

Listing for trial

1.32 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

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. **1.33**

Assessment of costs

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 46. 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 46.50–46.53. **1.34**