Complex Commercial Litigation

Contributing editors
Simon Bushell and Daniel Spendlove

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GETTING THE DEAL THROUGH

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Contributing editors

Simon Bushell and Daniel Spendlove

Signature Litigation LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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England and Wales

Simon Bushell, Daniel Spendlove and Matt Peacock
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Background

1 How common is commercial litigation as a method of resolving high-value, complex disputes?

Commercial litigation remains the preferred method for parties wishing to resolve high-value, complex disputes in England and Wales. Parties are attracted to a system that is one of the most reliable, predictable, trusted and efficient in the world. The English judiciary retains an almost unrivalled global status for quality and independence.

2 Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

The English litigation market is vibrant and a key contributor to the wider economy. According to recent research, two-thirds of all cases before the Commercial Court in London involve international parties. The system is adept at handling such disputes and is considered transparent and neutral when doing so.

While London is unquestionably the country's legal capital, a number of regional legal centres are emerging (for example, Bristol and Manchester) to take advantage of the lower costs associated with operating outside of London. However, disputes in the regional courts are usually lower value and typically involve domestic parties.

3 What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

English law is based on common-law principles. However, if Parliament has enacted a statute in a particular area, then the judges are bound to follow that statute as long as it provides a complete answer to the legal question posed.

English common law has developed over hundreds of years. In most commercial disputes there are a number of specific issues in dispute and likely a precedent that applies to each issue. The precedent does not have to be identical to the facts, but the key principle (or 'ratio') of the precedent can be applied by the court to determine the outcome, unless there is a distinguishing feature about the relevant case that persuades the judge to disapply or modify the principle.

While an exact answer to any complex case may not always be found, it is generally possible to narrow down and predict the relevant principles and how they will be applied, or at least anticipate the 'balancing act' that the judge will need to undertake for the application of the relevant principles to the particular facts. As a result, most cases are determined fairly, efficiently and predictably.

The rules of civil procedure are codified in the Civil Procedure Rules (CPR). This is split into Rules, Practice Directions and commentary. The courts rely on common-law precedent when interpreting and applying the CPR in particular cases.

Bringing a claim – initial considerations

4 What key issues should a party consider before bringing a claim?

First, can the claim be brought in time? As a general rule, the claimant has six years from the date of breach (in contract cases) or the date the loss was suffered (in tort cases) to commence proceedings. However, this assumes that English law is the applicable substantive law of the issues in dispute. If another substantive law applies then the limitation period of that law will apply instead.

Second, what are the merits of the claim? For example, does the case turn on disputed or poor-quality evidence? Is it based on an area of law that is unclear?

Third, if a judgment is obtained, what are the prospects of it being paid, and will enforcement proceedings be necessary? What are the prospects of enforcement proceedings being successful, and how long could they take? Could interim steps be taken at the outset to maximise the prospects of recovery?

Fourth, will any publicity of, or disclosure in the proceedings harm the claimant's commercial interests? (If so, would a private process such as arbitration be more suitable?)

Fifth, how is the prosecution of the claim going to be funded?

5 How is jurisdiction established?

The essence of jurisdiction is the valid service of a claim that has been issued by the English courts. Claim forms are issued either for service inside the jurisdiction or outside the jurisdiction. The first step is to identify whether there is any binding choice of jurisdiction in favour of the English courts, which will invariably be upheld even if the parties or the subject matter of the dispute have no connection at all with England.

If there is no binding choice of jurisdiction in favour of the English courts, the domicile of the defendant must be considered. Under the Recast Brussels Regulation (EU) No. 1215/2012, 'domicile' means resident in the jurisdiction, provided that the nature and circumstances of their residence indicate a substantial connection with England.

If the defendant is domiciled in the EU, the general rule is that it must be sued in the court of the EU country in which it is domiciled. However, there are various exceptions to this rule. For example, in contract cases where the contractual obligation was to be performed in England, and in tort cases where the harmful act occured in England, a defendant domiciled in another EU country may be sued in England. If there are multiple defendants domiciled in different EU countries, the English court will usually have jurisdiction in relation to all of the claims should one defendant be domiciled in England and the other cases be closely connected that it would be expedient to hear them together to avoid the risk of irreconcilable judgments.

If the defendant is domiciled outside the EU, in the absence of personal service (for example, where the defendant or its agent is temporarily present on a visit), the claimant will need to obtain permission from an English court to serve the proceedings outside the jurisdiction. The claimant will, at this point, need to demonstrate:

- that there is a serious issue to be tried;
- that there is a good arguable case that one of the so-called 'jurisdictional gateways' applies;
- that England is the most appropriate forum for the case; and
- that the court should exercise its discretion to permit service out of the jurisdiction.

Under new rules, if a party starts proceedings in an EU country in breach of an exclusive jurisdiction clause, that court must stay the proceedings until the court in the country in which the proceedings ought

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to have been launched has ruled that it has jurisdiction in favour of the other country. This is to guard against the colloquially known 'Italian torpedo', where under the old rules, even if the proceedings ought to have been brought in a certain country pursuant to an exclusive jurisdiction clause, a defendant who wished to create delay and disruption would launch proceedings in a country whose courts may be more favourable to its strategic aims. All other courts would then stay any parallel proceedings that might have been launched until the court of the country first seised ruled on its own jurisdiction.

If a party starts proceedings outside the EU in favour of England, the other party should consider applying to the English Court for an anti-suit injunction. A breach of such an injunction is a contempt of court that is potentially punishable by imprisonment, and is a ground to resist the enforcement of a foreign judgment in England. To obtain an anti-suit injunction, the applicant must demonstrate that the foreign proceedings are or would amount to a breach of an exclusive jurisdiction clause, or that the foreign proceedings are vexatious and oppressive and England is the natural forum for the dispute.

6 Res judicata: is preclusion applicable, and if so, how?

Res judicata will usually prevent a party from relitigating a case where a prior judgment has determined a particular issue or issues. The principle applies to English judgments as well as foreign judgments, provided the judgment has been given by a court of competent jurisdiction and is final and conclusive on the merits.

Where res judicata applies, a party can apply to the English court to strike out the new proceedings for abuse of process. This will usually happen at a very early stage in the proceedings.

7 In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

English courts regularly determine disputes that are governed by foreign law. In these circumstances, the issues of foreign law are usually presented as expert evidence. If there is any difference of opinion between the experts as to the foreign law in question, the court will then make a determination on which expert's interpretation is preferred.

There are situations where the application of foreign law can be of tactical advantage to one of the parties. For example, the foreign law in question may entitle the claimant to a cause of action that is not available under English law; or, the foreign law in question may entitle the claimant to a higher award of damages than would have been available under English law. Conversely, foreign law can also provide a definitive answer to a claim (eg, a shorter limitation period thereby time-barring the claim, or a substantive law that does not recognise an oral contract).

8 What initial steps should a claimant consider to ensure that any eventual judgment is satisfied? Can a defendant take steps to make themselves 'judgment proof'?

A claimant should seek to establish whether the defendant's assets are sufficient to meet any eventual judgment, and where those assets are located. If they are located in the EU, then an English judgment will automatically be recognised and enforced there and the process should be relatively straightforward. If they are located outside the EU, then the question of recognition and enforcement will be determined by whether there is a bilateral treaty in place between England and the country in question, and the local laws of the jurisdiction in question. In practice, this tends to make recognition and enforcement a more burdensome and time-consuming exercise.

Although there is nothing in principle that prevents a defendant from taking steps to 'restructure' before a judgment is issued (eg, by dissipating or transferring assets), in practice, defendants who reorganise their affairs in anticipation of a judgment are liable to have such transactions scrutinised by the other parties, judgment creditors or the court. Furthermore, if a corporate defendant takes deliberate steps to dissipate assets to avoid a judgment debt, one or more of the company's directors may face personal civil liability.

If a party apprehends that its opponent is taking these steps to proactively reorganise their affairs with the intention of avoiding a future judgment, it should consider obtaining a freezing injunction (see question 9).

9 When is it appropriate for a claimant to consider obtaining an order freezing a defendant's assets? What are the preconditions and other considerations?

A freezing injunction is an interim order that prevents a defendant from hiding, moving or otherwise unjustifiably dissipating its assets so as to render itself judgment-proof. It is typically sought by a claimant to preserve the defendant's assets until any judgment can be obtained or satisfied. While usually sought at the outset of proceedings, a freezing injunction can be sought at any stage, including after the judgment has been given. The English court has the power to grant a freezing injunction both in respect of assets in England and Wales (domestic freezing injunctions) or worldwide (worldwide freezing injunctions).

The ambit of the order can include various types of assets, including intangible assets, as long as they are capable of being enforced against. Examples include bank accounts, shares, goodwill, physical property and land. If the applicant is successful, the court's order may require the respondent to provide an affidavit setting out the details of their assets. Where the claimant has a proprietary interest in respect of an asset or its proceeds (ie, it asserts that they are, or represent, its own property that has been wrongfully taken), it may seek a proprietary injunction over the specific assets.

The applicant must demonstrate that it has an underlying cause of action, the existence of assets within the jurisdiction (or outside the jurisdiction if those are insufficient to meet the claim) and a real risk that the assets could be dissipated. Freezing injunctions are an equitable remedy so the court will have regard to equitable principles in coming to its decision. Typically, a successful applicant will need to provide a cross-undertaking in damages. Once it becomes apparent that a freezing injunction may need to be sought it is important to not delay in applying for the same, as this will weaken the argument that there is a real risk of dissipation of assets.

In addition to supporting English proceedings, the English courts also have the power to grant freezing injunctions in support of arbitral proceedings as well as in support of substantive proceedings brought in a foreign jurisdiction pursuant to section 25 of the Civil Jurisdiction and Judgments Act 1982 (as extended by the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/302)). This can provide the applicant with a remedy against a respondent resident or with assets in England, even when that remedy may not be available in the jurisdiction in which the main proceedings are being heard (so long as it does not result in an inconsistency with the local law or the judgments of the two courts).

10 Are there requirements for pre-action conduct and what are the consequences of non-compliance?

The CPR contain several pre-action protocols that set out what is expected of parties before commencing litigation. The CPR encourage, in strong terms, parties to comply with the pre-action protocol relevant to their type of claim. They provide a general pre-action protocol for situations where the specific protocols do not apply. The protocols require parties to set out the factual and legal basis for their claim, and the loss suffered, in a so-called letter of claim. The prospective defendant then has a period of time to set out its case in response. This exchange of letters is private between the parties at this stage. The purpose of the exchange is to allow parties to exchange information before litigation commences, in the hope that litigation can be avoided. It is not unusual for cases to be settled at this stage.

The main consequences for non-compliance are potential adverse costs awards and the proceedings being stayed (postponed) until the parties follow the pre-action protocol. Compliance with a pre-action protocol is not required where pre-action correspondence would defeat the purpose of the proceedings (eg, obtaining a search order).

11 What other forms of interim relief can be sought?

English courts can grant a wide range of interim relief, including security for costs, pre-action disclosure, specific disclosure, third-party disclosure, and payments into court. Interim injunctions include asset-freezing injunctions (see question 9), search orders (to obtain and preserve evidence), prohibitory injunctions (preventing a party from taking certain action), and mandatory injunctions (forcing a party to take action).

In urgent cases, interim relief can be obtained quickly and, when appropriate, without initial notice to the other party.

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12 Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?

The court expects parties to have considered ADR ahead of litigation. If the parties cannot demonstrate this, the court can order a stay for an attempt at ADR to be made. If an invitation to ADR is ignored or unreasonably refused by one party, case law has confirmed that that party can be subject to potentially severe costs sanctions.

13 Are there different considerations for claims against natural persons as opposed to corporations?

Under English law, a corporate is a separate legal person. Litigation is conducted on behalf of the corporate by its directors, who must respect their fiduciary duties towards the corporate.

When a corporate defendant falls insolvent, many claimants look to pierce the 'corporate veil' to pursue the company's directors personally for a judgment debt. However, this is very difficult unless there is obvious fraud or transactions that were clearly carried out at an undervalue. It may be that the directors benefit from directors and officers insurance, which would usually cover civil liability (assuming no fraudulent conduct took place).

Another consideration is that it is generally easier to obtain information about corporates in the public domain than it is to find information about natural persons.

14 Are any of the considerations different for class actions, multiparty or group litigations?

In practice, the same considerations apply. However, in group litigation and class actions there are a number of additional practical considerations. It usually takes longer to prepare and bring the claim and it is therefore even more important that limitation periods are considered at the outset. For example, it can be time consuming to identify (and bring into the proceedings) all relevant claimants. A defendant may challenge whether there is sufficient common interest between all the claimants.

In relation to a class action that is subject to a group litigation order, that order will usually contain directions about the establishment of the group register (the list of relevant claimants), as well as directions as to a 'lead solicitor' role, whose obligations will be to manage and keep up to date the group register as well as other common aspects of the litigation, including filing documents at court on behalf of all claimants with respect to the common issues. The order will identify and define the common issues between the various claimants that are to be tried in the group litigation. The order may also contain directions with respect to the publishing of the group litigation, deadlines for claimants to join the group, whether there should be any 'test claimants', the shared liability of claimants with respect to adverse costs (and any other arrangements between them) and directions as to the appointment of a managing judge.

Given that there can be different categories of claimants with varying interests, identifying and defining the common issues that are to be the subject of group action can take time and have a significant impact on the structure of the litigation and costs. Claimants may wish to consider whether there are any preliminary issues that could be addressed by the court, which would provide a (relatively less costly) basis on which the group action can proceed. The funding structure can also take time to develop in circumstances where it often takes time to build a group of claimants, from whose proceeds the funders' return will be paid, as well as obtaining a rounded view of the merits (on which the funders will generally rely). Focusing on a preliminary issue, or something similar, may assist in this respect.

The increasingly more common use of group actions is likely to result in the basic structure provided for in the Civil Procedure Rules being reformed in the near future. There may, therefore, be further considerations for group litigation after these reforms.

15 What restrictions are there on third parties funding the costs of the litigation or agreeing to pay adverse costs?

Historically, the principles of champerty and maintenance have restricted the involvement of third-party funding in litigation for fear of creating a market in litigation. While there has been some relaxation of those principles, there are a number of important considerations to keep in mind to avoid potential pitfalls.

Probably the most important consideration is to ensure that the funder does not control the litigation. While the funder can be kept up to date and even involved in certain decision-making, care must be taken to ensure that this does not amount to the taking of or influencing such decisions. Solicitors who conduct litigation must take steps to ensure that no conflict of interest arises. In complex commercial cases funders often instruct their own solicitors, in part to guard against this risk. Care must also be taken to ensure that the funder's return is not disproportionate to the risk that it is taking.

Litigation funding is a rapidly growing market in English litigation – it is generally accepted that litigation funding is here to stay. Since the funder shares in the proceeds of any winnings or recoveries, it tends only to be available for claimants.

The most common type of adverse costs insurance is an 'after the event' (ATE) policy. The ATE industry in England is also expanding. This usually covers a party's own disbursements and the risk of having to pay the opponent's legal fees in the event of defeat. With some limited exceptions, the party taking out the insurance cannot recover the cost of doing so from the opponent.

The claim

16 How are claims launched? How are the written pleadings structured, and how long do they tend to be? What documents need to be appended to the pleading?

Proceedings are formally commenced when the court issues a claim form presented by the claimant. There is a fee to do so, which varies depending on the value of the claim.

Claim forms are fairly short documents that contain only party names, quantum (or remedy) sought and very brief details of the claim. The main substance of the claim itself is pleaded in a written statement of case known as particulars of claim. These must be limited to the material facts that the party intends to prove at trial (ie, not evidence of those facts) and relevant to the remedy sought by the claimant. The general rule is that pleadings should be as concise as possible; in the Commercial Court, permission is required to file a pleading more than 25 pages long.

17 How are claims served on foreign parties?

Claims can be served on a foreign defendant's English solicitor if they are instructed to accept service on the foreign defendant's behalf. This is the easiest way to effect service.

If the foreign defendant is physically present in England, claims can be served on the defendant (and in some circumstances its agent) in person. However, individuals cannot be served inside court buildings, so care must be exercised if planning to serve someone while they are in England giving evidence in another claim.

As explained in question 5, the rules on jurisdiction and service on foreign parties depend on the jurisdiction in which the court papers are to be served. Defendants domiciled in the EU will normally be served by way of registered post. However, where a defendant is domiciled outside the EU, as explained in question 5, permission to serve out the jurisdiction must be obtained. Assuming permission to serve out the jurisdiction is obtained, the method of service will be determined by the rules of service laid down by applicable conflict-of-laws rules.

English courts can permit service via alternative means, even by social media platforms such as Twitter and Facebook. However, if such a method of service is not permitted under the law of the local jurisdiction, then it is possible the court will take the view it cannot make such an order.

The rules on service for interim injunctions vary; for example, a search order is typically (but not always) personally served by the supervising solicitor at commencement of the search.

It is also possible to use the Foreign Process Section of the court for service via diplomatic channels. English courts will arrange for the documents to be delivered to the host country's Ministry of Foreign Affairs, which will then arrange for service locally.

18 What are the key causes of action that typically arise in commercial litigation?

Most cases are advanced on the basis of a breach of contract or a breach of tortious duty (eg, negligence). An enforceable contract need not be

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written or signed, and so many disputes are litigated on the basis of an oral contract.

In complex commercial cases, parties sometimes plead one or more of the so-called economic torts. This includes the torts of procuring a breach of contract and unlawful interference, which arise where one party has unlawfully meddled in the contractual affairs of others.

Claims for breach of trust often arise in cases of misappropriation of assets. Since trusts can (in principle) arise orally, the question of whether or not a trust has arisen can involve a complex factual dispute with significant witness evidence.

The various causes of action can be advanced together. For example, in civil-bribery claims, claims of breach of fiduciary duty and knowing receipt are often advanced alongside each other.

There are several causes of action that involve dishonesty on the part of the wrongdoer (for example, deceit, bribery, misstatement knowingly made and conspiracy). The professional rules that govern solicitors and barristers provide that such cases can only be advanced if there is some evidence supporting the cause of action and if they can be properly particularised.

19 Under what circumstances can amendments to claims be made?

If a statement of case has been filed at court but not yet served on the other parties, it can be amended without the court's permission.

If that statement of case has already been served, it can be amended at any time subject to the agreement of the other parties to the proceedings.

Amendments made late in proceedings must pass additional hurdles to be allowed by the court, and are more likely to be refused if the trial date would be jeopardised. Furthermore, to protect defendants from being unfairly deprived of a defence of limitation, there are restrictions on the types of amendment that can be made after a limitation period has expired.

20 What remedies are available to a claimant in your jurisdiction?

The most common remedies are damages (the object of which is to compensate the claimant, rather than to punish the defendant), injunctions (which mandate or prohibit certain specified conduct), declarations (a statement that a certain state of affairs does or does not exist) and restitution (eg, an account of profit).

In contract cases, the court can order specific performance (a form of mandatory injunction that requires an individual to perform the contract they entered but did not complete), but this is rare. The claimant would need to show that damages were not an adequate alternative remedy and that no other party could perform the contract.

In trust cases, the court can order a remedy that is proprietary in nature (for example, a constructive trust under which the claimant is to benefit). This outcome might result in a claim for tracing of misappropriated assets.

In certain shareholder disputes there are a range of remedies available to the court. In claims of so-called unfair prejudice the court can order, among other things, an order to have the affairs of the company in question regulated and the sale of shares in the company from one shareholder to another.

21 What damages are recoverable? Are there any particular rules on damages that might make this jurisdiction more favourable than others?

In contract cases, the aim of damages is to put the claimant in the position it would have been had the contract been performed (subject to tests of foreseeability of harm).

In tort cases, the aim of damages is for the court to look to restore the claimant to the position it would have been had the tort not occurred.

If the claimant has lost an opportunity to achieve a potential outcome as a result of a breach of contract or tort, it may be able to recover loss-of-chance damages. These are measured according to the prospects of the claimant achieving the particular outcome that it hoped for (eg, to pursue a particular business opportunity).

If fraud can be proven, the claimant is entitled to all losses flowing from that fraud, even if those losses were not reasonably foreseeable. This can make England an attractive jurisdiction to litigate fraud cases.

In all cases, the claimant must mitigate its loss. This means that it has a duty not to make its own position worse. Defendants will often raise mitigation as a ground on which to seek to limit the amount of damages payable.

Interest is generally payable on money judgments. There are only a couple of causes of action that permit the court to award punitive damages, and they are rarely available in commercial cases.

Responding to the claim

22 What steps are open to a defendant in the early part of a case?

A defendant should first scrutinise the claim to identify the issues in dispute and the supporting evidence, with the aim of making it as hard as possible for the claimant to get over the hurdles for each issue. It will also enable the defendant to plan and structure its defence strategy, and marshal the necessary evidence to meet the case against it.

Depending on the outcome of that exercise, the defendant can consider tactical steps such as making a request for further information pursuant to CPR Part 18. This is often a useful way of applying early pressure on a claimant to make its case good, and (depending on the responses received) it can be used as a platform for strike out of all or part of the claimant's claim.

A defendant may also consider admitting part of a case, particularly if it has no answer to that part of the case and an admission would make little or no overall difference to the case. It may also allow the defendant to avoid having to disclose documents that may otherwise harm its case.

If a defendant believes that a third party is liable for some or all of the claim made against it, it can seek to join that party to the proceedings.

23 How are defences structured, and must they be served within any time limits? What documents need to be appended to the defence?

The CPR require the defendant to serve a defence, which must either admit, deny or require the claimant to prove each of the matters set out in the particulars of claim. The CPR sets strict time limits but in complex commercial litigation the parties will often agree to vary these. If the defendant considers it has its own claim, this can be included in the defence (typically under the heading 'counter claim').

24 Under what circumstances may a defendant change a defence at a later stage in the proceedings?

Once a defence has been served, the defendant will need the consent of all other parties to the claim to change it. If they are unable to obtain consent, the court can grant permission to a party to amend its statement of case. Typically, defendants amend their defences either following disclosure (where the defendant becomes aware from that disclosure of facts that it intends to rely upon) or following the claimant amending its particulars of claim (where the defendant has new allegations to answer). The current trend is to discourage amendments made very late in proceedings, particularly those that threaten the trial date.

25 How can a defendant establish the passing on or sharing of liability?

If a defendant to a negligence claim can show contributory negligence on the part of the claimant, or that the claimant's action or inaction furthered the harm it complains of, then this ought to reduce its liability accordingly.

If 'joint and several' liability has been contractually pre-agreed between defendant parties then each defendant would be liable for the entire performance of the agreement irrespective of blame, so the claimant could choose to proceed against the most resourced defendant.

A defendant can seek to join other parties (see question 22), or, following a final award against it, bring its own proceedings against co-defendants for a contribution to the damages payable.

26 How can a defendant avoid trial?

A party can apply to strike out the entire claim under the summary judgment procedure at any stage in the case. However, the threshold for strike-out is high – the claimant must convince the court that the

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statement of case shows no reasonable grounds for bringing the claim. Since most complex commercial disputes turn on disputed evidence, which can only be tested and determined on a full trial, very few of these cases are struck out on this basis.

The only other ways to guarantee avoiding trial are settlement or admitting the claim in full. Many complex commercial cases in England settle before actual trial. There are numerous reasons why this happens. Firstly, the CPR front-loads some of the costs of litigation by requiring that the parties narrow down and focus on the issues between them. Secondly, the fact that the parties' witnesses will be cross-examined and scrutinised in public and before a highly qualified judge acts as a catalyst to achieve a settlement. Thirdly, the court will periodically remind the parties of their ongoing obligation to consider ADR. Finally, the parties may consider settlement is in their commercial interests, either mutual or for wider reasons (eg, reputational risk).

Unless it caused the claimant to discontinue, a counterclaim would not avoid trial (as the counterclaim would be heard at the same time as the claim).

27 What happens in the case of a no-show or if no defence is offered?

If a defendant fails to file an acknowledgement or defence within the requisite time limit then the claimant can apply for judgment in default. The defendant can seek to reverse this by applying to set the default judgment aside, but it will have to show that it has a real prospect of successfully defending the claim or demonstrate to the court that there is some other good reason to allow it to attempt to defend the claim.

If a defendant does not appear at trial, the court has the power to strike out its defence. Generally this will not happen and the case will instead be heard without the party present (and therefore the defendant will be unable to present its case or respond to novel matters or evidence raised during trial).

28 Can a defendant claim security for costs? If so, what form of security can be provided?

Once proceedings have formally commenced, a defendant (or those in the position of a defendant, such as a respondent to an appeal) can apply for security for costs. A claimant can also claim security for costs for its defence to any counterclaim. It can be a highly effective weapon against a claimant.

The application must be made promptly. There are a number of grounds for ordering security. The most common is that there is reason to believe that the respondent will be unable to pay the applicant's costs if ordered to do so. If the security is not deposited, the claim is stayed. It should be noted that the practice of the Commercial Court is to make the defendant compensate the claimant in the event that claimant is successful at trial. Compensation will cover any losses the claimant suffered from having funds tied up in security. Typically, the court orders that the claimant pay money into court or provide a third-party guarantee. In practice, applications for security for costs are typically settled.

Progressing the case

29 What is the typical sequence of procedural steps in commercial litigation in this country?

The typical sequence is as follows:

- pre-action correspondence between the parties;
- issuing of a claim form by the claimant;
- acknowledgement of service by the defendant;
- service of particulars of claim by the claimant;
- service of defence by the defendant;
- allocation to a case management track by the court;
- service of reply to defence by the claimant (an optional step);
- case management conference (only in large or complex claims);
- disclosure of documents by the parties;
- exchange of witness statements;
- exchange of expert reports (if necessary);
- pre-trial review hearing (only in large or complex claims);
- trial;
- any post-trial matters (eg, costs hearings, if not settled);
- appeal by the losing party (if permission is granted); and
- enforcement (if necessary).

During any of these stages, either party may make interim applications to the court.

30 Can additional parties be brought into a case after commencement?

Yes. Parties can be added or substituted in existing proceedings either on the court's own initiative or on the application of an existing party or person who wishes to become a party.

31 Can proceedings be consolidated or split?

Yes. The court has an overall power (and obligation) to actively manage cases, which includes consolidating overlapping claims so they can be tried together. This can be done either on the court's own initiative or upon application of one of the parties.

Proceedings can be split but this is becoming increasingly rare; typically, they are split for very large disputes, where one trial will be held over liability and then a second over quantum.

32 How does a court decide if the claims or allegations are proven? What are the elements required to find in favour, and what is the burden of proof?

The court is robust in only testing and deciding pleaded facts on the basis of the evidential picture that has been put before it. In other words, the court does not speculate or construct a factual narrative. In civil litigation, the burden of proof is stated as 'on the balance of probabilities'. This means that the facts alleged must be shown more likely than not to have occurred (ie, the court being 51 per cent sure is sufficient).

33 How does a court decide what judgments, remedies and orders it will issue?

The court will generally only award the relief and remedies that have been sought by the claimant or applicant, and that are within its power to award. It will rarely order a remedy or relief that has not been specifically requested.

34 How is witness, documentary and expert evidence dealt with?

Court directions will provide what evidence is to be adduced, when, by whom and how. In most English proceedings, the parties will exchange witness and documentary evidence. The court will only allow expert evidence if it is satisfied that the case involves matters on which it does not have the requisite technical or specialist knowledge.

Evidence in civil proceedings is usually dealt with in the following order:

- Disclosure. This is where the parties exchange between themselves lists (and, if requested, copies) of all non-privileged documents that either support or harm their case or their opponent's case. It is usually the most time-consuming and expensive stage of the proceedings. In some circumstances it can be beneficial to seek an order for a third party (eg, a former employee) to produce documents.
- Witness statements. This is where the parties exchange statements of witnesses of fact that they seek to rely on at trial. The witness statement must be in the witness's own words, and must be accompanied by a statement of truth. The court's directions often provide for reply witness statements. At trial, parties tend to focus on attacking the credibility of a witness and the quality of the evidence they have given.
- Expert reports. If the court has allowed one or more of the parties to adduce expert evidence, the relevant experts must give evidence in accordance with the instructions that have been given to them by the relevant party or parties. Those instructions are usually disclosable to the opponent. Sometimes, joint expert evidence is ordered, but this is rare in complex commercial disputes. The expert's duty is to the court, not to the party instructing it and paying its fees. It is usual, therefore, for parties to instruct an expert on an advisory basis first (to obtain a preliminary indication of their thinking) before formally instructing them as an expert. Parties often seek to attack the credibility of the opponent's expert, for example, on their experience in the particular expert field or their performance during cross-examination when pressed on their opinions.

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- Trial. The court will usually hear live, oral evidence from the relevant witnesses and experts in open (ie, public) court. The witnesses and experts are usually cross-examined by the opposing counsel. After this, the court will receive oral and written submissions from each counsel on the evidence given, and on the documents produced during the disclosure stage.

Cases are usually won or lost on the nature, content and quality of the documentary, witness and expert evidence. For this reason the various stages described above are time- and cost-heavy.

35 How does the court deal with large volumes of commercial or technical evidence?

If there is technical evidence that the court could not reasonably be expected to decide without the assistance of expert opinion from practitioners in the field in question, the court will usually give direction for the production of expert evidence (see question 34). The creation of the Financial List (a specialist division of the Commercial Court) reduces the need for such evidence in complex banking and finance cases. This is because the judges in that division of the court have specific experience in banking and finance matters, which means that they can determine many of the issues in question without the assistance of an expert.

Evidence of commercial practices will usually be presented through witness evidence. Often, that will be developed by the parties' counsel as part of their court advocacy.

36 Can a witness in your jurisdiction be compelled to give evidence in or to a foreign court? And can a court in your jurisdiction compel a foreign witness to give evidence?

A witness in England can be compelled to give evidence in or to a foreign court. The foreign court needs to make a request for such evidence through a formal letter of request in a prescribed form. An application then needs to be made to the English court, usually ex parte.

English courts can also compel a foreign witness to give evidence. An English court can issue its own formal letter of request to the relevant judicial authorities of the foreign country. The ease and length of time it takes to obtain such evidence can vary considerably depending on the country in question.

37 How is witness and documentary evidence tested up to and during trial? Is cross-examination permitted?

English courts tend to place more evidential weight on documentary evidence than witness evidence. It is very difficult to challenge documentary evidence unless it is inadmissible (eg, privileged) or questions can be raised as to its authenticity. Such questions are usually dealt with in discrete applications before trial.

Witness evidence is presented initially as a written witness statement. The evidence is given under oath (which means that contempt of court can follow if it is found to be untruthful), and can only be challenged through live cross-examination at trial. If the witness in question is unable or unwilling to present themselves for cross-examination, then the weight of the evidence adduced can be challenged. The weight that the court places on the evidence tends to be determined by the reason for the non-attendance. For example, if the witness has died or is seriously unwell, the evidence will carry greater weight than if the witness was reluctant to attend trial because of (for example) a holiday commitment. Overseas witnesses can provide video evidence.

38 How long do the proceedings typically last, and in what circumstances can they be expedited?

It is rare for complex commercial litigation cases to last less than 12 months. More often, they last between 12 months and two years (and sometimes longer). Cases can be expedited if they proceed under the Part 8 route (which is designed for cases where there is no substantial dispute of fact). The court also has the power to expedite cases under its general case-management powers if there is good reason to do so (for example, the proceedings would be futile if they were not expedited – such as when the claimant complains about the effect of a restrictive covenant).

39 What other steps can a party take during proceedings to achieve tactical advantage in a case?

A party can apply to strike out another party's entire case, or part of that case. The threshold to do so is high (see question 26). A party must show that part or all of the case in question discloses no reasonable grounds for bringing or defending the claim, that the statement of case is an abuse of process or otherwise likely to obstruct the just disposal of the proceedings, or if there has been a failure to comply with a rule, practice direction or court order.

In practice, courts are reluctant to strike out cases, either in part or whole, unless there are very clear grounds to do so. The court will, more often than not, afford a party a 'second chance' to plug any gaps in their case to avoid time and cost being incurred in having an entirely new set of proceedings started. A party considering strike out should therefore be mindful that a strike-out application can cause the other party to strengthen its case where it would otherwise have remained deficient.

Trial

40 How is the trial conducted for common types of commercial litigation? How long does the trial typically last?

The trial is an adversarial process which is closely managed by the judge.

In most complex cases, the parties lodge written opening submissions before the trial. The judge may have some reading time before the trial formally commences. The trial usually opens with oral submissions from each party's counsel.

After that, the evidence is heard and tested: usually witness evidence first, and then expert evidence. This tends to be the most time-consuming part of the trial.

At the end of the trial, each party usually makes oral and written closing submissions.

Trial can last anything from a few days to several months. Complex commercial litigation cases with heavy evidence tend to last at least two weeks.

41 Are jury trials the norm, and can they be denied?

Jury trials are not the norm in civil litigation. Most civil cases are heard at first instance and on appeal to the High Court by a single judge, rather than a jury. Appeals are heard by several judges.

42 How is confidentiality treated? Can all evidence be publicly accessed? How can sensitive commercial information be protected? Is public access granted to the courts?

The courts of England and Wales operate on the principle of open justice, so the general position is that hearings and trials are public. A public gallery is available for members of the public to sit. Accordingly, confidentiality in materials underlying the claim is lost when they are aired in public court (in the case of documents) or relied on at a trial or hearing (in the case of witness statements).

The court can order that a hearing (or part of it) be held in private in some circumstances, for example where the court considers it necessary in the interests of justice, but this is the exception and not the rule.

43 How is media interest dealt with? Is the media ever ordered not to report on certain information?

The principle of a free press is upheld by the courts as one limb of the principle of open justice. The starting point is that anything arising from a public hearing can be freely reported. However, the press will be excluded entirely when the court sits in private. For proceedings heard in public, courts have the power to restrict, postpone or prevent reporting if that is in the overall interests of justice. Failure to adhere to these restrictions is contempt of court (an offence).

44 How are monetary claims valued and proved?

A party can only recover damages according to the cause of action it advances (see question 33). A party must prove its loss through evidence and this can take place in separate proceedings if the court considers it appropriate to do so. Defendants often raise arguments that the loss is too remote, would have been suffered anyway or has been suffered as a result of the claimant not mitigating its loss (see question 25).

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Post-trial

45 How does the court deal with costs? What is the typical structure and length of judgments in complex commercial cases, and are they publicly accessible?

Costs tend to be awarded to the successful party. More often than not, the costs liability is settled between the parties after trial without recourse to the court. If the parties cannot agree, the court will assess the costs claimed and make an order as to the final award. Typically, a successful litigant can expect to recover approximately 60 per cent of its total outlay (costs on the standard basis); but if the opponent has been particularly unreasonable in its conduct of the litigation, the court may order more (costs on an indemnity basis) both as a deterrent to such conduct and to compensate the party who had to pay more to deal with that behaviour.

Judgments are typically large documents, first reciting the court's findings of fact (including specific findings on whether the judge considered particular witnesses credible and trustworthy) and then applying the relevant law to those established facts. Most are publicly accessible (eg, on www.bailii.org).

46 When can judgments be appealed? How many stages of appeal are there and how long do appeals tend to last?

There is no automatic right of appeal in England and Wales; permission to appeal must first be obtained. An unsuccessful party may ask for permission to appeal any question of law leading to the order immediately following hand down of the judgment in the relevant court. If this fails, it can renew its application for permission in the relevant appellate court. Appeals from the High Court are heard in the Court of Appeal, and appeals from the Court of Appeal are heard in the Supreme Court.

There has been a major backlog of appeals in the Court of Appeal for some time now and it is not unusual for parties to wait between 12 and 18 months to have their appeal heard in this court.

An application for permission to appeal will only be successful if the appeal has a real prospect of success or there is another compelling reason for the appeal to be heard (eg, it concerns an area of law important to public policy). The appeal itself will only be successful if the lower court's decision was wrong in law, or was unjust because of a serious irregularity, procedural or otherwise, in the proceedings.

Critically, save for in exceptional circumstances, findings of fact cannot be appealed.

47 How enforceable internationally are judgments from the courts in your jurisdiction?

Whether an English judgment can be enforced in a particular jurisdiction will depend on local law. The overall framework for the enforcement of English judgments in EU member states is determined by EU law and, while local law advice is still required, this framework substantially reduces the time and cost of enforcement in member states. So-called 'Brexit' may impact the application of these regulations and conventions.

48 How do the courts in your jurisdiction support the process of enforcing foreign judgments?

The English courts readily recognise foreign judgments as res judicata and enforce them in England and Wales. Enforcement proceedings must be brought in the courts in order to enforce the judgment. However, the defences open to a defendant are limited and in some cases the proceedings can be without notice to the defendant.

Typically, a judgment will only not be recognised and enforced by the court if it conflicts with the principle of natural justice or it substantially interferes with an individual's human rights. The court can also refuse to enforce judgments that offend public policy, but in practice this is construed exceptionally narrowly and is generally limited to judgments obtained by fraud or where the defendant was denied the right to a fair trial.

Other considerations

49 Are there any particularly interesting features or tactical advantages of litigating in this country not addressed in any of the previous questions?

In a series of cases over the last couple of years, the courts have adopted a much more rigid approach in relation to compliance with court orders and directions. If a party misses a deadline, even if by a matter of minutes or hours, the party in question could pay a very heavy price (at worst, their case could be struck out). This has encouraged parties to adopt a rigorous and organised approach when preparing for deadlines, and, in practice, means that the proceedings move forward fairly quickly, and in accordance with the timetable set by the court.

One further advantage for litigants in England is that the English legal market is highly competitive. There is a vast array of law firms and barristers who are willing and able to take on complex commercial cases. Many of the lawyers are highly specialist, and the overall quality of lawyers is very high. This, combined with well-established rules of legal professional privilege (which protects the confidentiality in lawyer–client discussions), is one of the many features that makes England an attractive jurisdiction in which to litigate.

50 Are there any particular disadvantages of litigating in your jurisdiction, whether procedural or pragmatic?

Litigating in England is notoriously expensive. Against this backdrop, the courts are taking an increasingly proactive and robust role in managing and controlling the costs of litigation. A current trend is for courts to require parties to prepare and file cost budgets at an early stage in the proceedings and to regularly update them. These budgets are presented in a prescribed form, with detailed breakdowns as to how each stage in the proceedings has been costed. The court then requires parties to justify these budgets before approving them. If a budget has been exceeded, the assumption is that the excess costs will not be recoverable from the other party if they win. The trend to try to reduce costs through court intervention of this nature is likely to continue.

SIGNATURE

Simon Bushell **simon.bushell@signaturelitigation.com**
Daniel Spendlove **daniel.spendlove@signaturelitigation.com**
Matt Peacock **matt.peacock@signaturelitigation.com**

138 Fetter Lane
London
EC4A 1BT
England

Tel: +44 20 3818 3500
Fax: +44 20 3818 3501
www.signaturelitigation.com

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51 Are there special considerations to be taken into account when defending a claim in your jurisdiction, that have not been addressed in the previous questions?

As explained above, parties must usually disclose a wide category of documents during the course of the proceedings (in a process known as disclosure). This can be an onerous and expensive exercise. However, it can also be used to a party's advantage in forcing the other party to disclose all documents (including those that are unhelpful) that are in its possession or control. The disclosure of a potentially damaging document can be the difference between a claimant's case succeeding or failing.

More generally, when compared to many other jurisdictions, English proceedings are relatively quick and streamlined. Appeals can only be made in exceptional circumstances. A defendant with a weak case should, therefore, always consider an early settlement, not least so as to avoid potential costs sanctions for defending a case where the defence has no merit. An early settlement offer (which would usually be disclosed to the court when the costs of proceedings are determined) can be a useful tactical tool.

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