CASE MANAGEMENT AND PROCEDURE

Tips and traps for the unwary

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INTRODUCTION

1. Rarely is the opportunity given as this talk provides – to have a good old fashioned whinge! I have been asked to provide a gentle guide to the procedural mistakes that are too often seen and which can, depending upon the composition of the bench, incite a less than welcome judicial response!

2. The paper covers the following broad areas:

   2.1. Pre-action disclosure;

   2.2. Witness statements;

   2.3. Authenticity of documents;

   2.4. Expert evidence;

   2.5. Jurisdiction;

   2.6. Part 18 requests; and

   2.7. Miscellaneous gripes!

PRE-ACTION DISCLOSURE

3. Chronologically this is the first evidence that will be obtained other than that from your client. Compliance with the pre-action protocols ought to have meant that such disclosure would follow as a matter of course. However this often will not occur requiring an application to be made to the court.

4. The requirement for such an order are set out in CPR rule 31.16(3):

   4.1. Both the applicant and the respondent are likely to be parties to subsequent proceedings;

   4.2. The documents sought would form part of standard disclosure; and

   4.3. Pre-action disclosure is desirable in order to fairly dispose of the anticipated proceedings, assist the dispute to be resolved without proceedings, or save costs.

5. Such applications are commonplace. However, a large number of errors are made in making them:

   5.1. Only **documents** can be sought:

      5.1.1. A "document" is defined in CPR rule 31.4 as meaning anything in which information of any description is recorded.

      5.1.2. It is the document that must be sought – not the information.

      5.1.3. Far too often a PAD application will be made, for example, to disclose the name of an insured driver in an RTA claim. There is no power under CPR rule 31.16 to order such disclosure.

      5.1.4. CPR rule 31.18 preserved common law powers to order disclosure pre-action. In the above example, a *Norwich Pharmacal*[1] application can be made which permits the court to order a respondent to disclose the identity of a wrongdoer where that respondent has been innocently caught up in the wrongdoing of another so that are more than a mere witness.

   5.2. The **correct respondent** must be identified:

[1] *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133

5.2.1. This is obviously required by CPR rule 13.16(3);

5.2.2. In the case of companies – the correct legal entity must be identified;

5.2.3. This can be difficult in a case where there has been no response from the proposed defendant. However, simply putting, for example, "Smith's Newsagents" is inevitably going to fail – no such entity can exist.

5.3. Thought needs to be put into the **list of documents** sought:

5.3.1. Far too often, generic copy and paste lists are used which have not been tailored to the case;

5.3.2. This is of particular relevance to costs – the general rule is that the applicant pays the respondent's costs (CPR rule 46.1). If the respondent acted reasonably in opposing a section of the application it becomes unlikely that the general rule will be disapplied.

5.4. Finally, when can an application be made? The rules are clear that such an order can only be made **pre-action**. Therefore an order cannot be made:

5.4.1. If proceedings have been issued since the application was made; or

5.4.2. Where proceedings have been issued but not yet served.

6. **NB: a WARNING for those issuing PADs in Manchester:** the court order listing the PAD hearing is very clear – the hearing is listed for 5 minutes. Unless the matter is agreed or unlikely to be disputed, the parties must write to the court to request a longer listing. This is rigorously enforced!

WITNESS STATEMENTS

7. Witness statements form the heart and soul of most claims. Their importance cannot be understated, and the need for their contents to be a proper reflection of the case not be overlooked. Yet despite this, common mistakes are still made.

8. The most common of which remain:

8.1. The **accuracy of the statements**. Statements need to be rigorously checked for accuracy, not only internally, but cross-checked with the disclosure documents, pleadings and any pre-action documentation (e.g. letter of claim or CNF).

8.1.1. It must be impressed on the client that they set aside the proper time to consider the statement and ensure it is accurate. They must be told to ask if there is anything they do not understand or want to change. It is NOT sufficient that the statement broadly reflects the nature of the case.

8.1.2. Whilst a number of judges will simply groan and accept the response from a witness that they didn't draft it, it was their solicitor, or that they didn't consider that a given issue was relevant, there are many more who will not.

8.1.3. When checking the accuracy of statements, it is necessary to stand back and see whether all relevant matters are covered – not just those in the client's own case, but also any matters raised in the opposing pleadings that need an answer.

8.2. **Statements of truth** – unlike pleadings, a witness statement can only be signed by the maker of the statement. Although reassuringly rare, it is still not unknown to see a witness statement signed by a solicitor on behalf of a client.

8.3. Where a witness is unable to read or sign a statement, they will need assistance to do so. This may be due to a language barrier, or an inability to read or write. The situation is often resolved by the use of an **interpreter**. However, PD22 is clear as to the requirements – the statement of truth must be certified by an **authorised person** – being a person who is able to administer oaths and take affidavits. This can be the party's solicitor. However, it does not permit a family friend or similar to endorse the statement, not an interpreter who is not an authorised person.

9. Finally, in this topic, is the issue of **hearsay**, which is often mentioned but nearly as often misunderstood. The rules relating to hearsay evidence are neatly contained within CPR Part 33. In summary:

9.1. If hearsay is contained within a witness statement from a witness who will be giving oral evidence at trial, the requirements of the Civil Evidence Act 1995 are already met when the statement is served (CPR r33.2(1)(a)).

9.2. If hearsay is contained in a witness statement but that witness is not being called at trial, the party seeking to so rely on it must:

9.2.1. Serve the witness statement in accordance with the order (CPR r33.2(1)(b)); and

9.2.2. When serving the statement inform the other parties that the witness will not be called and give reasons why they will not be called (CPR r33.2(2)).

9.3. In all other cases the party must serve a notice under section 2 of the Act:

9.3.1. Identifying the hearsay, state that the party serving the notice wishes to rely on the hearsay, and give reasons why the witness will not be called (CPR 33.2(3)); and

9.3.2. Must serve the notice (and any document containing the hearsay) no later than the latest date for filing witness statements (CPR 33.2(4).

9.4. Be aware that the requirements of section 2 of the Act do not apply to hearings other than trials.

9.5. Where a party follows the steps above, another party may apply under CPR 33.4 for an order that the witness attends trial for cross-examination, but such an application must be made within 14 days of the notice being served.

AUTHENTICITY OF A DOCUMENT

10. It is common for documents to be disclosed and relied upon at trial. In the vast majority of cases there is no issue to be taken with the assertion that the purported document is genuine.

11. However, there are a number of instances where the authenticity of a document may be challenged whether in whole only in part. It is important to remember that challenging the authenticity of a document is not limited to cases where it is said the document has entirely been invented:

    11.1. A photograph bearing a digital date and time stamp – a party may not challenge the content of the picture itself, but may wish to challenge the date and time shown.

    11.2. Correspondence said to have been sent to a party – another party may contend not only that they did not receive the document, but that the same was not created at the suggested time.

    11.3. Inspection/cleaning records – again a part may wish to challenge when these were created.

12. A very import rule is often overlooked in these scenarios – CPR rule 31.19:

    (1) A party shall be deemed to admit the authenticity of a document disclosed to him under Part 31 (disclosure and inspection of documents) unless he serves notice that he wishes the document to be proved at trial.

    (2) A notice to prove a document must be served –

        (a) by the latest date for serving witness statements; or

        (b) within 7 days of disclosure of the document, whichever is later.

13. As this is so often overlooked, it can catch an unprepared party by surprise at trial – and the odd judge!

EXPERT EVIDENCE

14. The rules and case law surrounding expert evidence alone would merit an entire seminar. A few brief points are worth noting however:

14.1. Only an expert can give opinion evidence. This is of great importance when it comes to so-called "**engineers' reports**" giving details of car damage. So far as they contain facts (such as which parts were damaged and needed replacing) they are documentary evidence. Where they attempt to give evidence as to the consistency of damage with a version of events for example, this is opinion evidence. The effect is clear – if the former, all opinion evidence must be disregarded. If the latter, permission must be obtained from the court.

14.2. **CPR rule 35.4(2)** is all too often overlooked. Whenever a party seeks permission, they must provide an **estimate of the costs** of the expert evidence. This is a mandatory requirement and many judges will simply refuse to consider any such request without costings.

14.3. **Part 35 questions -** CPR rule 35.6 governs the putting of written questions to an expert. The requirements of the rule are honoured more often in the breach than the observance. Unless the court gives permission otherwise, questions:

14.3.1. may only be asked once;

14.3.2. can only be put within 28 days of serve of the report; and

14.3.3. most crucially: "must be for the purpose only of clarification of the report".

14.3.4. Questions cannot be cross-examination of the expert in writing (as to which see the guidance on Part 18 questions below).

15. In addition to the above guidance, two further points must be borne in mind:

15.1. **CPR PD16 para 4.3** requires that a medical report, if medical evidence is to be relied upon, to be served with the Particulars of Claim. If this is not possible, an application should be made for

permission to serve without a medical report clearly explaining the reasons for the exceptional course being taken.

15.2. It is imperative that client's check the **accuracy** of any medical reports. The low value PI PAPs both state that a claimant is not able to challenge the factual accuracy of a medical report after it has been served on a defendant.

JURISDICTION

16. Establishing whether the court has jurisdiction to hear a case is a topic far too wide-ranging to be covered within this talk. However, one instance of a challenge to the court's jurisdiction is more common than others (save for those practitioners who deal with private international law).

17. Any challenge to the court's "power or authority to try a claim" is a challenge to the court's jurisdiction. This includes challenges relating to the proper service/commencement of proceedings.

18. The leading authority remains that of *Hoddinott*[2]. Just prior to the expiry of limitation, the claimants issued a claim. Again, just prior to the 4 month service period expiring, they applied to extend the time for service. This was granted ex parte.

19. The defendants applied to set aside the order extending time for service. Before this application was heard, the claimants served the proceedings. The defendants filed an acknowledgment of service in which they indicated that they wished to defend the proceedings, but did not indicate that they challenged the court's jurisdiction.

20. CPR Part 11 governs jurisdictional challenges. A defendant who wishes to challenge the jurisdiction of the court must:

    20.1. File an acknowledgement of service; and

    20.2. Within 10 days of the AoS, must file an application challenging the jurisdiction of the court.

    20.3. If it fails to file such an application, the defendant "*is to be treated as having accepted that the court has jurisdiction to try the claim*".

21. In *Hoddinott*, the Court of Appeal held that the rule was mandatory. As such, notwithstanding the defendant's extant application, they had submitted to the jurisdiction of the court.

[2] *Hoddinott & others v Persimmon Homes (Wessex) Limited* [2007] EWCA Civ 1203

PART 18 REQUESTS

22. Part 18 requests are frequently seen in PI proceedings – most commonly in cases involving suggested fraud or and LVI defence. They are a much used tool designed to narrow the issues between the parties. If the system is properly followed, the court need have no involvement in the process.

23. It is expected that a party will serve requests in writing on the opposing party, with a reasonable timescale stated in which a reply is expected. The opposing party can then respond to the request as it seems appropriate. It is when the requesting party is unsatisfied with the replies (if any) provided than an application can be made to the court under CPR rule 18.1.

24. Those parties, both the party asking and the party answering, must be aware of what amounts to an appropriate Part 18 request. I find it useful to recall that such requests were formerly known as 'further and better particulars'. However, the scope of Part 18 is wider than the pre-CPR power.

25. Rule 18.1 allows the court to order a party to either clarify any matter which is in dispute in the proceedings, or give additional information in relation to any such matter.

26. Further guidance is provided in the Practice Direction. Paragraph 1.2 states that a request should be "*concise and strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his own case or to understand the case he has to meet*".

27. A Part 18 request is NOT:

    27.1. A substitute for cross-examination before trial; or

    27.2. An attempt to obtain the key parts of the opposing party's witness evidence in advance of disclosure.

28. The following provide examples of Part 18 requests:

    28.1. In a claim in which the claimant contend a contract was formed between the parties (denied by the defendant), the defendant asks whether the claimant states this was an oral or written contract, when and where it was concluded, and the terms expressed. This would seem a wholly **appropriate** request – particularly given that

the claimant ought to have set those matters out in their pleaded case.

28.2. In an RTA PI claim, a defendant raises an LVI defence. The defendant serves lengthy and detailed Part 18 requests asking (what would your view be of these?):

28.2.1. When did the claimant first became aware of the defendant?

28.2.2. What speed does the claimant say the defendant was travelling?

28.2.3. What speed does the claimant say the defendant was travelling at when they made contact with the claimant's vehicle?

28.2.4. How was the claimant moved within the vehicle, if at all?

28.2.5. Did the claimant seek medical treatment after the accident? If so, when and where?

29. Finally, unlike in a PAD application, a Part 18 request seeks **information** not documentation. If the applying party seeks documentation, their application is not a Part 18 request, it is a specific disclosure application under CPR rule 31.12.

MISCELLANEOUS GRIPES

30. Given the topic, I could not resist putting the request out to colleagues about their own procedural gripes, or key ways to raise the judge's temper. Without naming the various contributors, the most common responses were as follows:

30.1. Only providing the court with one **trial bundle** – entirely forgetting about the poor witnesses (and the barristers who have to beg and plead with court staff to copy the bundle without levying charges requiring a second mortgage).

30.2. Failing to amend **statements of value** when serving schedules of loss which vastly exceed the upper limit. This was always frustrating, but it now comes with added danger following the decision in *Lewis v Ward Hadaway* [2015] EWHC 2503 (Ch) that deliberately restricted statements of value may amount to an abuse of process.

30.3. Trial bundles which include **black and white and/or poorly reproduced images**. Most court orders will now specifically direct that any images or photographs must be of good quality and in colour.

30.4. Overly large trial bundles, running to several lever arch files, with **medical records** or similar documents, when neither party intends to refer to any more than a handful or these pages.

30.5. **Costs schedules** either being served late or not at all prior to trial. The rules are clear – for trials it should be 2 clear days, and for other hearings not less than 24 hours.

30.6. **And one anonymous contributor** who indicated that he managed to annoy most judges simply by turning up!

HAVE I GOT ANY EVIDENCE?

31. To finish this talk I will highlight this seemingly obvious question. However, in the context of applications (which will be the subject of a later talk) it is crucial. Consider the following horror story:

    31.1. Judgment in default of a defence is entered.

    31.2. A perfectly prompt application is made to set aside the judgment. In reality, the defendant has a real prospect of defending the claim.

    31.3. The application notice contains the following information in the relevant box:

        31.3.1. We have made the application promptly.

        31.3.2. The defendant has a real prospect of success.

        31.3.3. A draft defence is attached.

    31.4. The statement of truth at the bottom of the box is duly signed.

    31.5. Attached is an unsigned defence setting out a full defence to the claim.

32. Should the application succeed?

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