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The Litigation Toolkit

Guide for
Civil Practitioners

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What a relief!

The Law and Procedure for Relief from Sanctions

Introduction

1. In litigation, as in life, sometimes things go wrong. Junior litigators will be all too familiar with some of the problems that can arise. The most common example is that of a missed deadline. However, given a sanction can be imposed by any rule, practice direction, or court order, the list of examples is potentially endless. When a breach results in a sanction, the question is what can be done to remedy it. Usually, the answer is to apply for relief from sanctions under rule 3.9 of the Civil Procedure Rules (“CPR”). In this edition of the BPJ Back to Basics series, we will be looking at the law and procedure surrounding relief from sanctions applications, as well as thinking about some practical tips when applying for relief.

Has there been a breach resulting in a sanction?

2. The first question to consider when faced with a breach is whether it has actually given rise to a sanction. Ordinarily, the answer will be straightforward. For example, if a witness statement is not served in time pursuant to CPR r.32.10, that witness is unable to give oral evidence at trial except with the permission of the court. The restriction on the giving of evidence operates as a sanction within the meaning of r.3.9 for which relief will be required (see, *Chartwell v Fergies* [2014] EWCA Civ 506). However, there are examples which are not quite as obvious. The *White Book* gives the example of *Yesss (A) Electrical Limited v Wearren* [2014] EWCA Civ 14 which concerned a late application for expert evidence. In that case, the applicant had failed to comply with elements of two previous directions orders. Nevertheless, as the directions orders had not imposed a sanction, there was no requirement to apply for relief. The mere fact that permission was required to call expert evidence was not itself a sanction, it was simply a requirement of the rules governing experts under Part 35. The point is that, just because a party requires the court’s permission to take a particular step (such as to call an expert or amend a statement of case), that does not necessarily mean that permission is itself a sanction.
3. The question, then, is how to identify whether or not a case falls within r.3.9. In essence, r.3.9 will only apply where there is *both* a breach of a rule, Practice Direction, or order, and

a sanction imposed for that breach. In *Yesss*, Birss LJ provided the following guidance on working out whether or not a case falls within the remit of r.3.9 (at [33]):

- (a) *Breach* – First, identify whether or not a rule, Practice Direction, or order has been breached. If not, then the r.3.9 does not apply. Identifying whether or not there has actually been a breach can be particularly important. The case may be that there is simply an irregularity capable of remedy by way of the court’s general discretion under r.3.10, rather than a breach requiring relief. An example is that of a costs budget signed by a costs draftsman rather than the party’s senior legal representative (see, *Americhem Europe Ltd v Rakem Ltd* [2014] EWHC 1881 (TCC)).
 - (b) *Express Sanction* – If there has been a breach, identify any sanction for that breach which is expressly provided for in the rules, Practice Directions, or in any order. An example would be an explicit sanction imposed by a court order or the sanction imposed by r.32.10 in respect of witness statements.
 - (c) *Implied Sanction* – If there is no express sanction, consider whether there is an implied sanction (i.e. where the rule does not state a sanction for non-compliance, but permission of the court is required to proceed). The most common example of this category is the failure to file a Notice of Appeal, or a Respondent’s Notice.
 - (d) *Sanction imposed as a result of a further step taken* – Consider whether a further step has been taken in consequence of the non-compliance. The most obvious examples are the entry of default judgment or the striking out of a claim for non-attendance at trial. Such cases will require an application for relief under r.3.9 (see, *FXF v English Karate Federation Ltd* [2023] EWCA Civ 891 at [59]-[60]).
4. In cases where there has been a breach, but there is no corresponding sanction, it will be for the aggrieved party to apply for a sanction to be imposed, either by way of strike out under r.3.4(2)(c), or for an unless order under the court’s general case management powers. In the author’s experience, except in the case of the most egregious persistent non-compliance by a represented party, the court will be reluctant to strike out for non-compliance. Therefore, an aggrieved party’s remedy will usually be in applying for an unless order to put the defaulting party in the procedural last chance saloon.

The Effect of Sanctions

5. Assuming there is a breach for which a sanction has been imposed, that sanction will have effect unless and until the defaulting party applies for and obtains relief (see, r.3.8(1)). This is perhaps unsurprising. However, notwithstanding the fact that the wording of r.3.8(1) assumes that a defaulting party will apply for relief, it remains open to the court to grant relief of its own motion (see, *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463 at [33]). Naturally, the court will only rarely exercise this jurisdiction because it will usually require evidence from the parties to determine the matters set out in r.3.9. Therefore, except in exceptional cases, the defaulting party will be required to make an application with appropriate evidence.
6. An interesting question is whether parties can agree to extend the time for compliance without the need for an application for relief. The answer provided by r.3.8 is “no with a but”:
 - (a) Rule 3.8(3) provides that, where a rule, practice direction or order (a) requires a party to do something within a specified time, and (b) specifies the consequence for failure to comply, the parties may not agree to extend the time for compliance except as provided in r.3.8(4).
 - (b) Rule 3.8(4) provides that, unless the court orders otherwise, the time for doing the act in question may be extended by prior written agreement of the parties for up to a maximum of 28 days, provided that such extension does not put at risk any hearing date.
7. The key phrase is that an extension may be by the “*prior*” written agreement of the parties. On its face, the rule requires that any agreement be made prior to a breach. Therefore, in most cases, if it appears likely that a breach will occur (for example, if a looming deadline will be missed because your client is hospitalised), there are two options. The first is to work with the other parties to agree an extension prior to breach. The second option is to make an “in-time” application prior to the expiry of the deadline. Given the expectation that parties will co-operate in furthering the Overriding Objective, it is to be hoped that any non-defaulting party will approach any request for an agreed extension pragmatically.

If they do not, a failure to co-operate may be a point which can sound in costs. If agreement cannot be reached, an in-time application is always preferable as it would engage the court's jurisdiction to extend time, rather than requiring relief from sanctions (see, paragraph 3.9.11 of the *White Book*).

8. That being said, it may well be open to the court to expand the scope of r.3.8(4) to include retrospective agreements by the terms of any directions order given. Paragraph 3.8.2 of the *White Book* quotes the standard direction given by clinical negligence masters in the Kings Bench Division, which provides (emphasis added):

“The Parties may, by prior agreement in writing, extend time for a Direction in this Order by up to 28 days and without the need to apply to Court. Beyond that 28-day period, any agreed extensions of time must be submitted to the Court by email including a brief explanation of the reasons, confirmation that it will not prejudice any hearing date and with the draft Consent Order in Word format. The Court will then consider whether a formal application and hearing is necessary. Any retrospective agreement to extend time is to be submitted to the Court in like manner.”

Therefore, when preparing a draft directions order, it may be prudent to include provision for retrospective agreements to provide additional protection in the event of breach.

The Court's Jurisdiction to grant relief

9. Where an application for relief from sanctions is required, the court's general discretion is contained within r.3.9, which provides (emphasis added):

“(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.”

10. This broad discretion is glossed by the now-familiar guidance of the Court of Appeal in *Denton v TH White Ltd* [2014] EWCA Civ 906, which provided that an application for relief should be approached in three stages:
- (a) Stage 1 – The Judge should identify and assess the seriousness and significance of the defaulting party’s failure to comply which engages r.3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second or third stages.
 - (b) Stage 2 – Consider why the default occurred. Where there is a good reason for the default occurring (i.e. one which is outside of the defaulting party’s control), the court is likely to grant relief.
 - (c) Stage 3 – Evaluate all the circumstances of the case, so as to enable the court to deal justly with the application. All the circumstances specifically include the factors listed in r.3.9(1)(a) and (b). That is to say, the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance.

Denton stage 1: Assess the seriousness and significance of the breach

11. The first question is whether a breach is serious and / or significant. The focus of the assessment at this stage is upon the breach itself, rather than any surrounding circumstances (such as the defaulting party’s previous record of compliance) which are to be left to stage 3. The rule of thumb provided in *Denton* when assessing this limb is whether or not the breach imperilled a future hearing date or otherwise disrupted the conduct of litigation generally. If not, the breach is likely to be on the lower end of the spectrum of seriousness and significance. Nevertheless, it is possible to imagine breaches which are serious notwithstanding the fact that they do not affect the progress of litigation (such as the payment of court fees). With that in mind, the assessment at stage 1 will depend upon the nature of the specific breach in question and (in most cases) its impact upon the broader course of litigation. As stated above, if the breach is neither

serious nor significant, the court is unlikely to need to spend much time on the second or third stages. That being said, in the author's experience, the court will often conduct a cursory assessment of stages 2 and 3 for the sake of completeness, even where it considers the breach to be of lesser seriousness and significance.

Denton stage 2: Reason for the breach

12. Where a breach is serious or significant, it is particularly important to consider why it occurred. If there is a good reason for why the breach occurred, the court will usually grant relief even in the case of a serious breach. The question, therefore, is what qualifies as a good or a bad reason. The court in *Denton* refused to give any concrete guidance, but the court has suggested that good reasons are likely to be those arising from circumstances outside the control of the defaulting party (see, *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 at [43]). The following are examples (and examples only) of possible good reasons:

(a) *Debilitating illness or accident* – *Mitchell* at [41] provided the example of the defaulting party or their solicitor suffering from a debilitating illness or being involved in an accident. Similarly, good reason has been found where a party's key witness had been preoccupied with caring for and visiting his wife who was suffering from a debilitating illness (see, *Cranford Community College v Cranford College Ltd* [2014] EWHC 349 (IPEC)). One point to consider if relying upon the illness of a solicitor as a reason for default is that the court may ask why another member of the firm could not have taken over conduct in their colleague's absence. For example, where a family member of the solicitor with conduct of the matter is suffering from a long-term illness and the firm or team in question is large enough to allow for appropriate cover, that is unlikely to be a good reason (see, *British Gas Trading Ltd v Oak Cash & Carry Ltd* [2016] EWCA Civ 153 at [45]-[51]). Of course, this will be a matter of fact and degree which depends upon when the illness occurs and the surrounding circumstances.

(b) *Later developments in the course of litigation which show the original period for compliance was unreasonable* – Again, this is likely to be a matter of fact and degree. If it has been apparent for some time that compliance would not be possible, a party

will be expected to have applied to have either sought or applied for an extension. Failing that, the court will likely expect a good reason as to why that was not possible.

(c) *Delay caused by the court* – Where an order requires a party to take some step through court (for example, the issuing of a claim or an application notice) and the court delays the issuing until after the prescribed deadline, that can qualify as a good reason (see, *Service Insurance Co Ltd v Beacon* [2014] EWHC 2435 (QB)). *Service Insurance* concerned a failure to comply with the terms of a consent order to issue a new claim by given date, where the claimant had delivered the claim form in time, but a court delay led to it being issued 4 days after the deadline.

13. Conversely, cases where there is no good reason for the breach will likely include those attributable to the defaulting party or their legal representatives. For example, overlooking a deadline will rarely be a good reason for default. Further, well-intentioned incompetence for which there is no good reason ought not attract relief unless the default is trivial (see, *Mitchell* at [41] & [48]). Where there is no good reason, or the reason provided is insufficient to justify relief on its own, the court will move to consider all the circumstances of the case.

Denton stage 3: All the circumstances of the case

14. Stage 3 of the *Denton* test will necessarily depend upon the facts of each case. That being said, the following are likely to be relevant in many applications for relief:

(a) *The need (a) for litigation to be conducted efficiently and at proportionate cost and (b) to enforce compliance with rules, practice directions and court orders* – The court is specifically required to bear these factors in mind by r.3.9(1). Although there are other factors which may be of greater importance in a given case, the r.3.9(1) factors are likely to be significant. For example, if the defaulting party's history of non-compliance has led to significant delay which risks the cost of pursuing the claim becoming disproportionate, that may well be a compelling reason to refuse relief.

(b) *Promptness of applying for relief* – Promptness is likely always to be a factor in whether or not relief is granted. However, promptness is not itself a prerequisite for

relief. Again, where a breach is of lesser seriousness or significance, the promptness of the application is unlikely to be a significant factor within reason.

(c) *The defaulting parties' record of compliance* – Where a party has a good record of compliance, relief is more likely to be granted.

15. One point to bear in mind is that the merits of a parties' claim or defence is generally irrelevant when it comes to case management decisions, such as the granting of relief. The rationale for this approach is straightforward; requiring the court to consider the merits of a party's underlying claim as part of an application for relief would necessarily increase the costs of such applications. Further, in the most extreme cases, parties who improperly seek to rely upon the strength of their underlying claim as a basis for relief may well find themselves punished in costs (see, paragraph 3.9.14 of the *White Book*).

Opposing an application for relief from sanctions

16. For a non-defaulting party, the imposition of a sanction may appear to be something of a silver bullet. However, the question of whether or not to oppose an application for relief is one which ought to be given proper consideration. Where a party opportunistically and unreasonably opposes an application for relief, they will be acting in breach of the obligation to co-operate imposed by r.1.3 and may find themselves penalised in costs as a result. The decision whether or not to oppose an application will be determined by a frank assessment of the merits of the application for relief. For example, if it appears that the breach was trivial or for a good reason such that relief is likely to be granted, opposing relief will likely be opportunistic. By contrast, if the breach appears serious or significant, or there is no good reason, or it is not obvious that relief is appropriate, it will be entirely proper to oppose the application. As with many areas of practice, this will be a judgment call for legal professionals about which they may need to provide robust advice to lay clients who may wish to oppose any grant of relief.

Practical tips

17. In summary, when faced with an application for relief from sanctions, it is useful to bear the following points in mind:

- (a) Is an application required? That is to say, it can be worthwhile to consider whether a breach occasioning a sanction has occurred. Often it will be obvious whether or not this is the case, but it may be that there is a better course of action.
- (b) If it appears a breach is likely to occur, can the parties agree to extend the relevant deadline? If you are at the case management stage, consider including directions which provide for retrospective agreement to extend deadlines to provide greater protection. If agreement cannot be reached before the deadline, seek to avoid the need for relief by way of an in-time application to extend.
- (c) If an application is required, the more promptly it is made, the better. The evidence should clearly explain each of the *Denton* stages; if it can be shown that the breach was neither serious nor significant, or that there was a good reason for default, relief is likely to be granted.
- (d) When faced with an opponent's application for relief from sanctions, consider whether it is appropriate to oppose relief and be prepared to give robust advice as to potential adverse costs consequences, if necessary.

CHARLES TOWL

The Law and Procedure for Obtaining and Setting Aside Default Judgments

Introduction

1. Default judgment is one of the most powerful procedural tools at a litigant's disposal, enabling judgment to be obtained without a trial and generally without any examination of the merits. Yet it remains a common source of avoidable error.
2. Its obvious attraction and apparent simplicity can lead trigger-happy parties to overlook the conditions governing its use. A Claimant must establish proper service of the proceedings, expiry of the relevant period, that no Defence or anything intended to be a Defence has been filed, and that default judgment is available for the relief claimed.
3. Those conditions matter. A default judgment entered when the requirements of CPR Part 12 are not satisfied must be set aside under CPR 13.2. Even a regularly entered default judgment may be set aside under CPR 13.3. A party who obtains default judgment without first checking the position may therefore achieve little more than delay and an unattractive argument about costs.
4. This article provides a practical guide to obtaining default judgment under CPR Part 12 and to setting it aside under CPR Part 13.

Obtaining default judgment

The conditions under CPR 12.3

5. Judgment in default of an Acknowledgment of Service may be obtained only if, at the date judgment is entered:
 - 5.1 the Defendant has filed neither an Acknowledgment of Service nor a Defence to the claim, or any part of it; and
 - 5.2 the relevant time for doing so has expired.
6. Judgment in default of a Defence may be obtained where an Acknowledgment of Service has been filed but, at the date judgment is entered, no Defence has been filed and the relevant period has expired. It may also be obtained on a counterclaim where no Defence to Counterclaim has been filed within the relevant period, there being no requirement for an Acknowledgment of Service in response to a counterclaim: CPR 12.3(2)(b) and CPR 20.4(3).

7. Crucially, the relevant date is the date judgment is entered; not the date on which it is requested or the date on which the Court decides to grant it. In *Galliani v Sartori* [2023] EWHC 3306 (Comm), the Acknowledgment of Service was filed after the Court had decided to grant default judgment, but before the Order was sealed. Judgment had therefore not yet been properly entered for the purposes of CPR 12.3, and had to be set aside. For those acting for Defendants, the message is clear: if judgment has not yet been entered, file the Acknowledgment of Service or Defence immediately. The fact that the deadline has passed, or that judgment has already been requested, may not prevent a late filing from defeating the request.
8. For the purposes of default judgment, the question is whether a Defence or “*any document intended to be a defence*” has been filed: CPR 12.1. Its quality is therefore beside the point. If such a document falls short of the requirements of CPR 16.5 or discloses no viable defence, the Claimant should instead consider applying to strike it out and/or for summary judgment.

Calculating the deadline

9. The general time limits will be familiar:
 - 9.1 under CPR 10.3, an Acknowledgment of Service must be filed within 14 days after service of the Claim Form or, where the Claim Form states that Particulars of Claim are to follow, within 14 days of service of the Particulars of Claim;
 - 9.2 under CPR 15.4, a Defence must be filed within 14 days after service of the Particulars of Claim; and
 - 9.3 if an Acknowledgment of Service is filed, the Defence must be filed within 28 days after service of the Particulars of Claim.
10. These are only the general rules. Different timing provisions apply in some specialist Courts and where the claim is served outside the jurisdiction. The parties may agree an extension of up to 28 days for filing the Defence under CPR 15.5 and the Court may also extend time under its general case-management powers. The relevant deadline must therefore be reviewed in each case.
11. Where a Defendant has filed an Acknowledgment of Service indicating an intention to dispute jurisdiction and has made the appropriate application under Part 11, the Defendant is not required to file a Defence before that challenge is determined. Default judgment will not be available in the meantime.
12. There is a further trap where the proceedings have been left dormant. CPR 15.11 provides for a stay where six months have passed since the end of the period for filing a Defence and

the other conditions in that rule are met. Claimants must then apply to lift the stay before seeking default judgment.

Cases where default judgment is unavailable

13. CPR 12.2 excludes default judgment:
 - 13.1 on a claim for delivery of goods subject to an agreement regulated by the Consumer Credit Act 1974;
 - 13.2 where the Part 8 procedure is used; and
 - 13.3 where another rule or practice direction says that default judgment may not be obtained.
14. CPR 12.3(3) separately prevents default judgment where:
 - 14.1 the Defendant has made an undetermined application for strike out or summary judgment;
 - 14.2 the whole claim, including costs, has been satisfied;
 - 14.3 in a money claim, the Defendant has admitted liability for the whole amount and requested time to pay; or
 - 14.4 notice has been given of the application identified in CPR 12.3(3)(d), and that application remains unresolved.
15. Practitioners should note that the ordinary Part 12 procedure is excluded or modified in some specialist proceedings including possession claims, contentious probate claims, and claims for provisional damages. In addition, Part 12 applies to counterclaims but not to other additional claims which are subject to the special provisions in Part 20. Where the claim is anything other than an ordinary Part 7 claim, the relevant provisions should therefore be consulted.

Request or application?

16. Choosing the wrong procedure can have serious consequences. A request for default judgment is ordinarily dealt with administratively by a Court officer; whereas an application requires a Judge to consider the Claimant's entitlement to the relief sought. A Claimant who follows an incorrect route risks delay, additional costs, and a judgment which may later be set aside.
17. A Claimant may ordinarily obtain judgment by filing a request where the claim is for:
 - 17.1 a specified amount of money;
 - 17.2 an amount of money to be decided by the Court;
 - 17.3 delivery of goods where the Defendant is given the alternative of paying their value;or

17.4 a combination of those remedies.

18. Forms N205A or N225 are used for a specified amount or delivery of goods where the Defendant is given the alternative of paying their value. Forms N205B or N227 are used where the amount is to be decided by the Court. No fee is payable for the request itself. Where the Claimant rather than the Court served the Claim Form, CPR 6.17(2)(b) requires a certificate of service to be filed before default judgment may be obtained.
19. By contrast, a Part 23 application is required where the claim consists of or includes some other remedy, or where judgment is sought for costs other than fixed costs alone: CPR 12.4(3) and CPR 12.10. An application is also required in the particular cases identified in CPR 12.11, which include claims against children or protected parties, claims in tort between spouses or civil partners, and certain claims involving service out of the jurisdiction.
20. The application should be made on Form N244 and accompanied by evidence addressing service, expiry of the relevant period, the absence of any Acknowledgment of Service or Defence, and the relief claimed. A draft Order should also be provided. Subject to the exceptions in CPR 12.12, such documents should generally be served as soon as practicable and at least three days before the Court deals with the application.
21. A request for default judgment is made without notice. Conversely, where a Part 23 application is required, the Application Notice and supporting evidence must generally be served under CPR 23.7, subject to the exceptions in CPR 12.12. In particular, supporting evidence need not be served on a Defendant who has failed to file an Acknowledgment of Service: CPR 12.12(2)
22. Whether judgment is sought by request or application, the Court must be satisfied that the Particulars of Claim were served. A certificate of service on the Court file is sufficient: CPR 12.12(6)(a).

Consideration by the Court

23. Even if all the requirements are met, it is important to remember that the Claimant is not necessarily entitled to every Order sought. In *Ras Al Khaimah Investment Authority v Azima* [2023] EWHC 2108 (Ch), drawing upon *Lux Locations Ltd v Zhang* [2023] UKPC 3, the Court recognised that it retained a discretion not to enter default judgment where the result would be unjust. That consideration is particularly important where non-monetary relief may affect the rights of the Defendant.

24. Where the claim is for both money judgment and another remedy, CPR 12.4(4) allows the Claimant to abandon the latter and obtain judgment by request for the former. That course should not, however, be taken lightly: an express abandonment of the other remedy may prevent the Claimant from pursuing that relief while the default judgment remains in place: *Pincus v Johal and another* [2024] EWHC 502 (Ch).

The effect of judgment

25. The Court will consider whether the claim is genuinely for a specified amount or alternatively for an amount to be assessed. Merely estimating a figure on a claim for damages does not necessarily make it a specified money claim: *Edward v Okeke* [2023] EWHC 2932 (KB).
26. Default judgment for a specified amount will ordinarily be for the amount claimed, less payments received, together with costs and any interest which satisfies CPR 12.7. The Claimant may, when requesting default judgment, specify a date for payment or payment by instalments, but if neither is specified, the sum is payable immediately: CPR 12.5(1) and (2).
27. Where the amount is to be assessed, default judgment determines liability but not quantum. The Claimant must still prove the amounts recoverable. The Court may give directions for a disposal or assessment hearing: CPR 12.8. The Defendant may then raise matters going to quantum, including questions of causation, provided that they are not inconsistent with the judgment on liability: *Lunnun v Singh* [1999] CPLR 587 and *Symes v St George's Healthcare NHS Trust* [2014] EWHC 2505 (QB).
28. Particular care is needed where there are several Defendants. Under CPR 12.9, the Court must consider whether the claim against the defaulting Defendant can properly be dealt with separately. That may not be possible where liability is alleged jointly, in the alternative, or through a common allegation such as conspiracy. Before seeking judgment against one Defendant, practitioners should therefore consider whether doing so could prejudice remaining claims against others, together with any practical consequences, including the prospects of enforcement.

Setting aside default judgment

CPR 13.2: was judgment wrongly entered?

29. Whenever instructed to set aside default judgment, the first question is whether it was properly entered. Check service, calculate the deadline for the Acknowledgment of Service and Defence, and establish precisely what was filed when judgment was entered.
30. Under CPR 13.2, the Court *must* set aside judgment if a condition in CPR 12.3 was not satisfied, or if the whole claim had been satisfied before judgment was entered. The merits of the proposed Defence are irrelevant. The application should instead identify expressly which condition was not met and the evidence which establishes that fact.
31. Invalid service must be distinguished from valid service which did not in fact come to the Defendant's attention. In *Akram v Adam* [2004] EWCA Civ 1601, service in accordance with the CPR remained effective despite actual non-receipt. That scenario falls to be considered under CPR 13.3 rather than CPR 13.2.
32. Nor does every procedural defect make the judgment irregular. For example, a failure to provide the response pack may be relevant under CPR 13.3, but does not, without more, mean that the conditions in CPR 12.3 were not satisfied: *Rajval Construction Ltd v Bestville Properties Ltd* [2010] EWCA Civ 1621.
33. Delay does not remove the right to mandatory relief under CPR 13.2. Even so, an irregular judgment remains effective unless and until it is set aside. The application should therefore be made promptly. However, issuing the application does not itself stay enforcement, and so any request for a stay should be sought as part of the same Application Notice.

CPR 13.3: discretionary relief

34. Where judgment was regularly entered, the Court may set it aside or vary it if:
 - 34.1 the Defendant has a real prospect of successfully defending the claim; or
 - 34.2 there is some other good reason why judgment should be set aside or varied, or why the Defendant should be allowed to defend.
35. An arguable Defence is not enough. The Defendant must show a real, rather than fanciful, prospect of successfully defending the claim. The test is essentially the same as that applied on summary judgment. Providing a properly pleaded draft Defence, compliant with

CPR 16.5, is often central to meeting that threshold. A mere outline of the intended case in a witness statement is unlikely to suffice.

36. “*Some other good reason*” is a separate ground. It may include actual non-receipt despite technically valid service, procedural unfairness, or even conduct by the Claimant which materially contributed to the default. For instance, in *S T Shipping & Transport Inc v Vyzantio Shipping Ltd* [2004] EWHC 3067 (Comm), the Claimant’s lengthy silence of 18 months create an impression that the claim was not being pursued and was a relevant factor in the exercise of the Court’s discretion.
37. CPR 13.3(2) expressly requires the Court to take account of whether the application was made promptly. There is no fixed period which will invariably be treated as prompt. The essential question is whether the Defendant acted with all reasonable speed in the circumstances.
38. In *FXF v English Karate Federation Ltd* [2023] EWCA Civ 891, the Court of Appeal confirmed that an application under CPR 13.3 is an application for relief from sanctions to which the *Denton* approach applies. Accordingly, the Court will first consider the specific matters in CPR 13.3, including the merits and promptness. If that threshold is crossed, the Court will then apply *Denton*:
 - 38.1 the seriousness and significance of the default;
 - 38.2 whether there was good reason for the default; and
 - 38.3 all the circumstances of the case, including the factors identified in CPR 3.9.
39. The Defendant’s evidence must therefore explain clearly and candidly what actually happened: how and when the proceedings were received; what went wrong; when the problem was discovered; what was done in response; and why any delay occurred. General references to oversight, administrative error, or pressures of work are unlikely to assist unless the underlying events are explained. The evidence should also address any particular prejudice to the Claimant if judgment is set aside.

Procedure and costs

40. The application is made on Form N244. It should state whether relief is sought under CPR 13.2, CPR 13.3, or both. An application under CPR 13.3 must be supported by evidence. It should include:
 - 40.1 a witness statement dealing with service, default, and any delay;
 - 40.2 a properly pleaded draft Defence;
 - 40.3 the key supporting documents; and

40.4 a draft Order dealing with the setting aside, the revised deadline for filing and service of the Defence, any stay of enforcement, consequential directions, and costs.

41. Defendants should be advised that, where default judgment was entered as a result of their default, they can usually expect to be ordered to pay the costs occasioned by that default, even if the application succeeds.

Conclusion

42. For Claimants, default judgment can look like an easy procedural win. Often it is. It would be unwise, however, to treat it as a foregone conclusion. The proceedings must be reviewed with care. It is not enough that the Defendant appears to be in default. Service must be valid and proven, the relevant period must have expired, the default judgment regime must apply to the claim and the relief sought, and the correct procedure must be used.
43. For Defendants seeking to set aside default judgment, CPR 13.2 should be considered first. If judgment was wrongly entered, the Court has no discretion and must set it aside. If not, the Defendant must persuade the Court under CPR 13.3 that a regularly obtained judgment should nevertheless be disturbed. A successful application requires a real prospect of successfully defending the claim or some other good reason. It should be made promptly and supported by evidence which addresses the *Denton* principles.
44. Default judgment, and the jurisdiction to set it aside, are useful and powerful procedural remedies. Whichever side one is acting for, close attention to service, timing, procedure, and evidence will often prove determinative.

ANGUS THOMAS

A guide to amending statements of case and adding, removing or substituting parties

It is common for a party to discover, after proceedings have commenced, that its statement of case needs to be changed. The amendment may be relatively minor, for example, correcting a factual error or clarifying a pleaded allegation. Or, it may be more significant, such as introducing a new cause of action or changing the basis of a claim.

Separately, a party may need to add, remove or substitute a party to the proceedings. Although such a change will often require consequential amendments to the claim form or another statement of case, the addition, removal or substitution of parties is governed by CPR Part 19, rather than being an amendment to a statement of case under CPR Part 17. The two Parts may need to be considered together where, for example, an application to add a defendant also requires the claim form and particulars of claim to be amended.

This article provides a practical overview of the relevant rules and the considerations which should be borne in mind when advising on or making an application.

Amendments to Statements of Case

The procedure is relatively straightforward where the amendment is made before the statement of case has been served or where all parties consent. However, difficulties tend to arise where permission is required, particularly where the application is made late in the proceedings or after the expiry of a limitation period.

Before Service

The first question should always be: Has the statement of case been served?

Pursuant to CPR 17.1(1), a party may amend its statement of case at any time before it has been served on any other party. Permission is therefore generally unnecessary at this stage.

Accordingly, where a statement of case has not yet been served, permission is generally unnecessary.

After Service

Once a statement of case has been served, CPR 17.1(2) provides that it may only be amended by either of the two methods:

1. with the written consent of all the other parties; **or**
2. with the permission of the court.

If the amendment involves removing, adding or substituting a party, the application must be made in accordance with CPR 19.4.

Amendments by consent

Where a statement of case has already been served, the simplest route is often to obtain the written consent of all other parties. There is no need to make an application to the court where all necessary parties consent.

The consent should be obtained in writing, and the amended statement of case should then be filed and served in accordance with the rules and an appropriate consent order.

Solicitors should nevertheless check the existing directions before proceeding. For example, an order may have imposed a deadline for amendments or may require permission before any amendment is made.

It is also worth remembering that consent between the parties does not necessarily override a court order or case management direction. If an amendment would require the variation of an existing order, an application to the court may still be necessary.

When permission is required

Where a statement of case has already been served, and the parties do not consent, an application for permission to amend is made under CPR Part 23 using Form N244.

The court's power to allow an amendment is subject to:

- CPR 19.2, where the amendment involves changing the parties;
- CPR 19.6, where a new party is being added or substituted after expiry of the relevant limitation period; and
- CPR 17.4, where the amendment introduces a new claim after expiry of the relevant limitation period.

The court may also give consequential directions concerning amendments to other statements of case and their service.

If a party has amended their statement of case where permission of the court was not required, the court may disallow the amendment. Such an application can be made by the opposing party.¹

The court's considerations

Amendments should generally be permitted so that the real dispute between the parties can be determined, provided that any prejudice caused to the opposing party can be adequately

¹ CPR r.17.2

compensated, ordinarily through costs, and that the efficient administration of justice is not significantly harmed.

That does not, however, mean that amendments will automatically be allowed.

The court will consider the circumstances of the particular case, including:

- the nature and significance of the proposed amendment;
- why the amendment is required;
- when the need for the amendment arose;
- why the application has been made when it has;
- the stage the proceedings have reached;
- the effect of the amendment on the existing timetable;
- whether the trial date would be imperilled;
- whether further disclosure or evidence will be required;
- the prejudice to the applicant if the amendment is refused;
- the prejudice to the opposing party if it is allowed;
- whether that prejudice can be compensated by an order for costs; and
- the interests of other court users and the efficient administration of justice.

Solicitors should therefore avoid leaving an amendment application until the last minute.

If it becomes apparent that a pleading needs to be amended, the application should be considered promptly, rather than waiting until shortly before trial.

This is consistent with PD 23A, which provides that every application should be made as soon as it appears necessary or desirable to do so.

Process of making the application to Court

The applicant should generally file:

1. the application notice; and
2. a copy of the statement of case showing the proposed amendments.

The proposed amended pleading should make it immediately apparent to the judge what is being changed.

An application to amend should generally be supported by evidence where the circumstances require explanation.

The evidence should explain why the amendment is necessary and why it is being sought at that stage.

For example, the evidence might explain:

- when the relevant facts came to light;
- why the original pleading was incorrect or incomplete;
- why the amendment could not reasonably have been made earlier;
- whether the amendment affects disclosure or evidence;
- whether the amendment affects the trial timetable; and
- what prejudice is likely to be caused to the other parties.

This is particularly important for a late application as discussed above.

Practice Direction 17 also deals with how amendments should be presented.

The amended statement of case and the court copy of it should be endorsed as follows:

(1) where the court's permission was required:

Amended [Particulars of Claim or as may be] by Order of [Master][District Judge..... or as may be] [Legal Adviser] dated.....

(2) Where the court's permission was not required:

Amended [Particulars of Claim or as may be] under CPR [rule 17.1(1) or (2)(a)] dated.....

The amended statement of case does not necessarily have to reproduce the original text. However, where the court considers it desirable, the amendments can be shown using coloured amendments or by use of a numerical code in a monochrome computer generated document.

Where colour is used, deleted text should be struck through and replacement text inserted or underlined in the same colour. The Practice Direction provides for successive amendments to be shown in red, green, violet and yellow.

The application notice itself can contain evidence if it is properly verified by a statement of truth, although a witness statement will often be preferable where a detailed factual explanation is required.

Where permission is granted, the amended statement of case should normally be filed within 14 days of the order, unless the court specifies a different period. The amended pleading should be verified by a statement of truth unless the court orders otherwise. A copy of the order and amended statement of case should then be served on the other parties unless the court directs otherwise.

Adding, removing or substituting parties

The addition, removal and substitution of parties to proceedings is governed by CPR Part 19. This is distinct from an amendment to a statement of case under CPR Part 17.

The court may order that a person be added as party where:

1. it is desirable to add them so that the court can resolve all the matters in dispute; **or**
2. there is an issue involving the proposed new party and an existing party which is connected with the matters in dispute, and it is desirable to add the new party so that the court can resolve that issue.

The court can also order that a person cease to be a party where it is no longer desirable for them to remain a party.

Substitution is dealt with separately under CPR 19.2(4). Broadly, substitution may be appropriate where the existing party's interest or liability has passed to the proposed new party and it is desirable for the substitution to enable the court to resolve the matters in dispute.

An application for permission:

- may be made by an existing party or by a person who wishes to become a party;
- must be supported by evidence; and
- must be made under Part 23.

There are also specific requirements where the proposed new party is to become a claimant. A person cannot be added or substituted as claimant unless they have given their written consent and that consent, together with the proposed amended claim form and particulars of claim, has been filed with the court.

Where a new defendant is added, the defendant does not become a party until the amended claim form has been served on them. This is an important practical point: obtaining an order adding a defendant is not, by itself, sufficient to make that person a party.

An order adding, removing or substituting a party must also be served on all existing parties and any other person affected by the order.

What if limitation period has expired?

Where a party is to be added or substituted after the expiry of a relevant limitation period, CPR 19.6 applies.

The court may only make the order where:

1. the relevant limitation period was current when the proceedings were commenced; and

2. the addition or substitution is **necessary**.

The rule sets out when an addition or substitution will be considered necessary. This includes, for example:

- where the new party is being substituted for a party who was named in the claim form by mistake;
- where the claim cannot properly be continued by or against the original party unless the new party is added or substituted; or
- where the original party has died or become bankrupt and the relevant interest or liability has passed to the new party.

The test is therefore significantly more restrictive than the ordinary test for adding a party under CPR 19.2.

Introducing a new claim

Where an amendment introduces a new claim after the limitation period has expired, CPR 17.4 applies.

The court may permit a new claim to be added only where the new claim arises out of the same facts or substantially the same facts as a claim already in issue in the proceedings.

There are also specific provisions dealing with correcting a genuine mistake as to the name of a party and altering the capacity in which a party claims.

Costs

The applicant should expect costs to be an issue.

PD 17 states that a party applying for an amendment will usually be responsible for the costs of and arising from the amendment. CPR r.19.4(10) similarly provides that a party applying to add a new party by amendment will be responsible for the costs of and arising from the amendment unless the court orders otherwise.

This means that even where permission to amend is granted, the applicant may be ordered to pay the other party's costs of dealing with the amendment.

Where an amendment has been necessitated by the other party's conduct, or where the parties have agreed a different costs position, there may be scope for a different order.

AMANPRIT KAUR

A Step-by-Step Guide To Summary Judgment

1. Summary judgment under CPR Part 24 can provide a powerful tool for both Claimants and Defendants to litigation. It allows for swift determination of a claim without the time and costs associated with awaiting determination at a trial. Even where the summary judgment does not dispose with the entirety of the claim, summary determination of an issue, or issues, can have important tactical implications. For example:
 - a. The issues to be determined at a trial are narrowed, which may well significantly reduce the costs of the proceedings;
 - b. A successful application for summary judgment on some of the issues is likely to be accompanied by a costs order. This could place pressure on the other party and could be utilised as part of settlement discussions; and
 - c. The evidence filed and the other side's position in response to the application, provides early insight into that parties' approach to the litigation.
2. This article provides a step-by-step guide of the key provisions relating to summary judgment applications.

(1) When is Summary Judgment Available?

3. Summary judgment is widely available and an application can be made in most proceedings. This includes in Part 8 proceedings, albeit Part 8 proceedings are designed, in and of themselves, to be simple and expeditious. Therefore, the utility of summary judgment in Part 8 proceedings may be more limited.
4. The only circumstances in which summary judgment is not available is by a Claimant against a Defendant in some possession claims relating to residential properties. Specifically, such claims against a mortgagor, tenant or contract-holder, or a former tenant or former contract-holder holding over with protected occupancy (CPR 24.2(b)).

(2) The Timing of the Application

5. In relation to the timing of an application, it is first necessary to consider whether summary judgment is available at that stage of the proceedings:
 - a. A Defendant may apply for summary judgment at any time, including before filing a defence.
 - b. A Claimant may not apply for summary judgment against a Defendant until the Defendant has filed an acknowledgement of service or a defence, unless the court gives permission (CPR r. 24.4(1)(a)) or a rule or practice direction states otherwise (CPR r. 24(1)(b)).
6. If permission is required under CPR r. 24(1)(a), this can be sought within the same application, and determined at the same hearing, as the application for summary judgment *FBN Bank (UK) Ltd v Leaf Tobacco A Michailides SA [2017] EWHC 3017 (Comm)*.
7. If a summary judgment application is made (by any party) before a Defendant has filed its defence, the Defendant does not have to file a defence before the application is heard; the usual time limits do not apply (CPR r. 24.4(4)). However, importantly, this does not mean that the Defendant is not permitted to file a Defence in these circumstances (*Natural Resources Inc v Origin Clothing Ltd [1995] FSR 280*). There are important tactical considerations to weigh in the balance when deciding to file a defence in these circumstances:
 - a. In some cases, the fact that no defence is required by the rules could be of significant assistance to the Defendant. The Defendant avoids the costs of preparing a defence. This may be particularly helpful where the Particulars of Claim contains numerous and lengthy (albeit hopeless) issues that it would be time consuming and expensive to respond to within a proper defence.
 - b. In other cases, the defence may serve a useful role at the hearing of a summary judgment application. The defence may provide a convenient manner in which to set out the reasons why summary judgment should, or should not, be granted.
8. Thereafter, a summary judgment application can be made at any time including at trial. *Devon and Cornwall Autistic Community Trust v The Cornwall Council [2015] EWHC 403 (QB)* provides an example of a case in which the High Court found that it was appropriate to grant

summary judgment (and strike out) at the outset of the trial. However, as a general rule, cases where summary disposal at trial will be appropriate will be very rare (*Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550).

9. In many cases, it will be most appropriate to make a summary judgment application before, or at the time of, filing the directions questionnaire. Indeed, the directions questionnaire for fast track, intermediate track and multi-track claims (Form N181) includes whether a party intends to make an application in the future. Also, Practice Direction 26.3(3)(a) specifically lists a party's intention to apply for summary judgment as an example of information that is likely to help the court in determining allocation and assignment to a complexity band.

(3) Making the Application: Procedural Requirements

10. There are a number of specific items that must be included in an application notice seeking summary judgment (CPR r. 24.5(1)). The application notice must:
 - a. State that the application is for summary judgment.
 - b. State that the applicant believes the respondent has no real prospect of succeeding on the claim, defence or issue to be determined.
 - c. Identify concisely any point of law or document relied upon.
 - d. State that the applicant knows of no reason why the disposal of the claim, defence or issue should await trial.
 - e. Draw the respondent's attention to their right to rely on evidence opposing the application.
11. The respondent must receive at least 14 days' notice of both the date fixed for the hearing and the issues which it is proposed the Court will decide at the hearing (CPR r. 24.4(5)).
12. Evidence in relation to summary judgment applications must be filed as follows:

- a. As with applications under Part 23, the applicant's evidence in support can either be set out within the application notice or be attached and served within the application notice (CPR r. 24.5(1)(c));
- b. The Respondent's evidence must be filed at least 7 days before the hearing (CPR r. 24.5(3)(a)); and
- c. The Applicant's evidence in reply must be filed at least 3 days before the hearing (CPR r. 24.5(3)(b)).

13. However, it is important to note that this does not prevent the applicant from relying on evidence that has already been filed and served (CPR r. 24.5(4)).

(4) The Test for Summary Judgment

14. The test for summary judgment will be familiar to most practitioners. Pursuant to CPR r. 24.3, the court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if:

- a. It considers that the party has no real prospect of succeeding on the claim, defence or issue; and
- b. There is no other compelling reason why the case or issue should be disposed of at a trial.

15. There is a wealth of case law in relation to how this test should be interpreted and applied. However, some key cases are summarised below.

No Real Prospect of Success

16. The classic summary of the principles applicable to summary judgment is set out by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]:

- i) *The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All E.R. 91;*

- ii) *A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];*
- iii) *In reaching its conclusion the court must not conduct a “mini-trial”: Swain v Hillman;*
- iv) *This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];*
- v) *However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ 550;*
- vi) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] F.S.R. 3;*
- vii) *On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent’s case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the*

applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.

- viii) This summary was approved by the Court of Appeal in AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301 at [24]:

17. The term “mini-trial” is frequently used, but less often defined. In Okpabi v Royal Dutch Shell Plc [2021] UKSC 3, the Supreme Court found that the Judge had been drawn into conducting a mini-trial because:

- a. “[I]nstead of focusing on the pleaded case and whether that discloses an arguable claim, the court is drawn into an evaluation of the weight of the evidence and the exercise of a judgment based on that evidence.” [107]; and
- b. “Being drawn into conducting a mini trial led to the court making determinations in relation to contested factual evidence that were not appropriate on an interlocutory application” [120].

18. Similarly, the question often arises as to what actually is a “short point of law”. In Commerz Real Investmentgesellschaft MBH v TFS Stores Ltd [2021] EWHC 863 (Ch), Chief Master Marsh gave the following guidance at [12]:

The notion of shortness does not relate to the length of the document to be construed or the length of the material passage in that document; but it may relate to the length of the hearing that will be required and the complexity of the matrix of fact the court will have to consider. In my experience the court regularly deals with points of law and of construction of real difficulty on the hearing of an application for summary judgment.

19. As to the information that can reasonably be expected to be available at a trial, it is not sufficient for a respondent to simply argue that further information may ‘turn up’ prior to the trial. The respondent must satisfy the Court:

- a. Of the nature of the material it says will become available; and
- b. Whether there are reasonable grounds to believe that this material will add to or alter the evidence relevant to whether the claim has a real prospect of success.

(*Okpabi* at [127] – [128] and *Korea National Insurance Corp v Allianz Global Corporate & Specialty AG (formerly Allianz Marine & Aviation Versicherungs AG)* [2007] EWCA Civ 1066).

Compelling Reason for Trial

20. There are a number of authorities dealing with circumstances in which the Court has found a compelling reason for a trial. The issue is likely to be fact specific. For example, cases concerning a developing area of law (*UBS AG v Rose Capital Ventures Ltd* [2018] EWHC 3137 (Ch)) or where an appeal is pending (*Daimler AG v Walleniusrederierna Aktiebolag* [2019] EWHC 3197 (Comm)).

21. However, it is less common for this aspect of the test for summary judgment to be a significant issue at the hearing of the application. In the recent decision of *N&CJ Horton Property v Norman* [2026] EWHC 959 (Ch) Mr Justice Leech at [16] held that the overriding objective of deciding cases justly and at proportionate cost was relevant to the issue of whether there was a compelling reason for trial and noted that “[i]t is rare for the Court to find a compelling reason for a trial, when it has concluded there is only one realistic outcome.”

(5) Combination with a Strike Out Application

22. There is a substantial overlap between summary judgment under CPR Part 24 and applications to strike under CPR r. 3.4 (White Book 2026, para 24.0.1). It is therefore common for parties to apply for both summary judgment and strike out within the same application. This approach is confirmed by Practice Direction 3A, para 1.5 which provides:

A party may believe they can show without a trial that an opponent’s case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case

may be, because of a point of law (including the interpretation of a document). In such a case the party concerned may make an application under rule 3.4 or apply for summary judgment under Part 24 (or both) as they think appropriate.

23. In such cases there is authority to suggest that the two applications can be taken together and a single test applied (*Begum v Maran* (UK) Ltd [2021] EWCA Civ 326 at [21]). In *Maranello Rossi Ltd v Lohomij BV* [2021] EWHC 2452 (Ch) at [25] HHJ Keyser QC used the terminology of "reasonable arguability" to cover the test under either rule.

24. However, it should be remembered that there are distinctions between the two tests. In strike out applications, the Court will be more concerned with the statement of case, as opposed to any evidence that may be available (*Swain v Hillman* [2001] 1 All E.R. 91). In the recent decision of *BG Atlantic Inc v Hay Hill Investments Ltd* [2026] EWHC 226 (KB), the High Court held that:

The main difference between an application for summary judgment and an application to strike out is that, on an application to strike out, the pleaded facts should be assumed to be true, and evidence to support claims made in the pleadings is inadmissible.

25. In some cases, the distinction will be of limited relevance; for example, where the parties agree the factual background, but it is argued that the claim cannot be sustained even on the agreed facts. In other cases, the difference will be more significant.

26. Parties should mindful only to bring a strike out application alongside a summary judgment application in appropriate cases. Indeed, in *AF Kopp Ltd v HSBC UK Bank plc* [2024] EWHC 1004 (Ch), HHJ Hodge KC at [19] cautioned applicants as follows:

I have recently detected an unfortunate tendency for applicants to seek to bolster summary judgment applications by incorporating applications to strike out, even in cases where the latter relief is wholly inappropriate. I would encourage legal representatives to desist from this 'scatter-gun' approach, which only serves to divert the court's attention away from the real issues which arise on the summary judgment application.

(6) Costs

27. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party (CPR r. 44.2(2)(a)).
28. As such, where a summary judgment application is successful, often the respondent will be ordered to pay the applicant's costs.
29. However, parties should be mindful of whether fixed costs may apply. Where the claim is for a specified sum of money which exceed £25 and summary judgment is granted, fixed costs will apply (CPR r. 45.16(2)(a) for claims issued after 1 October 2023). However, the Court retains a discretion to disapply fixed costs (CPR r. 45.16(1)).
30. Where, an application for summary judgment is made but is unsuccessful, the applicant could consider seeking costs in the case or costs in the issue. This would mean that if the applicant is ultimately successful at trial and the allegations are made good, the costs of the summary judgment application will be recoverable. In *Sharp v Blank* [2016] EWHC 776 (Ch), a similar order was made. In that case, summary judgment applications were made on a number of issues in the claim, with mixed success.
31. However, it appears that the circumstances in which the Court may be willing to make such an order are limited. In *Matrix Receivables Ltd v Musst Holdings Ltd* [2024] EWHC 2167 (Ch) the Court noted that *Sharp* had turned on its own facts and went on to emphasise that:
- a. The usual starting point remains that the unsuccessful party will pay the successful party's costs;
 - b. There is no requirement for a party that has successfully opposed the summary judgment application to show that the application was unreasonably brought; and
 - c. In that case, there was no reason to depart from the usual starting point.
32. Similarly, in *BTI 2014 LLC v Pricewaterhousecoopers LLP* [2019] EWHC 3219 (Ch), the Court held that, the fact that the applicant might succeed on the issues at a trial, was not a good reason to refuse the respondent its costs of successfully opposing the application.

33. If the summary judgment has been dealt with in less than one day, the usual rule is that costs should be summarily assessed at the conclusion of the hearing (Practice Direction 44, para 9.2(b)). As such, a statement of costs should be filed at least 24 hours before the hearing in readiness for summary judgment application (Practice Direction 44, para 9.5(4)(b)).

Conclusion

34. Summary judgment can provide an important and powerful tool in appropriate cases. However, the practitioners should retain a sharp focus on the relevant legal test and procedural requirements at each stage of the application.

ELOISE MARRIOTT

Security for Costs - Law and Procedure

1. Where a party is facing the prospect of defending a claim there may be real concerns as to whether, should the defence be successful, the costs of doing so can be recovered from the claimant. In such situations it is often sensible to make an application for security for costs in order to protect your client's financial position. But what restrictions are there on an application and how will the court decide if security should be granted? This article addresses these issues in relation to applications for security pursuant to CPR 25, alongside the procedure for bringing an application.

What is a security for costs order?

2. An order for security for costs requires a claimant to pay money into court or provide another form of security against the possibility that they may have to pay the defendant's costs should the claim not succeed. An order for security for costs protects a defendant against the risk that they will win at trial and be awarded costs accordingly but not be able to enforce this award for reasons such as the claimant residing outside the jurisdiction.
3. Security for costs can also be a useful tactical move; the threat of an application can focus a claimant's mind on the merits of the case and encourage them to undertake a costs-risk analysis which can assist with early resolution.

Who can an order be made against?

4. Ordinarily, security for costs is ordered against a claimant. It can also be ordered against a defendant who has made a counterclaim in proceedings provided that the counterclaim is a separate claim as opposed to simply a defence such as a set-off.²
5. CPR 25.29 allows for security for costs to be ordered against an appellant, or a respondent to an appeal who cross-appeals. Further, there is the jurisdiction to make an order where that party is a limited company and there is reason to believe it will be unable to pay the costs of the other parties should its appeal be unsuccessful.
6. Security for costs can also be ordered against a third party in two circumstances:
 - a. Where that party has assigned the right to the claim to the claimant to avoid liability for costs; and
 - b. Where they have contributed/agreed to contribute to the claimant's costs in return for a share of anything recovered in the proceedings.³
7. If security is sought from a third party, the court's discretion is wide. CPR 25.28 is clear that this can only be ordered when it is satisfied that it would be just in all the circumstances and the third-party is someone against whom a costs order can be made.

² *TC Developments (South East) Ltd v Investin Quay House Ltd* [2019] EWHC 1432 (TCC).

³ CPR 25.28.

Who can apply for an order?

8. A defendant to any claim can make an application for security for costs.⁴ This includes a claimant where they are defending a counterclaim/Part 20 claim. A claimant who becomes a respondent on appeal is also a defendant for the purposes of this rule.⁵ An interested party does not class as a defendant and so cannot apply for security for costs.⁶

Which costs can be secured?

9. An order for security for costs can only be sought in proceedings, so cannot cover pre-action costs. It is not available in claims that have been allocated to the small claims track as this would undermine the limited scope of recoverable costs in these cases. An interim application can be classed as proceedings if it raises issues as to the parties' rights which are independent of the issues in dispute in the main action; this is a matter of substance over form.⁷
10. Security for costs is usually limited to costs going forward from the application. For this reason, it is important to make an application early in proceedings otherwise significant costs may be incurred which cannot be secured.

Grounds for bringing an application

11. The court can only consider making an order for security for costs if an enactment permits it or if one or more of the grounds are met.⁸ These are where the claimant:
- a. Is not resident in the jurisdiction;
 - b. Is a company or body, incorporated inside or outside England and Wales (including unlimited companies) and there is reason to believe that it would be unable to pay any costs order in favour of the defendant;
 - c. Has changed their address since the claim was commenced in order to avoid the consequences of litigation;
 - d. Failed to give their address/gave an incorrect address in the claim form;
 - e. Is acting as a nominal claimant (other than a representative under CPR 19) and there is reason to believe they would be unable to pay any costs order in favour of the defendant; and
 - f. Has taken steps in relation to their assets that would make it difficult to enforce any order for costs against them.

Claimant resident outside of the jurisdiction

12. A person resides in a place if it is their habitual place of residence and they reside there for a settled purpose, even if their permanent residence is elsewhere. A person is not resident out of the jurisdiction unless and until they actually move there, so this ground is not satisfied by an

⁴ CPR 25.29.

⁵ Ibid.

⁶ *New Lottery Co Ltd and another Gambling Commission and others* [2025] EWHC 1522 (TCC).

⁷ *GFN SA and others v The Liquidators of Bancredit Cayman Ltd* [2009] UKPC 39.

⁸ CPR 25.27(b)(i) – (vi).

intention to move. When deciding whether a claimant company is resident outside of the jurisdiction the court will look to where its central management/control is located.⁹

13. In order to avoid any possibility that an order for security is discriminatory against those resident in a foreign jurisdiction (Article 14 ECHR), where this gateway is relied upon the applicant must also show that there is a real risk that residence outside of the jurisdiction poses substantial obstacles to the enforcement of any future costs order. This test requires objectively justifiable grounds that the obstacles to enforcement or the additional costs burden or delay in enforcement would not be encountered if the costs order were enforced in England and Wales.¹⁰

Inability of a claimant company to pay costs

14. The defendant does not have to prove on the balance of probabilities that the claimant will not be able to pay any costs order but that there is reason to believe that they will not be able to pay any costs order when it would fall due. Although the burden is on the defendant to prove this, the court can draw inferences if the claimant chooses not to provide full financial information. It is not enough to establish that there is reason to believe that a claimant may not be able to pay as the required threshold is will not be able to pay.
15. However, where a claimant company is in liquidation there is a presumption that there is reason to believe that they will be unable to pay any costs award and the burden shifts to the claimant to show that it will be able to pay.¹¹
16. This ground applies only to companies and incorporated bodies. There is no ground for a security for costs application against an individual for impecuniosity.

Change of claimant's address

17. To meet this ground the applicant must show that the claimant has changed address with the aim of avoiding having to pay any future costs or security for costs order. This is more easily shown where a claimant has moved multiple times. Where the court finds there are other reasons for the move such as personal and family considerations, this ground will not be made out.¹²

Claimant's failure to provide their address

18. This ground is one which, on its own, is unlikely to justify an order for security for costs even if it is made out. It is therefore best to use this ground only in conjunction with another. Further, if this ground is made out and the court moves to consider whether to apply its discretion, the court is very unlikely to do so unless it finds that the address was withheld as an attempt to evade any future costs order.¹³

Nominal claimant

⁹ *Re Little Olympian Each Ways Ltd* [1995] 1. W.L.R. 560.

¹⁰ *Bestfort Developments LLP v Ras Al Khaimah Investment Authority* [2016] EWCA Civ 1099.

¹¹ *Vacek v Triload Invest S.R.O (In Liquidation)* [2020] EWHC 3264 (Ch).

¹² *Aoun v Bahri* [2002] EWHC 29 (Comm).

¹³ CPR 25.27.21.

19. A nominal claimant is one whose name is used to bring a claim in which they do not have any significant legal or beneficial interest. Typically, there should also be some element of duplicity, but this is not always necessary.¹⁴ Trustees, liquidators, executors and personal representatives are not usually considered nominal claimants.

Claimant who has taken steps to make enforcement difficult

20. This ground applies to both individual and corporate claimants. To satisfy this ground the defendant must prove that steps have actually been taken to move or otherwise put assets out of reach of any enforcement action; suspicion or intention is not enough. The test is objective so there is no need to prove that the claimant intended to evade enforcement.¹⁵

The court's discretion

21. Once one of the gateway grounds has been satisfied, the court retains a wide discretion to grant security for costs where it is just to do so. The court will take account of all the circumstances of the case and will seek to balance the injustice to the claimant of making a payment for security against the injustice to the defendant if security were not ordered.
22. In exercising its discretion, the court will usually consider:
- a. The ground on which the application is based;
 - b. The claimant's ability to comply with any order for payment;
 - c. Whether any order for security would stifle the claimant's ability to continue with the claim;
 - d. Whether the claimant is able to raise funds from other sources;
 - e. Prospects of success of the claim and defence, although the merits of the case should not be considered in detail;
 - f. Whether the claim is bona fide or a sham;
 - g. The timing of the application and any reasons for delay;
 - h. Whether the claimant's financial position was caused by the defendant's actions; and
 - i. Whether the claimant has taken out ATE insurance which could cover any costs order.

Types and amount of security

23. Security can be ordered in several different forms, including:
- a. Guarantee by a third party such as a parent company or bank;
 - b. Payment to the defendant's solicitors to hold on account for the claimant;

¹⁴ *Tamiz v Offley and another* [2022] EWHC 305 QB.

¹⁵ *Bush and another v Bank Mandiri (Europe) Ltd* [2014] EWHC (Comm).

- c. Payment into court (the most common form);
- d. Solicitors' undertaking; or
- e. A charge over property, although this is rarely used.

24. The court has a wide discretion when determining the amount of security to be ordered. This is case dependant and can vary from an amount covering the additional expenses likely to be incurred if enforcement is required against the claimant, to an amount covering the whole of the defendant's estimated costs.
25. The court will usually order the security to be given within a reasonable time. This is often 14 days but can be longer depending on the circumstances of the case.

Consequences of default

26. There is no automatic consequence for failure to make a security payment, so it is important that one is built into the order. Automatic strike out provisions can be added, although this is rarely done. Another option is that the claim be stayed until the security is paid. This is unlikely to be used in the Commercial Court; instead, the court prefers to provide that the defendant have liberty to apply for strike out of the claim in the event of default.

Procedure

27. It is best practice to first seek security for costs by consent, so a letter should be sent to the other party setting out the basis for the request, the type of security and the amount sought. Any requests for further information which could strengthen the client's application should also be requested.
28. The timing of the application is important as the court is unlikely to order security for costs incurred pre-application. Where a case is clearly a nuisance claim, the pre-application letter could be sent prior to any defence. However, where it is unclear as to whether the claim is a nuisance it is best to send the letter after a defence has been filed so that the client cannot be accused of attempting to stifle the claim. It is also important to note that an application for security does not prevent the claimant obtaining default judgment if no acknowledgment of service or defence has been filed.
29. If agreement cannot be reached, an application notice, draft order and witness statement should be filed at court and served on the party from whom security is sought.¹⁶ The appropriate fee should also be paid.
30. Form N244 should generally be used, or N244(CC) in the Commercial Court. The application notice must contain:
- a. The applicable grounds for security from CPR 25.27, 25.28 and/or 25.29;
 - b. If security is sought pursuant to a statute, the details which authorise the court to make the order;

¹⁶ CPR 25.27.

- c. The level of judge required. This is usually a master in the King's Bench Division, a judge in the Chancery Division and Technology and Construction Court and a master or a district judge in the Commercial Court; and
 - d. Whether a hearing is necessary and a time estimate for the same.
- 31. Although an order for security for costs can be given on consideration of papers alone, it is unlikely that the court would do so. An oral hearing is almost always required.
- 32. If the application is made against a non-party to proceedings, an application must also be made to join them pursuant to CPR 19.4 for the purpose of costs only.
- 33. The witness statement in support of the application should ideally cover:
 - a. The grounds on which security is sought and the evidence in support. Where multiple grounds are relied upon it should be clear which evidence relates to which ground;
 - b. Any factors relevant to the court's discretion including the location of the claimant's assets and any practical difficulties in enforcement;
 - c. The amount of security sought and why. Details of costs already incurred and an estimate of future costs would assist here; and
 - d. Any pre-application request for security by consent and the response, if not without prejudice.
- 34. The application should be made on notice, so it is important to ensure that the respondent is served with the application notice and evidence in good time before the hearing. These times differ depending on the court.
- 35. If the respondent wishes to oppose the application, they should file and serve a witness statement in reply containing details as to their financial circumstances or other evidence as to why it would not be just to make the order.
- 36. If an application for security for costs is refused further applications can be made but only if there is some relevant change in circumstance.

Conclusion

- 37. Security for costs can be a powerful tool in a defendant's toolkit, but it is important that one of the grounds for bringing an application is properly made out or security will not be granted. The court's discretion is wide, and its consideration focuses on balancing the injustice of making an order against that suffered by the defendant if it is not made. As such, it is difficult to predict the outcome of any application. When successful, security for costs can protect your client's financial position and even provide incentive to the claimant to settle or withdraw the claim.

ABBI ROBINSON

Offers, Settlement, and Without Prejudice Privilege: A Practical Guide

Introduction

1. Very few parties commence proceedings with the desire to fight to the bitter end at trial. The Civil Procedure Rules, pre-action protocols and modern case management philosophy all encourage parties to explore opportunities to resolve disputes efficiently and proportionately. This is reflected by the court's willingness to impose adverse costs consequences on parties who unreasonably refuse to engage in settlement discussions or alternative dispute resolution, even where they ultimately succeed at trial.
2. Effective settlement requires more than simply making an offer. Consideration must be given to the form of the offer, the protection afforded by the without prejudice ("WP") rule, the potential costs consequences of rejection and the manner in which any compromise is documented. A misunderstanding of any of these issues can result in the loss of a tactical advantage, unexpected costs exposure or the unintended creation of a binding settlement agreement.
3. This article provides an overview of the principal forms of settlement offer, the operation of the WP rule and some of the common pitfalls that arise during settlement negotiations.

Why settlement matters

4. There are three key reasons why settlement matters:
 - i. Certainty. Settlement gives parties an element of control over the outcome of the dispute rather than leaving it to judicial determination.
 - ii. Reduce costs. It is a truth universally acknowledged that litigation is expensive and even a successful party rarely recovers their full legal costs. Furthermore, proceeding to trial carries risks of adverse costs consequences. When formulated properly, settlement can reduce costs and/or offer significant costs protection.
 - iii. Confidentiality. Settlement can be achieved privately, without the matter needing to be heard at trial.

The main types of settlement offer

Part 36 Offers

5. Part 36 is a self-contained procedural code for settlement offers. CPR 36.5 sets out the form and content of a Part 36 offer, and in order for a Part 36 offer to be binding, it must comply with the requirements. The regime is designed to encourage settlement by attaching potentially significant cost consequences to the rejection of a reasonable offer (as per CPR 36.13, 36.14, or 36.17).
6. The costs risk can place considerable pressure on a party to engage realistically with settlement proposals, whilst providing substantial protection in circumstances where an offer is unreasonably rejected. Accordingly, Part 36 offers operate as a useful mechanism for settlement and a method of managing costs risks.

Calderbank Offers

7. A Calderbank offer, also known as a “without prejudice save as to costs” (“WPSATC”) offer, does not carry the prescribed procedural consequences under CPR 36. Instead, Calderbank offers can be placed before the Court at the point where costs are considered.
8. The principal tactical advantage of a Calderbank offer lies in its flexibility, allowing parties to propose bespoke settlement terms, costs arrangements, payment structure or commercial solutions that may fall outside the scope of a Part 36 offer. Whilst the matter of costs remains under the Court’s discretion, a well-judged Calderbank offer can still provide powerful costs arguments whilst giving the offeror considerable freedom in structuring a proposed compromise.

Without Prejudice Offers

9. A purely WP offer forms part of protected settlement negotiations and cannot generally be referred to either on substantive issues in dispute or on the matter of costs, unless both parties consent or a recognised exemption applies (discussed further below). The primary benefit of a WP offer is that it facilitates frank negotiation. Parties are often more willing to explore compromises, make concessions, or test settlement positions when they know that such discussions cannot be referred to later down the line throughout the course of litigation.

Open Offers

10. An open offer carries no privilege and cannot be shown to the Court or relied upon throughout proceedings. Whilst relatively uncommon, a clear advantage of this type of offer is that it may be used by a party wishing to demonstrate the reasonableness of its position from an early stage. The potential disadvantage is that the offer may be placed before the Court during the determination of substantive issues as such, care will need to be taken surrounding admissions as to liability.

The Without Prejudice rule

General settlement negotiations and the WP rule

11. The WP rule governs the admissibility of evidence and generally excludes all negotiations genuinely aimed at settlement from being given in evidence. That being said, the rule itself is not limited to negotiations aimed at resolving the legal issues and extends to cover those aimed at avoiding or reducing the scope of litigation. The rule is rooted in public policy: parties should be encouraged to negotiate freely and make concessions in pursuit of settlement without fear that those concessions may subsequently be used against them if negotiations fail.

Does correspondence need to be marked “Without Prejudice”?

12. A common misconception is that the privilege arises simply because the correspondence is marked “WP” however, merely applying the label will not create protection where no dispute exists, or where the correspondence does not form part of a genuine settlement dialogue. Similarly, a communication may be protected, even where it lacks the WP label, if it objectively forms part of a genuine attempt to settle a dispute. The test remains one of substance rather than form (*Dixon Stores Group Ltd v Thames Television Plc*¹⁷).

13. Notwithstanding this, practitioners should exercise care when labelling correspondence. In *Sternberg Reed v Harrison*¹⁸, whilst the Court recognised that settlement negotiations were impliedly but not expressly WP and therefore could not be relied upon in relation to the substantive issues in the case, the Court treated them as WPSATC as opposed to completely WP, and therefore they were capable of being considered on the matter of costs. This decision has attracted criticism however, as a matter of good practice,

¹⁷ [1993] 1 All E.R. 349

¹⁸ [2019] EWHC 2065 (Ch); [2020] Ch 223

practitioners should ensure that the intended status of any settlement communications is clearly stated at the outset.

Exceptions to the Without Prejudice rule

14. The protection of WP privilege is broad but not absolute. The following (non-exhaustive) list outlines the principal exceptions to the WP rule (as set out in *Unilever plc v The Procter & Gamble Co*¹⁹, and since confirmed in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd and others*²⁰):

- i. Whether WP communications have resulted in a concluded settlement agreement. WP communications may be examined to determine whether the parties actually reached a binding settlement and, if so, on what terms.
- ii. As evidence of misrepresentation, fraud, or undue influence. The Court may examine negotiations where a party alleges that a settlement should be set aside due to fraud, misrepresentation, duress or undue influence.
- iii. Where a statement may have given rise to an estoppel.
- iv. As evidence of perjury, blackmail, or other unambiguous impropriety. NB: The threshold for unambiguous impropriety is particularly high, and usual commercial pressure and robust negotiations, without more, are likely to fall short of this.
- v. To explain delay.
- vi. As evidence of the reasonableness of a settlement. In *Muller and another v Linsley and another*²¹, WP negotiations relating to a previous settlement were admissible as they were considered to be relevant to the Claimant's mitigation of loss (as opposed to being used as evidence of admissions). This decision has been subject to serious scrutiny surrounding the practical difficulties of separating out inadmissible aspects negotiations from admissible aspects of negotiations

¹⁹ [2000] 1 WLR 2436

²⁰ [2010] UKSC 44

²¹ [1996] P.N.L.R. 74

- vii. On the questions of costs (where parties have made WPSATC offers).
- viii. Where communications are received in confidence with a view to matrimonial conciliation.

15. A further exception, known as the interpretation exception, also permits WP communications where necessary to assist the Court in interpreting the meaning of a settlement agreement.

Waiver of WP privilege

16. The WP privilege belongs to both parties and therefore WP communications cannot be shown to the Court without the consent of both parties. However, difficulty arises where one party seeks to rely upon part of WP material in support of its case. The Courts have repeatedly emphasised that a party will not be permitted to "cherry-pick" favourable aspects of WP negotiations alongside withholding the remainder of the relevant context, given the practical difficulties with "salami slicing" WP material into admissible and inadmissible parts. However, if one party seeks to gain an advantage by relying on WP material, fairness may require the court to permit the opposing party to refer to related communications forming part of the same negotiating process (*Somatra Ltd v Sinclair Roche & Temperley*²²).

17. Practitioners should therefore exercise caution before referring to settlement negotiations in witness statements, applications or submissions. Equally, it is open to a party to object to the intended reliance on WP material, should they become aware of the other party intending to do so. Consideration should be given to objective at the earliest opportunity and requiring a party seeking to rely on material to justify its admission.

18. Where admissibility is disputed, it is preferable for the issue to be resolved before the judge is exposed to the material. In *AZ v BY*²³, an award was set aside as a result of the adjudicator having seen WP material.

²² [2000] EWCA Civ 229

²³ [2023] EWHC 2388 (TCC)

Unintended acceptance and binding settlements

19. One of the most significant risks during settlement negotiations is the accidental creation of a binding agreement. A settlement agreement is simply a contract. Accordingly, the usual principles of offer, acceptance, consideration and intention to create legal relations apply. Where the parties have agreed all essential terms, the court may conclude that a binding settlement has been reached notwithstanding that one or both parties anticipated that a more formal document would later be prepared. The importance of this is illustrated by *Bieber and others v Teathers Limited (in liquidation)*²⁴, where the Court held that an exchange of emails gave rise to a binding settlement notwithstanding that the parties anticipated the preparation of a more detailed formal agreement. Importantly, the Court was concerned with the objective effect of the communications rather than the parties' uncommunicated intentions.

20. Practitioners should also be wary of “subject to contract”. Whilst commonly used to indicate that no binding contract has been entered into, the case law suggests that a mixed approach has been taken as to whether the “subject to contract” restriction acts as a complete shield to a binding agreement being entered into (*Jirehouse Capital and others v Beller and another*²⁵ - where the restriction of “subject to contract” was lifted with reference to the parties’ conduct, compared to *Joanne Properties Ltd v Moneything Capital Ltd and another*²⁶ - where the Court found there could be no binding contract agreement until a formal contract was made). Clearly consistency in wording and conduct throughout negotiations remains critical.

Practical points

21. Settlement opportunities should be considered from the outset of every dispute and revisited throughout proceedings. In many conventional civil disputes, Part 36 remains the most effective settlement mechanism because of the certainty of the associated costs consequences. However, where a more bespoke solution is required, consideration should be given to a Calderbank offer.

²⁴ [2014] EWHC 4205 (Ch)

²⁵ [2009] EWHC 2538 (Ch)

²⁶ [2020] EWCA Civ 1541

22. Careful attention should also be paid to labelling correspondence correctly; the absence of the “WP” label may give rise to unnecessary arguments regarding admissibility. Conversely, applying the label to correspondence which simply advances a party's case, without any genuine attempt to compromise the dispute, will not necessarily attract protection.
23. Particular care should be exercised when negotiations are taking place by email. Practitioners should consider expressly stating whether communications are open, WP, WPSATC, or subject to contract. Ambiguity in this area frequently generates costly satellite disputes.
24. Finally, where settlement has been reached, practitioners should ensure that the agreement is properly documented. Consideration should be given to:
- i. Whether the agreement should be embodied in a consent order or Tomlin order.
 - ii. How costs are to be dealt with.
 - iii. Whether confidentiality provisions are required.
 - iv. The timing and method of payment.
 - v. Whether there are any continuing obligations on either party.
25. A carefully documented settlement will usually avoid the need for further litigation concerning the interpretation or enforceability of the settlement itself.

ABIGAIL COLLIER

Appeals: An Introductory Guide for Junior Commercial Practitioners

What is an appeal?

An appeal is the process by which a litigant in a lower court invites a higher court to set aside or vary an order, or part of an order, made by the lower court.

What can be appealed?

The function of an appeal court is to deal with judgments or final decisions. As such an appeal cannot be made just against the findings or reasons given in the judgment: the appeal must be brought against the overall outcome (White Book 2026, Vol 1 at 52.0.4).

Subject to that principle, an appeal can be brought against almost any order made by the County Court or High Court.

However, whilst it is possible to appeal a case management decision, para 4.6 of CPR PD 52A discourages such appeals to be brought unless “the issue is of sufficient significance to justify the costs of an appeal”, “the procedural consequences of an appeal (e.g. loss of trial date) outweigh the significance of the case management decision”, and/or the issue is not “more convenient to determine ... at or after trial”.

On what grounds can an appeal be brought?

The appeal court will only allow an appeal where the lower court’s decision is “wrong” or “unjust because of a serious procedural or other irregularity in the proceedings in the lower court” (CPR 52.21(3)).

The first limb of CPR 52.21(3) – that the decision is “wrong” – is deceptively simple. Whilst, for example, it can be straightforward to appeal an error of law, it is much more difficult to appeal a finding of fact or an exercise of judicial discretion. Further guidance is set out in Volume 1 of the White Book 2026 at 52.21.5.

Unless the appeal court orders otherwise, it will not hear oral evidence or any evidence which was not before the lower court (CPR 52.21(2)). If a party wishes to introduce new evidence on appeal, the court will only introduce that evidence if it satisfies the stringent criteria set out in *Ladd v Marshall* [1954] 1 W.L.R. 1489. Those are:

1. It could not have been obtained with reasonable diligence for use at the trial;
2. It must have an important, though not necessarily decisive, influence on the result of the case; and
3. It must be credible on its face.

Do you need permission to appeal?

Litigants almost always require permission to appeal from a decision of a judge in the County Court or High Court. Limited exceptions are set out in CPR 52.3. One of the main exceptions is against an order for committal for contempt of court (CPR 52.3(1)(a)(i)).

Permission to appeal must be obtained from either the lower court or the appeal court (although if the lower court refuses permission, the appellant still has the right to seek permission from the appeal court – CPR 52.3(3)).

Permission to appeal will only be granted where there is a “real prospect of success”, or there is “some other compelling reason” for the appeal to be heard (CPR 52.6). For second appeals, the test is much stricter: as well as having a real prospect of success, the appeal must also raise “an important point of principle or practice” or there must be “some other compelling reason for the Court of Appeal to hear it” (CPR 52.7).

What is the process for an appeal?

A broad timeline for an appeal is generally as follows:

Event	Deadline	Rule
<i>(Optionally)</i> The appellant asks permission to appeal from the lower court at the hearing where the decision was made or any adjournment of that hearing.	Date of the hearing	CPR 52.3(2)(a)
<i>(If permission is refused, or permission is not sought from the lower court)</i> The appellant seeks permission to appeal from the appeal court by filing an Appellant's Notice and Grounds of Appeal.	21 days from the decision of the lower court	CPR 52.12(2)(b)
The Appellant files a skeleton argument.	14 days after filing the Appellant's Notice	No formal rule, but section 7 of the Appellant's Notice advises appellants to file a skeleton argument within this time
The Appellant files an appeal bundle. In particular the appeal bundle <u>must</u> contain a transcript of the judgment of the lower court or other record of reasons, <u>except</u> appeals from cases allocated to the small claims track.	35 days after the Appellant's Notice is filed (for appeals in the County Court and High Court)	Paras 6.3 and 6.4, CPR PD 52B
The lower court or the appeal court grants permission to appeal and specifies the grounds of appeal on which permission is granted.		
<i>(Optionally)</i> The Respondent files a Respondent's Notice. A Respondent's Notice must be filed where a Respondent wants to cross-appeal the lower court's decision or uphold it on different or additional grounds. A Respondent who simply wants the decision to be upheld for the reasons already given does not need to file a Respondent's Notice.	14 days after permission to appeal is given	CPR 52.13
The Respondent files and serves its skeleton argument, if appropriate.	No formal deadline – dependent on court's directions	No formal rule – dependent on court's directions
The appeal is heard.		

Note that if permission to appeal is refused on paper by the appeal court, the appellant has the right to request the court to reconsider that decision at an oral hearing within 7 days, unless the appeal is certified to be totally without merit (CPR 52.4(2)). This is effectively the “last chance saloon” for the appellant. No further appeal can be made against a decision refusing permission to appeal once that has been refused by the lower court and appeal court (see s.54 Access to Justice Act 1999 and White Book 2026, Vol 1 at 52.3.9).

Where does an appeal need to be made?

For some of the most common scenarios, for proceedings other than family or insolvency proceedings:

- An appeal from a District Judge in the County Court lies to a Circuit Judge in the County Court.
- An appeal from a Circuit Judge in the County Court lies to a High Court Judge.
- An appeal from a District Judge, Master or Registrar in the High Court lies to a High Court Judge.
- An appeal from a High Court Judge lies to the Court of Appeal.

(see Table 1, para 3.5 of CPR PD 52A.)

Note that for appeals within the County Court, some County Courts do not have an appeals centre and therefore an appeal from a District Judge in one County Court must sometimes be made to a different County Court. Be sure to check the table of appeal destinations in Table A in CPR PD 52B to confirm the correct location.

For appeals in insolvency proceedings, refer to Part 4 of the Practice Direction on Insolvency Proceedings for further information.

How long does an appeal take?

Practitioners should note that appeals have strict time limits, and critically, these cannot be varied by agreement between the parties (CPR 52.15(2)). Any application to vary any time limit in CPR 52 or its practice directions must be made to the court.

This does not mean, however, that appeals are a quick process. It may well take several months before an appeal court grants or refuses permission to appeal (let alone list an oral hearing if permission is refused). A substantive appeal hearing may then take several further months to be listed.

One of the most common difficulties appellants face is obtaining a transcript within the 35-day time limit for filing an appeal bundle. The appeal court may be sympathetic to granting extensions of time for obtaining the transcript, but ideally, a transcript should be applied for as soon as the appellant decides it intends to apply for permission to appeal.

What is the difference between an appeal and an application to set aside a previous order?

In addition to appeals, there are various ways in which a party may apply to have an order set aside, revoked or varied. These include (but are not limited to):

- The court has a power to vary or revoke a previous order under its general case management powers (CPR 3.1(7));
- Where a party does not attend trial, and judgment is given or an order is made against them, that party can apply to set aside that judgment or order (CPR 39.3(3)).

Whilst the scope of CPR 3.1(7) seems broad, there is extensive authority which strongly suggests that CPR 3.1(7) cannot be used to circumvent an appeal and should not be used to discharge a sealed final order (see White Book 2026, Vol 1 at 3.1.17.1). CPR 3.1(7) might be more suitably used where, for example, there is a material change of circumstances, or where a matter which

ought to have been dealt with at an earlier hearing was mistakenly overlooked by the parties and by the court (White Book 2026, Vol 1 at 3.1.17.2).

Generally, where a party is entitled to apply to set aside an order under CPR 39.3 after failing to attend a hearing, it should make an application under that rule rather than appeal (White Book 2026, Vol 1 at 52.0.5).

Practical tips and points to consider

- Take extra care in drafting the grounds of appeal. The appeal court will not entertain any appeal against any aspect of the decision that is not in the grounds of appeal and for which permission to appeal is not given. Once filed, the grounds of appeal may only be amended with the permission of the appeal court.
- Appeal deadlines cannot be extended by agreement, so make sure they are adhered to. If there is a risk of a deadline being missed, make an application to the court for an extension of time as soon as possible, and obtain the consent of the other party if at all possible (although the court must still ultimately approve any extension).
- Appeals are often an expensive and lengthy process, even against the most straightforward decisions. Carefully consider whether the costs of an appeal justify one, especially where the prospects are uncertain. Respondents, however, typically do not need to respond to any prospective appeal unless and until the appellant obtains permission to appeal.
- The normal rule is that an appeal does not operate as a stay of execution of the lower court's order (CPR 52.16). As such any appellant who wants to stay the lower court's order needs to separately apply for a stay (a pro forma application is contained within the Appellant's Notice).

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