MILLS & REEVE

briefing

Guide to the Civil Procedure Rules (CPR)

Introduction

This guide is intended to give you an overview of the Civil Procedure Rules and how they may affect your case. Please do not destroy it as we may refer to it during the conduct of a claim to help explain the requirements of the Civil Procedure Rules. These notes are for general guidance only and should not be relied upon without specific advice.

The Civil Procedure Rules were introduced in 1999 to give judges more control over cases and to encourage lawyers and litigants to co-operate with each other. Amendments introduced in 2013 require stricter case management by judges in order to ensure that claims are resolved at proportionate cost.

Case management by judges includes:

- identifying the key issues early on in the case
- fixing strict timetables
- limiting expert and witness evidence to what is required
- determining the proper scope of disclosure
- encouraging alternative dispute resolution ("ADR") and settlement out of court.

Two of the major principles underlying the Civil Procedure Rules are, firstly, that the conduct of proceedings should be reasonable (unreasonable conduct will be penalised) and, secondly, that the court and the parties should

consider whether the likely benefits of taking a step in the proceedings justify the cost of taking it. These form part of the "overriding objective", discussed below.

Overriding objective

The overriding objective of the Civil Procedure Rules is to ensure that cases are dealt with justly and at proportionate cost. This includes: ensuring that the parties are on an equal footing; saving expense; ensuring that the case is dealt with fairly and expeditiously; and dealing with the case in a way that is proportionate to the amount of money involved, the importance and complexity of the case and the parties' financial positions.

The parties have to help the court to further the overriding objective. Failure to comply with this duty, or any rule or court order, is likely to result in a sanction. Sanctions include:

- The court striking out all or part of the claim or defence, or debarring a party from calling certain evidence.
- The court requiring a payment into court as a condition of continuing with the claim or defence.
- The court ordering the party in default (even where they are successful) to pay all or part of their opponent's legal costs or refusing to allow them to recover all or part of their costs from their opponent.

Pre-action behaviour

Much of the preparation in a case, whether as claimant or defendant, will need to be done before proceedings are issued. Pre-action protocols set out the steps which should be taken by both sides before litigation commences. The protocols require parties to provide full details of their case, to disclose documents voluntarily at an early stage (if not, the court may order a party to do so) and to try and agree upon a joint expert witness where expert evidence is needed.

The way a party behaves before litigation will be taken into account as part of their track record in that case - this will be relevant to applications for extensions of time and to orders for costs.

Issuing proceedings prematurely - that is, before the parties have given each other sufficient information to enable settlement proposals to be made and considered - may well result in costs and interest sanctions being imposed upon the defaulting party.

Part 36 offers to settle

Both sides can make offers to settle, before or after the case starts, which will be considered by the judge awarding costs at the conclusion of the case. The offer may relate to the whole claim or to individual issues and must be in writing. Part 36 offers to settle have been designed in particular to help claimants persuade defendants to deal with claims promptly and realistically. Parties who do not attempt to settle whether by making an offer, negotiating or mediating (see *ADR* below) may be penalised in costs at the end of the case. Where a defendant's offer for a sum of money is accepted, he must pay the sum within 14 days (or whatever period is agreed between the parties). If he does not, the claimant may enter judgment.

Costs consequences

For the claimant: If a claimant's offer to settle is rejected by a defendant and the claimant goes on to obtain a judgment for more than this offer then he may be awarded increased interest on his claim at base rate plus up to 10 per cent, a full indemnity for his costs with increased interest on those costs, and an additional amount of 10 per cent of the damages awarded (or the costs awarded in a non-monetary claim) up to a maximum sum of £75,000. If the offer is rejected and the claimant recovers less than he offered to accept, there are no adverse costs consequences. In other words, there is unlikely to be a down side to a claimant's Part 36 offer.

For the defendant: If a defendant's offer to settle is not accepted by the claimant then the claimant may be at risk on costs if he continues the action. If the claimant fails to beat the offer, the defendant will usually be entitled to his costs from 21 days after the date of the offer and interest on those costs. However, there is no punitive interest.

ADR (alternative dispute resolution)

Parties who dismiss the opportunity for ADR out of hand are likely to incur costs penalties. For the party who is ultimately unsuccessful, this may involve paying the other side's costs on a full indemnity basis. For the successful party, a refusal to attempt ADR may significantly reduce the costs recoverable from the other side; indeed the court could decide to make no costs order at all.

Alternatively, the court could order the claim (or part of it) to be stayed to allow attempts to be made to settle the case by ADR.

The most common form of ADR is mediation. In mediation, a specially trained mediator attempts, through negotiation, to bring the parties to a settlement. A mediator does not adjudicate between the parties in dispute or make an award; rather the mediator is a neutral person whose role is to help the parties to consider their respective positions objectively, from a commercial as well as a legal perspective, and to come to an agreement which is acceptable to both sides.

All discussions and documents generated in the course of mediation are privileged and will not be referred to in any court hearing that might subsequently take place.

The main difference between a mediation and a court hearing is that a mediator will not decide who is right and who is wrong. He cannot force a settlement on the parties. Until there is a settlement, the mediation is non-binding and the parties are free to walk away.

If agreement is reached, it will be documented and signed. The agreement will then be legally binding.

For further information about mediation and other forms of alternative dispute resolution, please ask for a copy of Mills & Reeve LLP's Guide to ADR.

Allocation of cases

As soon as a defence has been filed, the parties will have to complete "directions questionnaires" indicating how they consider the case should be dealt with. The court will allocate the case to one of three tracks:

- Small Claims Track: most cases under £10,000
- Fast Track: most cases over £10,000 and under £25,000. The case must be suitable for a trial lasting no more than one day and be ready for trial within 30 weeks from allocation.
- Multi-Track: most cases over £25,000 and cases where the claim is for something other than money.

Statements of case and statements of truth

The details of the claim and defence are set out in statements of case. These must include a concise account of all the relevant facts. Parties are not permitted simply to deny everything without setting out their own version of events.

Statements of case (and other documents such as witness statements) must include a statement of truth ("I believe that the facts stated are true"). The statement of truth can be signed by you, or by a senior person in your company. Mills & Reeve LLP can sign statements of truth where you have authorised us to do so. If we do sign on your behalf, we will be confirming your belief that the facts stated are true. If you do not have an honest belief in the truth of the facts stated, proceedings may be brought against you for contempt of court, the penalties for

which are imprisonment or a fine. Alternatively, the claim or defence could be struck out and costs orders made against you.

Whoever signs the statement of truth, it is vital that full investigations have been carried out before the statement of case is drafted and the statement signed.

Summary judgment

Any party to an action can use the summary judgment procedure to dispose quickly of cases where a claim, defence, or particular issue has no real prospect of success at trial. The court can also use the procedure to narrow down the points in dispute or the amount of evidence required.

Duty of disclosure

As you may be aware, as part of the litigation process, you are generally required to disclose to your opponent(s) all documents which:

- support your case;
- harm your case;
- support any other party's case; or
- harm any other party's case.

This is known as "standard disclosure", and the duty to disclose relevant documents continues until the end of the case. The court may dispense with or limit disclosure or the parties can agree to do so.

A document means anything in which information of any description is recorded and includes not only paper documents and other physical items such as videos, but also documents in electronic form such as emails, word-processing documents and computer generated pictures.

It is vitally important that you are aware of your duties in respect of disclosure. The advertent or inadvertent destruction of otherwise disclosable data and documents (whether electronic or paper) could prejudice your case and could lead to costs penalties and even imprisonment. If the dispute does arise, a reasonable search of potentially relevant electronic data and paper documents will be required.

As soon as you are aware that a dispute may arise, you should not destroy any electronic data or paper documents which could be relevant to the dispute, but should take steps to preserve them. All document retention policies, which can automatically delete data, should be suspended for the duration of the dispute and you should not search for any electronic documents since merely opening a document will alter the data. It may be necessary to engage an expert to forensically preserve electronic data.

For further information about disclosure, please ask for a copy of Mills & Reeve LLP's Guide to Disclosure.

Case management conference

In order to involve the parties fully in the control and conduct of the case, the judge may require you (or an appropriate person within your organisation), or we might want you, to attend at court for a case management conference (CMC). At this conference the judge will give directions for the future conduct of the case, review the parties' costs budgets, deal with any specific applications and may decide to dispose of an issue there and then, or order the trial of a preliminary issue. He or she may also discuss settlement with the parties.

Expert evidence

Even if you require the assistance of an expert to enable you to formulate and assess the merits of your case, you may not be able to rely upon that expert's evidence at trial, or if you are, you may not be able to recover the costs of instructing your expert from your opponent if you win. The court has wide powers to limit expert evidence in order to reduce the costs incurred in a case and shorten the length of trial.

In many cases the court will expect the parties to give joint instructions to a single expert. The judge will have power to appoint a single expert if the parties have failed to do so and to exclude the parties' own expert evidence unless the use of separate experts can be justified. Since an expert's overriding duty is to the court and not to the party instructing him, there may be little disadvantage in instructing a joint expert if both parties are happy with the choice of expert.

Experts must summarise the substance of all instructions given to them by a party, both oral and written, in their reports. Communications between experts and one party may in certain cases be disclosed to the other party. This means that a party can no longer have a confidential discussion about his case with his expert. Experts may also seek directions directly from the judge, making clear their role as independent advisers to the court.

Costs

One of the main objectives of the Civil Procedure Rules is to keep the costs of litigation to the minimum appropriate to the particular case. The principle of proportionality will be applied by the court to any claim for recovery of costs from the other side. This means that only those costs which can genuinely be justified in the context of the size and complexity of the claim will be recoverable. In addition, the reasonableness of all aspects of your conduct both before and after proceedings, for example in attempting to settle the claim or in contesting particular issues, will be taken into account in deciding whether or not to order your opponent to pay all or part of your legal costs, even if you have succeeded in the case at trial. It is quite possible that the court will take a different view from that taken by the parties or their advisers as to what costs are proportionate and what is or is not reasonable conduct.

If you lose the proceedings then you will have to pay your own legal costs and also a proportion of your opponent's costs, subject to what has already been said about proportionality and reasonableness.

Summary assessment of costs

At the end of any hearing or trial lasting less than one day, the judge will decide whether one party should pay the costs of any other party in connection with that hearing and may assess the amount to be paid there and then after hearing brief representations from the parties or their legal representatives. The parties' solicitors will have to disclose details of their costs to each other before the hearing. As a general rule, where a party is ordered to pay a sum in respect of his opponent's costs, he will have to do so within 14 days.

If the amount of the costs to be paid is not assessed by the judge at the hearing and the costs cannot be agreed with your opponent then they will be subject to detailed assessment after the case has been concluded.

IF YOU HAVE ANY QUESTIONS ABOUT MATTERS RAISED IN THIS GUIDE PLEASE FEEL FREE TO DISCUSS THEM WITH THE PERSON HANDLING YOUR DISPUTE.