HLPA meeting 20 September 2023:
Litigating effectively

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Housing litigation in the County Court: Using the CPR effectively

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What's new in the CPR: FRCs (not for us)

New 'fixed recoverable costs' (FRC) regime applies to most civil litigation being conducted on the fast track or the new 'intermediate' track

New rule 45.1(4) exempts housing claims from the new FRC regime (intended to be a delay for two years ie until October 2025). Housing claim defined as:

> 'a claim or counterclaim which relates, in whole or in part, to a residential property or dwelling and which, in respect of that property, includes a claim or counterclaim for—
>
> (a) possession;
>
> (b) disrepair; or
>
> (c) unlawful eviction,
>
> save where the claim or counterclaim in respect of the residential property or dwelling arises from a boundary dispute.'

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What's new in the CPR: allocation, track, 'complexity bands'

These amendments apply only to claims issued on or after 1st October 2023. Of particular relevance in the new rules (when they apply):

- Part 26 (allocation) and Part 28 (fast track and new intermediate track) and their practice directions will be replaced with new versions
- New 'intermediate track' between fast track and multi track, for claims between £25k and £100k - new rule 26.9(7)
- When a case is allocated to the fast track or intermediate track the court must also assign the claim to a 'complexity band' – new rule 26.14
- Complexity bands: within the fast track, possession and housing disrepair claims will normally be assigned to band 3 or (if complex) band 4. Within the intermediate track, there are four possible bands depending on complexity.
- Changes to provisions about directions on the fast and intermediate track

What's new in the CPR: costs in housing cases

- Fixed costs on commencement of possession claim and entry of judgment remain the same, but are moved to CPR 45.20 and 45.21

- The old provisions limiting fast track trial costs are no longer in the new Part 45 (for proceedings issued on/after 1st October 2023)

- Costs budgets will become less relevant, if cases are to be allocated to the new intermediate track rather than the multi track

Civil Procedure Rules 1998 – the starting point

The overriding objective – Rule 1.1

1.1 (1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—

(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;

(b) saving expense;

(c) dealing with the case in ways which are proportionate—

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

1.3 The parties are required to help the court to further the overriding objective.

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The overriding objective

- legal representatives will not be in breach of any duty to their client if they agree reasonable extensions of time: such agreement furthers rule 1.1(2)(e)

(*Hallam Estates Ltd v Baker* [2014] EWCA Civ 661)

- A party is not, however, under a duty to inform their opponent of procedural mistakes

(*Barton v Wright Hassall LLP* [2018] UKSC 12, *Woodward v Phoenix Healthcare Distribution Ltd* [2019] EWCA Civ 985)

Varying time limits by agreement with other party

Rule 2.11: Unless these Rules or a practice direction provide otherwise or the court orders otherwise, the time specified by a rule or by the court for a person to do any act may be varied by the written agreement of the parties.

Limitations on rule 2.11 include:

- Where a court order requires a party to do something within a specified time AND specifies the consequence of failure to comply. Parties can agree to extend time for up to a maximum of 28 days, by prior written agreement, only if court has not ordered otherwise and the extension does not put at risk any hearing date: rule 3.8(4)
- Extension of time for filing defence – maximum of 28 days and must inform court of agreement: rule 15.5
- Appeals – rule 52.15

Sanctions & relief from sanctions

- ‘Sanction’ means any adverse consequence imposed on a party from their failure to comply with a rule, practice direction or order.
- Does the rule, practice direction or order specify a sanction which will come into operation if there is non-compliance? (eg striking out or dismissing case, being unable to rely on evidence of witness at trial, limiting costs budget to applicable court fees).
- Rule 3.8 – the sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.

Rule 3.9: relief from sanctions

Rule 3.9

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need—

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence.

Relief from sanctions: Denton principles

Denton v TH White Ltd [2014] EWCA Civ 906

Three stages for the court considering application for relief from sanctions:

(1) identify and assess the seriousness and significance of the breach (ie the failure to comply with a rule, practice direction or court order)

(2) consider why the default occurred.

(3) evaluate all the circumstances of the case, so as to enable the court to deal justly with the application, including r.3.9(1)(a)&(b).

Parties can be penalised (including in costs) for unreasonably refusing to agree extensions of time or unreasonably opposing applications for relief from sanctions.

Relief from sanctions: timing

PD 23A para 2.7: Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it.

British Gas Trading Ltd v Oak Cash and Carry Ltd [2016] EWCA Civ 153: Court of Appeal regarded D's lack of promptness in applying for relief from sanction as the critical factor and the application was refused.

Diriye v Bojaj [2020] EWCA Civ 1400: a two-month delay in applying for relief from sanctions was held to militate strongly against the grant of relief. "The need to act promptly if a party is or might be in breach of an order is axiomatic".

Other types of application

In-time application to extend time before time for carrying out act expires

- Denton principles do not apply to such applications: Court will apply the overriding objective without reference to rule 3.9(1)(a) and (b).
- Is the extension reasonable? Would it neither imperil a hearing date or otherwise disrupt the proceedings?

Out-of-time applications to extend time (where no sanction applies)

- 'implied sanction' regime – same principles applied as under rule 3.9?
- or is it unnecessary for that party to make an application?

Dealing with a party's failure to comply

Where no sanction is specified it is open to the other party to apply for:

- an Unless order, under the court's general powers of case management (rule 3.1(3): when the court makes an order, it may specify the consequence of failure to comply with the order).
- an order striking out the statement of case of the party who failed to comply (rule 3.4(2)(c) permits the court to strike out a statement of the case if it appears to the court there has been a failure to comply with a rule, practice direction or court order)

Applying for an Unless order can be an effective tool to deal with an opponent's failures and may enable you to gain a tactical advantage.

Costs budgets

Rule 3.12: Costs Management applies to all Part 7 multi-track cases, with some exceptions including:

- where in proceedings commenced on or after 6th April 2016 a claim is made by or on behalf of a person under the age of 18 (a child)– r3.12(1)(c)
- where the court otherwise orders.

Costs budgets must be in a prescribed form - PD3D para 3(a) - and must be dated and verified by a statement of truth signed by a senior legal representative of the party – rule 3.13(5).

Must provide copy to any litigant in person (rule 3.13(6)).

Failure to file a costs budget

Rule 3.13(1): Unless the court otherwise orders, all parties except litigants in person must file and exchange budgets—

> (a) where the stated value of the claim on the claim form is less than £50,000, with their directions questionnaires; or
>
> (b) in any other case, not later than 21 days before the first case management conference.

Rule 3.14: Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees.

- This includes where a costs budget is filed late.
- If a costs budget is filed late, an application for relief from sanctions is required.

Costs budgets – further provisions

Rule 3.13(2) In the event that a party files and exchanges a budget under paragraph (1), all other parties, not being litigants in person, must file an agreed budget discussion report no later than 7 days before the first case management conference.

Rule 3.15A provides that a party must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions. Revised budget be submitted promptly by the revising party to the other parties for agreement, and subsequently to the court, in accordance with r.3.15A(3) to (5).

Service of documents

Rule 6.20(1) provides that a document may be served by any of the following methods—

(a) personal service, in accordance with rule 6.22;

(b) first class post, document exchange or other service which provides for delivery on the next business day, in accordance with Practice Direction 6A;

(c) leaving it at a place specified in rule 6.23;

(d) fax or other means of electronic communication in accordance with Practice Direction 6A; or

(e) any method authorised by the court under rule 6.27.

Service of documents – calculating time

Rule 6.26 - deemed service of documents other than claim form served within UK

METHOD OF SERVICE	*DEEMED DATE OF SERVICE*
1. First class post (or other service which provides for delivery on the next business day)	The second day after it was posted, left with, delivered to or collected by the relevant service provider provided that day is a business day; or if not, the next business day after that day.
2. Document exchange	The second day after it was left with, delivered to or collected by the relevant service provider provided that day is a business day; or if not, the next business day after that day.
3. Delivering the document to or leaving it at a permitted address	If it is delivered to or left at the permitted address on a business day before 4.30p.m., on that day; or in any other case, on the next business day after that day.
4. Fax	If the transmission of the fax is completed on a business day before 4.30p.m., on that day; or in any other case, on the next business day after the day on which it was transmitted.
5. Other electronic method	If the e-mail or other electronic transmission is sent on a business day before 4.30p.m., on that day; or in any other case, on the next business day after the day on which it was sent.
6. Personal service	If the document is served personally before 4.30p.m. on a business day, on that day; or in any other case, on the next business day after that day.

Service of documents – the email trap

Practice Direction 6A Para 4.1(1) When serving a document by email or fax, the party being served (or their solicitor) must previously have indicated in writing to the party serving—

- that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and
- the e-mail address (or fax number) to which it must be sent.

Para 4.1(2) provides that sufficient written indications for the purposes of paragraph 4.1(1) include

- an e-mail address set out on the writing paper of the solicitor acting for the party to be served but only where it is stated that the e-mail address or e-mail addresses may be used for service; or
- an e-mail address set out on a statement of case or a response to a claim filed with the court.

Para 4.2: Where a party intends to serve a document by electronic means (other than by fax) that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means (for example, the format in which documents are to be sent and the maximum size of attachments that may be received).

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Filing documents – the email trap

Practice Direction 5B para 2.3 – filing applications by email

In the County Court if a fee is payable in order for an e-mailed application or other document to be filed with the court a party must, when e-mailing the court

- provide a Fee Account number and authorise the court to charge the applicable fee to that Account; or
- outline the preferred method of payment (credit/debit card) and provide a contact number to take payment over the telephone.

When printed out on both sides of A4 paper, the maximum must not exceed 25 sheets of paper in total (including attachments and service copies).

Only one e-mail, including any attachments, may be sent to the court to take any step in the proceedings and the total size must not exceed 10MB

The court may refuse to accept any application or other document, including any attachment, e-mailed to the court where a fee is payable and the sender has not complied with the above requirements or where the court has not been able to charge or take the fee (PD 5B para 2.4)

Calculating time generally – clear days

2.8(2) A period of time expressed as a number of days shall be computed as clear days.

(3) In this rule "clear days" means that in computing the number of days—

(a) the day on which the period begins; and

(b) if the end of the period is defined by reference to an event, the day on which that event occurs,

are not included.

(Applies to any period of time for doing an act specified by CPR, practice direction or order.)

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Calculating time generally – clear days (2)

Examples—

(i) Notice of an application must be served at least 3 days before the hearing. An application is listed to be heard on Friday 20 October. The last date for service is Monday 16 October.

(ii) The court is to fix a date for a hearing. The hearing must be at least 28 days after the date of notice.

If the court gives notice of the date of the hearing on 1 October, the earliest date for the hearing is 30 October.

(iii) Particulars of claim must be served within 14 days of service of the claim form.

The claim form is served on 2 October.

The last day for service of the particulars of claim is 16 October.

Calculating time generally – clear days (3)

Rule 2.8 (4) Where the specified period—

(a) is 5 days or less; and

(b) includes—

(i) a Saturday or Sunday; or

(ii) a Bank Holiday, Christmas Day or Good Friday,

that day does not count.

Example—

Notice of an application must be served at least 3 days before the hearing.

An application is to be heard on Monday 20 October.

The last date for service is Tuesday 14 October.

Calculating time – what if the court is closed?

Rule 2.8 (5)

When the period specified for doing any act at the court office ends on a day on which the office is closed, that act shall be in time if done on the next day on which the court office is open.

Notices and Part 18 requests

Part 18 and PD 18: requests for further information

- Rule 18.1: court may at any time order a party to clarify any matter in dispute in the proceedings, or give additional information in relation to any such matter.
- First step is to serve a written request stating a date by which the response is required (giving other party reasonable time to respond).
- PD 18 para 1.2: a request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his own case or to understand the case he has to meet.
- Have regard to Practice Direction 18
- If no adequate response: consider an application to the Court for an order requiring the other party to provide the information sought

Notice to admit facts under rule 32.18: this can be served on another party no less than 21 days before trial, requiring them to admit facts, or a part of the case of the serving party, specified in the notice. May lead to costs consequences after the event for a party who did not admit facts when they ought to have done.

Other notices

Notice to prove documents under rule 32.19: a party shall be deemed to admit the authenticity of a document disclosed to him under Part 31 unless he serves notice that he wishes the document to be proved at trial.

Rule 32.19(2): A notice to prove a document must be served by the latest date for serving witness statements or (if later) within 7 days of disclosure of the document.

Notice of intention to rely on hearsay evidence

- rule 33.2(2): where a witness statement contains hearsay evidence and the witness is not being called to give evidence, a party intending to rely on the hearsay evidence must, when he serves the witness statement, inform the other parties that the witness is not being called to give oral evidence; and give the reason why the witness will not be called.
- Rule 33.3(3): where party intends to rely on hearsay evidence at trial which is not contained in a witness statement, they should serve a notice (no later than the latest date for serving witness statements) which identifies the hearsay evidence, states that the party serving the notice proposes to rely on the hearsay evidence at trial; and gives the reason why the witness will not be called.

Witness statements

Rule 32.8: a witness statement must comply with requirements set out in PD 32 including:

- Requirements for format, heading, what goes in top right corner, statement of truth
- Witness statement must be in first person and if practicable in witness's own words
- Where witness unable to read or sign, other than by reason of language alone: PD 22 para 3A. Document & statement of truth must be read to them by an authorised person ie a solicitor who must sign a certificate in the form at Annex 1 to PD 22.
- Witness statement must be in the witness's own language. Necessary to obtain translation of foreign language witness statements and file the signed foreign language statement together with translation. Translator signs the foreign language version and certifies that the translation is accurate.
- Amongst other things, the statement must state the process by which it has been prepared eg face-to-face, over the telephone and/or through an interpreter.
- a witness statement must indicate (1) which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and (2) the source for any matters of information or belief

Witness statements (2)

- Exhibits – usually better not to exhibit documents referred to in the witness statement? Think about what will happen when you prepare the trial bundle.

- What if the opponent's witness statements fail to comply with Part 32 and PD 32?

- See the presentation at the last HLPA meeting!

Witness summons

Rule 34.3 – permission of the court not required to issue witness summons for witness to attend trial (or produce documents at trial) provided the summons is issued at least 7 days before the trial.

Rule 34.5 – general rule is that a witness summons is binding if served at least 7 days before date on which witness required to attend (rule 34.6 deals with who is to serve the witness summons).

Rule 34.7 – witness must be offered conduct money and compensation for loss of time when the summons is served – see PD 34A. Rates: https://www.cps.gov.uk/publication/witness-expenses-and-allowances-annex-1-witness-expenses-ordinary-professional

Trial bundle

Unless the court orders otherwise, the claimant must file a trial bundle

- containing documents required by a relevant practice direction and any court order
- not more than 7 days and not less than 3 days before the start of the trial (rule 39.5)

The contents of the trial bundle should be agreed where possible and otherwise, a summary of the points on which the parties are unable to agree should be included (PD 32 para 27.12)

The party filing the trial bundle should supply identical bundles to all the parties to the proceedings and for the use of the witnesses. (PD 32 para 27.13)

Hard copies and/or electronic bundles?

Trial bundle

Practice Direction 32 para 27 gives detailed guidance. In particular:

- The documents specified at para 27.5 should be included
- Contemporaneous documents should usually be assembled in a single section in chronological order (para 27.14)
- The trial bundle should be paginated (continuously) throughout, and indexed with a description of each document and the page number. Where the total number of pages is more than 100, numbered dividers should be placed at intervals between groups of documents. (para 27.8)
- Unless the court otherwise directs, documents in the trial bundle should be copied double-sided (para 27.15)
- If a document to be included in the trial bundle is illegible, a typed copy should be included in the bundle next to it, suitably cross-referenced (para 27.11)

The originals of the documents included, and copies of any other court orders, should be available at trial (PD 32 para 27.6)

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