

## 3. Case management

### 3.1 General

The Civil Procedure Rules 1998 are ‘a new procedural code with the overriding objective of enabling the court to deal with cases justly’ (r.1.1(1)). The Rules impose the following obligations upon the court:

- to give effect to the overriding objective when it exercises any power under or interprets any rule (r.1.2)
- to further the overriding objective by active case management (r.1.4).

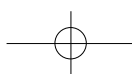
These obligations are mandatory in each case. The court ‘must’ seek to give effect to and further the overriding objective, and ‘must’ do so by ‘active’ case management. It is the elevation of these aspirations into regulatory requirements in order to achieve the overriding objective that is the hallmark of the Civil Procedure Rules.

Rule 1.4 contains a list of 12 matters which ‘active case management includes’. These constitute a checklist to be applied in each case that is subject to the court’s scrutiny and management. Their nature serves to emphasise the ‘active’ nature of the management required, and the obligation to intervene and exercise initiative in the furtherance of the overriding objective. Such an approach is required from the very outset, as demonstrated in particular by the following provisions in r.1.4(2):

- b) identifying issues at an early stage
- c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others
- d) deciding the order in which issues are to be resolved  
...
- g) fixing timetables or otherwise controlling the progress of the case  
...
- l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.’

These requirements are to be discharged by use of the court’s case management powers contained in Pt 3. They include the residual power under r.3.1(2)(m) to ‘take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.’

These powers define the court’s role of proactive case management and the substantial obligations upon it throughout the duration of a case from inception through allocation, at any



pre-hearing stage, at listing and at trial. Each stage requires positive consideration of separate questions. All require the application of the overriding objective and the implementation of the duty to undertake active case management.

### **3.2 Pre-allocation scrutiny**

The relevant provisions are continued in Pt 26 and Practice Direction 26 (PD26), which provide for automatic transfer of certain defended cases and allocation to one of the three tracks.

Pre-allocation scrutiny is a vital stage requiring rigorous investigation to ensure compliance with the Rules, that the issues are identified and that the appropriate orders are made in relation to both allocation and directions.

Consideration is given below to a number of situations encountered at this stage.

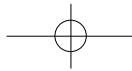
#### **3.2.1 One or both parties request a stay**

Rule 26.4 is mandatory. Where all parties request a stay the court 'will' direct that the proceedings be stayed for one month. The claimant must tell the court if a settlement is reached (r.26.4(4)), but this is not required if a settlement is not reached. In that event, the court 'will give such directions as it considers appropriate' (r.26.4(5)). The mere joint request for a stay does not exempt the parties from the requirement to file completed allocation questionnaires.

Power to extend the stay is contained in r.26.4(3). The procedure and the information which must be given are set out in PD26 para. 3. The court will need to be assured that any further stay is justified and in accordance with the overriding objective and the court's duties, and not sought simply to buy time. Where there are genuine attempts at settlement or compelling reasons why time is necessary, an extension will be entirely justifiable, particularly as the mandatory period of one month is not long. What the case management judge needs to guard against are repetitive requests for stays without justification which, if allowed, will lead to drift and delay.

#### **3.2.2 The allocation fee**

This is now largely an administrative matter. The relevant provisions are in r.3.7. The fee is payable whether or not an allocation questionnaire is filed. Sometimes allocation questionnaires may be dispensed with, for example following a summary judgment application or upon setting aside a default judgment. The parties will be before the court and all of the necessary information should be available to enable the court to allocate and give directions there and then. Dispensing with the questionnaire does not dispense with the fee and the order should include provision for it to be paid by a specified date. It is not so much an allocation fee but a fee payable at that stage by virtue of the fees orders applicable to the High Court and county court.



### **3.2.3 No allocation questionnaires or only one filed**

Where no party has filed an allocation questionnaire there is now a mandatory provision that a seven day unless order *will* be issued with the sanction that, in default, the claim, defence and any counterclaim will be struck out without further order.

Where only one party files an allocation questionnaire, the options are set out in PD26 para. 2.5(2) - either allocating if there is sufficient information, or ordering an allocation hearing.

Generally, the case management judge would always expect the claimant to file an allocation questionnaire. In all cases for claims in excess of £1000 there is a fee payable at that stage except unless there is an exemption. It may be difficult to proceed without an allocation questionnaire from a defendant. But that need not necessarily be so and where there is sufficient information available, the court should allocate and give directions as envisaged by the Practice Direction rather than routinely ordering defendants to file them. If a defendant has subsequently to apply for a variation or for other orders, the failure to file the allocation questionnaire in the first place can be taken into account in deciding what order to make and what the costs consequences should be.

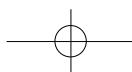
### **3.2.4 Inadequately completed allocation questionnaires**

In PD26 para. 2.3 there is an obligation upon the parties to 'consult one another and co-operate in completing the allocation questionnaire and giving other information to the court'.

PD26 para. 2.2 sets out what a party should do if he wishes the court to consider information which may affect allocation or case management. PD26 para. 2.3(2) obliges the parties to 'try to agree the case management directions which they will invite the court to make'.

Vague and non-committal information does not satisfy the duty of the parties to help the court. Failure to comply with these obligations can frustrate the court's case management duties. These are crucial obligations. The allocation questionnaires have a pivotal importance in the process and the court should insist upon them being completed properly. Sometimes, for example when cases are issued protectively after late instructions or where medical evidence is unclear at the time, an extension of time for filing allocation questionnaires might be appropriate. Otherwise they could be returned to the parties with a direction that they be completed. A hearing may be necessary or, sometimes, it may be possible to allocate and give directions on the basis of the available, albeit inadequate, information. It all depends upon the particular features of the case.

Effective case management requires the court to be astute in relation to default or non co-operation which, if it results in a hearing, should also result in a costs sanction. PD26 para. 6.1 provides that the court will only hold an allocation hearing on its own initiative if it considers it necessary to do so. This again reflects the obligations of active case management and in particular the obligation in r.1.4(2)(j) to attempt to deal with the case without requiring the parties to attend court.



PD26 para. 6.6 specifically provides for the sanctions the court will usually impose in the event of default in connection with the allocation procedure. Costs will usually be ordered on an indemnity basis and summarily assessed and made payable forthwith or within a fixed period. The court may also provide for strike out in default of payment.

In all of these instances of failings in relation to allocation questionnaires, it can be useful for the parties and other judges if orders recite the basis upon which they have been made. The order can specify the particular failing or omission. If the order is that an allocation hearing or case management hearing is to be convened, it might specify the particular failure and require the defaulting party to show cause why he should not pay the costs of that hearing.

### **3.2.5 Further information necessary**

There is power in Pt 18 that enables the court 'at any time' to order a party to 'clarify any matter which is in dispute' or 'give additional information in relation to any such matter'.

Rule 26.5(3) contains specific power to order the provision of further information 'before deciding the track to which to allocate proceedings or deciding whether to give directions for an allocation hearing to be fixed'.

If the detailed scrutiny of the statements of case and allocation questionnaires at this stage raises the need for the court to make an order to enable it to allocate, then, in accordance with PD26 para. 4.2(2), 'it will generally make an order under rule 26.5(3) requiring one or more parties to provide further information within 14 days'.

It is crucial to the proper exercise of the managerial function that the court has all of the information it needs and that the parties' cases are clear. If not, orders must be made at this stage.

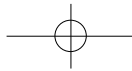
### **3.2.6 Statements of case incomplete**

Consideration should be given to the requirements in Pt 16 in relation to both parties' statements of case. Note in particular the obligations in:

- r.16.2 - contents of the claim form
- r.16.3 - statement of value to be included in the claim form
- r.16.4 - contents of the particulars of the claim form
- r.16.5 - content of the defence.

Incoherent claims and bare denials are examples of statements of case which should be struck out wholly or in part. The offending party may be given the opportunity of providing further information or correcting the omission in default of which a specified consequence would follow.

These are crucial considerations in relation to the early identification by the court of the issues in the case and it must insist upon compliance with the rule.



### **3.2.7 *Is transfer required or appropriate?***

The provisions in rule 26.2 for automatic transfer of certain defended cases are subject to four requirements and, in particular, that the claim is for 'a specified sum' and that the defendant is 'an individual'. Whilst this should be an automatic process, it is sometimes overlooked.

There is need, also, to consider the general provisions in Pt 30 in relation to transfer between county courts or between the High Court, and county court or within the High Court, and whether the court should exercise its powers at this stage. The criteria are set out in r.30.3.

The provisions in the County Courts Act 1984 and the High Court and County Courts Jurisdiction Order 1991 in relation to transfer still apply and the article 7(5) criteria (financial substance, importance, complexity and expedition) require consideration, remembering that expedition alone cannot be relied upon.

In reality, cases with a value many times that of the minimum required for issue in the High Court are conducted in the county court and it is only cases of very high value and/or complexity that are conducted in the High Court.

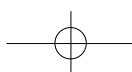
Transfers between county courts have a particular significance now that solicitors receive instructions from clients all over the country and cases are often issued in courts that have no connection whatsoever with the parties or the cause of action. The allocation questionnaires frequently suggest retention at the local court despite the considerable inconvenience that would cause parties and witnesses. Generally, the emphasis is upon local justice and cases should be transferred and conducted accordingly. The risk is that if this is not addressed at the stage of initial scrutiny, cases – particularly fast-track cases – may proceed to trial without the question of venue being considered further.

The allocation questionnaires, Pt 30 and the circumstances generally have to be considered. Where is it appropriate for the case to be conducted? After entry of judgment is there any reason why the case should not be transferred to the claimant's home court?

If a case is to be transferred then, generally, the sooner that is done the better, leaving the allocation and case management directions to the receiving court. Care should be taken to identify the home court accurately. Courts should have a directory of towns and street maps of London to help you. There is also a complete list of all courts in the practice books.

Multi-track cases in a feeder court must normally be transferred to the appropriate Civil Trial Centre. PD 26 para. 10.2 is essential reading and sets out the possibilities for preserving case management and even trial at the feeder court with the consent of the designated civil judge. There are procedures in place to deal with any such cases.

In general, however, multi-track cases should be transferred to be allocated and given directions at the trial centre. It would be essential to consult others and/or the designated civil judge before retaining and giving any directions in a feeder court.



### **3.2.8 Statements of truth have been omitted**

Rule 22.2(2) provides that 'the court may strike out a statement of case which is not verified by a statement of truth'. This requirement reflects a specific recommendation in Access to Justice that there should be 'a declaration by or on behalf of the litigant of belief in the accuracy and truth of the matters put forward'. How this requirement should be enforced will be a matter for consideration in each case but it should not to be ignored.

Not just anyone can sign a statement of truth. Statements signed by agents, members of the family or friends without proper authority should not be accepted and the claim should not be allowed to proceed unless and until it is rectified.

The statement of case remains effective unless struck out, but the party may not rely on the statement as evidence of any of the matters set out in it (r.22.2(1)).

It would almost always be appropriate to make an order giving a party the opportunity to correct the omission before striking out a case.

### **3.2.9 Summary disposal of cases**

PD26 para. 5.1 reflects r.1.4(2) as follows:

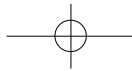
'Part of the court's duty of active case management is the summary disposal of issues which do not need full investigation and trial.' There are powers under r.3.4(2) to strike out a case where 'the statement of case discloses no reasonable grounds for bringing or defending the claim', or when the case 'is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings' and to give summary judgment under Pt 24. These powers are a vital part of the process of initial scrutiny.

A clearly hopeless case should be struck out. Otherwise it would be appropriate to give the party an opportunity to provide further specific information or to amend or replace the statement of case. Orders should specify the consequences of failure.

Applications by parties to strike out a claim under the other provision in r.3.4(2) are considered below.

Summary judgment is available to claimant or defendant on the 'whole of a claim or any particular issue' if there is 'no real prospect' of succeeding on or successfully defending the claim or issue. Scrutiny requires consideration of whether the statements of case warrant the exercise of these powers in pursuance of the court's obligations in relation to active case management. If so, except in the plainest of cases, an order convening a hearing and directing the party concerned to show cause why summary judgment should not be granted should be considered.

The test is no longer whether there is a 'triable issue', but whether there is a 'realistic,' as opposed to fanciful, prospect of success (*Swain v Hillman*, *The Times*, November 4, 1999).



Where a case is entirely without substance or contradicted by the document or the material it is 'fanciful' (*Three Rivers District Council v Bank of England* [2001] 2 AER 513). The test was further considered in *Celador Productions Ltd v Melville* [2004] EWHC 2362 and in *The Bolton Pharmaceuticals Company 100 Ltd v Doncaster Pharmaceuticals Group Ltd* [2006] EWCA Civ 661.

*Merchantbridge & Co Ltd v Safron General partner Ltd* [2005] EWCA Civ 158 cautions against summary judgment where there is a dispute about an oral agreement.

### **3.2.10 Orders by the court of its own initiative**

All of these powers are exercisable by the court on application or of its own initiative (r.3.3(1)). If so doing, the court may give any person likely to be affected by the order an opportunity to make representations (r.3.3 (2) and (4)).

Such an order must contain a statement of the right of a party affected by it to apply to have it set aside, varied or stayed (r.3.3(5)). The application must be made in accordance with r.3.3(6).

## **3.3 Allocating to track**

### **3.3.1 General**

Rule 26.7 is concerned with allocating to track, and the specified matters for consideration are set out in r.26.8(1).

A claim with no financial value will be allocated to the most suitable track, again by reference to the rule 26.8 criteria (r.26.7(2)).

There is no power to allocate to a lower track without the parties' consent (r.26.7(3)). However there is no such restriction precluding transfer upwards of a case.

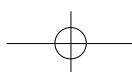
### **3.3.2 Valuing the claim**

This is the function of the court. Whilst the parties' views will be an important factor, the decision is for the court (PD26 para. 7.5).

Rule 26.8(2) imposes the obligation upon the court and specifies four items to be disregarded: any amount not in dispute, interest, costs and any contributory negligence. PD26 para. 7.4 deals further with and defines 'any amount not in dispute'.

Where there is more than one claimant, the claims will not generally be aggregated. The largest will generally be determinative (r.26.8(3) and PD26 para. 7.7).

Where the court is not satisfied that the value is as a party claims it to be, it will assess it and allocate accordingly, leaving that party to seek to set aside the allocation, or it will order further information from that party under r.26.5(3) (see PD26 para. 7.3(2)).



### **3.3.3 The disposal procedure**

The disposal procedure is an alternative to allocation where there has been a ‘relevant order’ as defined in PD 26 para. 12.1(2). Frequently this will be after the entry of a default judgment or judgment following an admission.

Originally the procedure was introduced to preserve the benefits of the small claims track regime where appropriate, to avoid disproportionate fast-track costs being incurred and to provide an efficient means of disposing of claims where there was no substantial dispute. It was designed for cases that have not already been allocated to a track and where there is not a genuine dispute on substantial grounds.

A ‘disposal hearing’ is now defined as a hearing which will not normally last longer than 30 minutes and at which there will not normally be oral evidence (PD 26 para. 12.4). The effect of this definition is to confine to a great degree the cases that will be dealt with in this way.

Where the conditions are satisfied, the procedure should be used and directions made for a disposal hearing.

### **3.4 Allocation to the small claims track**

Rule 26.6 provides that the small claims track (SCT) is the normal track for any claim which has a financial value of not more than £5,000 (r.26.6(3)).

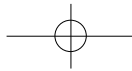
There are special provisions in relation to personal injury claims the effect of which is that the SCT is the appropriate track only if the overall value does not exceed £5,000 and the personal injury element is not more than £1,000. The personal injury element means for this purpose damages for pain, suffering and loss of amenity; anything else is excluded (r.26.6(2)).

Similarly, in any claim by a tenant against a landlord which includes a claim for the performance of repair works, the SCT will be the normal track only if the value of those works does not exceed £1,000 and the financial value of any other claim for damages does not exceed £1,000. There is a separate exclusion from the SCT of claims by a tenant against a landlord for harassment or unlawful eviction (r.26.7(4)).

There is a provision in PD26 para. 8.1(1)(d) that a case involving a disputed allegation of dishonesty will not usually be suitable for the SCT.

PD26 para. 8.1 gives general guidance about the small claims track. It is intended to provide: ‘a proportionate procedure by which straightforward claims with a financial value of not more than £5,000 can be decided without the need for substantial pre-hearing preparation and the formalities of a traditional trial.’

Suitable cases will include consumer disputes, accident claims, disputes about the ownership of goods, and most disputes between a landlord and a tenant other than those for possession.



Where the parties consent to allocation to the SCT, notwithstanding that the value of the claim exceeds the limit, it remains a matter for the court to decide whether that is appropriate (PD26 para. 8.1(2)(b)). If so then, with effect from 1 October 2005, ‘the SCT costs provisions will apply unless the parties agree that the fast track costs provisions are to apply’ (r.27.14(5)).

### **3.4.1 SCT directions**

Normally, the hearing time will not exceed a day. The obligation is upon the court to give case management directions to ensure the case is dealt with in as short a time as possible. Those directions will generally be given upon allocation.

The directions which may be given are specified in r.27.4. There are four options:

1. standard directions with a date for final hearing
2. special directions with a date for final hearing
3. special directions with provision for further directions no later than 28 days afterwards
4. the court may give notice of its proposal to deal with the case without a hearing and invite the parties to agree.

Appendix A to PD27 prescribes standard directions for use generally and in road traffic claims, building disputes, contractual claims, tenants’ claims and holiday and wedding claims.

### **3.4.2 Further information**

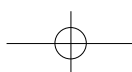
It is often the case that the information available to the case management judge is incomplete and insufficient to enable the requisite decisions to be made. PD 27 para. 2.3 provides the option of requiring a party to provide further information before the case is allocated and given directions. Similarly, when considering whether to order parties to exchange witness statements in a SCT case, specific consideration should be given to this option of ordering further information (PD27 para. 2.5). In this proactive way, the court can help focus attention upon the relevant and important aspects of the case and achieve the stated objective of avoiding undue formality.

### **3.4.3 Preliminary hearings**

When may or should the court hold a preliminary hearing? Rule 27.6 provides that it may do so only where special directions are necessary and it appears necessary for a party to attend court to ensure he understands what he has to do to comply, or to dispose of the claim summarily where a party has no real prospect of success or by striking out a statement of case or part of it.

The court must consider the desirability of limiting expense to the parties.

Preliminary hearings should not be convened unless there is a real need within r.27.6.



### **3.4.4 Disclosure**

Part 31 does not apply to the SCT (r.27.2(b)). What governs disclosure in the SCT are the provisions in r.27.4 relating to ‘standard’ and ‘special’ directions.

Standard directions will include provision for filing and service of copies of all documents to be relied upon at least 14 days before the hearing.

Careful consideration is necessary at the allocation and directions stage, therefore, as to what, if any, specific special directions may be necessary in a given case for disclosure.

Where the case is one in which there are likely to be certain important documents, specifying them in the order will help the small claims track litigant as well as the court.

### **3.4.5 Experts**

By virtue of r.27.2, the only rules in Pt 35 which apply to the SCT are r.35.1 (duty to restrict expert evidence), r.35.3 (experts – overriding duty to the court), r.35.7 (court’s power to direct that evidence is to be given by a single joint expert) and r.35.8 (instructions to single joint experts).

However, r.27.5 places an embargo on expert evidence in the SCT in any form without the permission of the court.

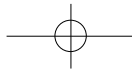
The vital consideration is whether expert evidence is reasonably required to resolve the proceedings or can the court reach its conclusion without expert advice and thereby discharge its obligations to restrict the evidence, save expense and deal with the case in a way which is proportionate.

If reasonably required, the power exists to direct that evidence be given by a single joint expert in accordance with the provisions in r.35.7 and r.35.8. There is also the option of an assessor in accordance with r.35.15.

The question in the particular circumstances of each such case is what is the reasonable and proportionate response? This is particularly so in view of the restrictions upon what the successful party can recover by way of an expert’s fees. The relevant provisions are r.27.14(3)(d) and PD27 para. 7.3(2). The parties need to be aware of the restriction and any expert needs to be instructed in as focused a manner as possible.

## **3.5 Allocation to the fast track**

The fast track is the normal track for a claim outside the small claims track and with a value of not more than £15,000 (r.26.6(4)), subject to the qualifications in r.26.6(5) that the trial must be likely to last for no longer than one day and oral expert evidence will be limited to one expert each in any field, and to two fields.



When allocating to the fast track the court will give directions and set a timetable, and will fix the trial date or window (maximum three weeks) (r.28.2). Case management will generally be undertaken at allocation and again on filing of the listing questionnaire.

A claim within the fast-track jurisdiction will normally be allocated to fast track ‘unless the court believes it cannot be dealt with justly’ (PD26 para. 9.1). This is the test to be applied when parties contend in the allocation questionnaires or at an allocation hearing for allocation to the multi-track, notwithstanding that the value of the claim is under £15,000. In particular the court will consider the limits likely to be placed on disclosure, whether expert evidence will be necessary, and whether the trial will last more than one day, though the latter is not conclusive (PD26 para. 9.1(3)(c)).

Where there is also a counterclaim or other part 20 claim as a result of which the trial will last more than a day, the court may not allocate to the fast track (PD26 para. 9.1(3)(e)).

### **3.5.1 Directions in the fast track**

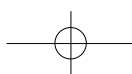
The Appendix to PD28 sets out standard fast-track directions on which the court will base its orders, so far as possible (PD28 para. 2.7). The standard period between directions and trial is 30 weeks.

The crucial feature is that normally there will be no case management hearing and compendious directions will be given at allocation. The court’s role therefore in identifying the issues and producing tailor-made directions generally, but in particular in relation to disclosure and expert evidence, is pivotal. The ‘first concern will be to ensure that the issues between the parties be identified and that the necessary evidence is prepared and disclosed’ (PD28 para. 3.3).

The provision in PD28 para. 2.2 emphasises both the need wherever possible to give directions at allocation without a hearing and the obligation of the parties to co-operate. That co-operation is a crucial requirement of the new culture and requires robust enforcement. PD28 para. 2.3 envisages the imposition of a sanction where a hearing is held because of default of a party or legal representative.

The parties should have submitted their own suggested or agreed directions. The court must consider them suitable and they must comply with the checklist in PD28 para. 3.6. Agreed directions which provide, for example, for exchange of experts’ reports, meetings of experts and a case management hearing in six months’ time do not comply and will not be acceptable.

The general approach to giving directions in the fast track is set out in PD28 para. 3.9 and, in those cases where the court cannot properly give directions on its own initiative or on the basis of the agreed directions filed, the options are set out in PD28 para. 3.10. – either allocate and convene a case management conference, or convene an allocation hearing and give directions at that stage. Normally it ought to be possible to allocate and give directions without



a hearing. Hearings that result from failures by the parties to comply with their obligations should have cost consequences to reflect those failures.

### **3.6 Allocating to the multi-track**

Rule 26.6(6) is the relevant provision. The multi-track is for all cases other than those allocated to the small-claims track or the fast track.

#### **3.6.1 Directions in multi-track cases**

The options are in r.29.2. When allocating to the multi-track the court can give directions and set a timetable for steps through to trial, or fix a case management conference (CMC) or pre-trial review (PTR), or both, with such additional directions as are appropriate.

A vital requirement to be borne in mind in all cases is that in r.29.2(2): to fix a trial date or window 'as soon as practicable'.

It is not obligatory for there to be a CMC in a multi-track case. There will be many straightforward cases where directions can be given at the outset through to trial in the same way as in the fast track. The first consideration should be whether the court is able to give directions of its own initiative or approve directions suggested by the parties.

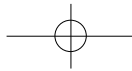
PD29 para. 4.7 sets out the requirements for any proposed directions. They must include the proposed trial date or period (para. 4.7(1)(b)). PD29 para. 4.8 raises additional matters which may also need to be addressed. As in the fast track, it is important to check agreed orders carefully. They may not always be compliant and should never be approved routinely.

PD29 para. 4.13 makes a CMC mandatory if the court is proposing of its own initiative to make an order for evidence on any issue to be given by a single joint expert, unless the parties have given written consent to the order.

Whenever a CMC is required it should be convened at the outset to enable the court to allocate and give directions. It may be possible to give some initial directions (typically for disclosure and exchange of lay evidence) and for these steps to be undertaken before the CMC. Consideration should also be given according to the particular case to the filing of a case summary, schedule of issues, details of proposed experts and their availability and core bundles.

Bespoke and creative orders help focus the attention of the parties and are the hallmark of active case management even though they may, on occasions, repeat and be a reminder of provisions in the rules themselves.

In assessing the time to be allotted to the CMC some allowance for reading time may be appropriate particularly in a substantial and complex case.



### **3.6.2 The case management conference**

The CMC should be the cornerstone of the process of bringing a multi-track claim to trial. An inquisitive and rigorous approach is essential. The court, with the assistance of the parties, must identify the issues which need to be resolved.

This is an invasive exercise in identifying what is genuinely in issue, and discarding what is not. Does there have to be a trial? What form of ADR might be appropriate? If there has to be a trial, should any issues be tried separately? What directions are necessary in relation to disclosure, lay and expert evidence and how can the requirement to list as soon as practicable be achieved?

PD29 gives very useful guidance as to the approach to be adopted, and pre-reading is essential to a clear grasp of the issues.

Some claims may require more than one CMC. Uncertainties in the medical prognosis, for example, may inevitably delay progress. If so and if possible, reserving it to a specified full-time judge and providing continuity is likely to be helpful. Beware, however, the cases in which the parties will ask for successive CMCs because they are dealing with the case in a piecemeal fashion and where there is no real justification and no purpose being served. The case management judge must never lose sight of the requirement to list for trial and the need to avoid drift and unnecessary delay.

Rule 29.3(2) provides that where a party is legally represented, a representative familiar with the case and with sufficient authority to deal with any issues which may arise must attend. If this requirement is not enforced robustly, the CMC is undermined. A breach should result in an appropriate and proportionate sanction. The most usual sanction would be costs. No costs might be allowed for the hearing or, if there has to be an adjournment to achieve an effective CMC, the defaulting party should pay the costs of that adjournment.

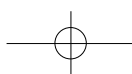
Many CMCs are now held by telephone. In the course of 2006 a pilot scheme originally undertaken in three county courts is being rolled out nationally and a new PD will replace the existing PD 23B. The scheme applies to all hearings of up to an hour's duration subject to certain conditions and requirements. The effect will be a considerable increase in the number of telephone hearings.

### **3.6.3 Orders**

Although these are tailor-made orders, it is efficient and helpful to try to use standard forms of wording where possible. Check with the court staff as to the practice in the particular court: it may well have a menu of specimen orders. There are also civil templates that have been devised and are available and used nationally.

### **3.6.4 Reasons**

If contentious issues arise at a CMC, in resolving them it is essential that reasons, albeit brief ones, are given.



### 3.7 Disclosure in the fast track and multi-track

The general order will be one for standard disclosure as defined in r.31.6. This includes documents on which the party relies and those which adversely affect his own or another party's case or support another party's case. It is further limited to those which are or have been in the party's control (r.31.8).

The underlying intention of this regime is to get to grips with disclosure and restrict it to what is necessary and proportionate in the particular case. Each case requires specific consideration in this respect. There is power to confine disclosure further in fast track (r.28.3(2)).

#### 3.7.1 Specific disclosure

Rule 31.12 contains the provisions for specific disclosure.

In *Three Rivers District Council and others v Governor and Company of the Bank of England (No 4)* [2002] EWCA Civ 1182, it was held that the criteria 'likely' to support a case or adversely affect the other's case was met where documents 'might well' do so. Where there was a jurisdictional threshold, as here, to the exercise of a discretionary power, a modest threshold of probability was sufficient. It was not necessary to demonstrate a probability.

#### 3.7.2 Pre-action disclosure

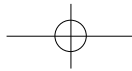
The provisions for pre-action disclosure against a prospective party under s.33 of the Supreme Court Act 1981 or s.52 of the County Courts Act 1984 now extend to all cases and are no longer confined to personal injury claims. The test to be applied is in r.31.16. Is it desirable in order to dispose fairly of the anticipated proceedings, to assist the dispute to be resolved without proceedings or to save costs?

The provisions for disclosure under s.34 of the Supreme Court Act 1981 or s.53 of the County Courts Act 1984 against a non-party are in r.31.17. The test is different. Are the documents likely to support the case for the applicant or adversely affect the case of another party and is disclosure necessary in order to dispose fairly of the claim or to save costs?

The general principles applicable to r.36.16 and r.36.17 were considered in *Black v Sumitomo Corporation* [2001] EWCA Civ 1819. 'Likely' to be a party means 'might well' be so if proceedings are issued.

*Marshall & Marshall v Allotts* [2004] EWHC 1964 QB supports a pragmatic approach. Will the disclosure help the parties focus more clearly on the issues and in their eventual statements of case if disclosure is ordered? The failure to make a proper response to the pre-action protocol was an influential consideration.

In *BSW Ltd v Balltec Ltd* [2006] EWHC 822 (Ch) it was said that the correct approach is threefold. First, establish whether the jurisdictional requirements in r.31.16(3) are satisfied. Secondly, establish whether it is 'desirable' having regard to the matters referred to in



r 31.16(3)(d). Thirdly, decide whether to exercise the discretion. Desirability is established if any of the matters referred to in r 31.16(d) are satisfied.

Such orders will invariably include an order for costs against the defendant because of default in compliance with a protocol. Otherwise, the particular provision in r.48.1 will apply.

The orders must contain the mandatory provisions referred to in r.31.16(4) and r.31.17(4). Those and the discretionary provisions in r.31.16 (5) and r.31.17 (5) must be considered in every case.

### **3.8 Expert evidence in the fast track and multi-track**

The CPR established and require court control of expert evidence.

Part 35 introduced the following provisions:

- the duty to restrict expert evidence to what is reasonably required (r.35.1)
- the court's power to do so, its permission always being necessary (r.35.4)
- the general requirement for expert evidence to be in writing (r.35.5(1))
- the specific prohibition in fast track cases of an expert attending unless it is necessary to do so in the interests of justice (r.35.5(2))
- the power to direct evidence by a single joint expert (r.35.7)
- the power to direct meetings of experts and statements of issues (r.35.12).

In fast-track cases, PD 28 para. 3.9 (4) envisages as part of the court's general approach a direction for a single joint expert 'unless there is good reason not to do so'.

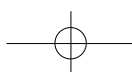
Where a party applies for permission he must identify the field of expertise and where practicable the expert (r.35.4(2)).

This has important implications for case management judges. The parties must satisfy you as to the need for any expert evidence and, when sought, the need for experts on each side. The routine granting of permission offends these obligations.

#### **3.8.1 The case law**

*Daniels v Walker* [2000] 1 WLR 1382 is essential reading. The following extracts give an indication of the guidance to the approach to be adopted.

*'In a substantial case such as this, the correct approach is to regard the instruction of an expert jointly by the parties as the first step in obtaining expert evidence on a particular issue. It is to be hoped that in the majority of cases it will be not only*



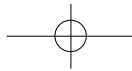
*the first step but the last step. If having obtained a joint expert's report, a party, for reasons which are not fanciful, wishes to obtain further information before making a decision as to whether or not there is a particular part (or indeed the whole) of the expert's report which he or she may wish to challenge, then they should, subject to the discretion of the court, be permitted to obtain that evidence.*

*'In the majority of cases the sensible approach will not be to ask the court straight away to allow the dissatisfied party to call a second expert. In many cases it would be wrong to make a decision until one is in a position to consider the situation in the round. You cannot make generalisations but in a case where there is a modest sum involved a court may take a more rigorous approach. It may be said in a case where there is a modest amount involved that it would be disproportionate to obtain a second report in any circumstances. At most what should be allowed is merely to put a question to the expert who has already prepared a report.'*

*Peet v Mid-Kent Healthcare Trust* [2001] EWCA Civ 1703 [2002] 1 WLR 210 was a case that dealt primarily with questions concerning the parties conferring with a single joint expert, but in which significant observations were made about expert evidence.

- 'In the absence of special circumstances, evidence by a single expert witness is the appropriate course to be adopted when giving directions in a case of this nature as to non-medical experts.'
- There is a duty upon lawyers and the court to control costs and one way of doing so was to ensure that expert evidence was 'restricted so far as possible'.
- The starting point is a single joint expert unless there is good reason not to.
- The evidence should be by the report and normally there should be no need for cross-examination.
- The court has a discretion to allow it, prior to or at the hearing.
- Any amplification should be restricted so far as possible.
- If there is an issue that is one thing, 'But the court should seek to avoid the situation arising, otherwise the object of having a single expert will in many situations be defeated.'
- It is very important to avoid 'an unnecessarily adversarial approach'.

All cases require consideration of whether expert evidence is reasonably required to resolve the proceedings and, if so, why a single joint expert should not be appointed. Where experts are allowed on both sides, provision must be considered for the preparation and filing of a



memorandum by them. There will need to be some mechanism at another CMC or at a pre-trial review for determining whether oral expert evidence is to be allowed. As ever, it is a case of devising the appropriate regime for the particular case.

### **3.8.2 Allowing a second expert**

*Beck v Ministry of Defence* [2003] EWCA Civ 1043 represents a significant change. It suggests that when such permission is granted it should normally be subject to a condition that the first report must be disclosed.

In *Hajigeorgiou v Vasiliou* [2005] EWCA Civ 236, the Court of Appeal dealt with an order in which permission was granted for expert evidence but in which the expert was not named. A distinction is drawn between cases in which the initial report has been disclosed prior to the application for a second expert and where it has not. There is no provision in the CPR to prevent a party from obtaining reports from different experts under the terms of the order made in this case.

### **3.8.3 Controlling experts**

*Stevens v Gullis* [2002] 1 AER 527 is an example of the court's power to control experts. The judge, in effect, disqualified one expert from participating in the proceedings where that expert had demonstrated a lack of grasp of his role and responsibilities.

*Phillips and others v Symes and others (No 2)* [2004] EWHC 2330 reviews the entire jurisdiction to consider a costs order against an expert.

## **3.9 Variation of the case management timetable**

The theme is the same and can be seen in r.28.4 and r.29.5 in relation to fast track and multi-track respectively.

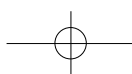
Whereas the parties are free to vary case management directions under r.2.11 they cannot do so in relation to the dates for pre-trial checklist, trial or trial period (in both tracks) as well as of a case management hearing or pre-trial review in multi-track. An application **must** be made to the court to vary any of those dates.

This approach is underpinned by the provision that the parties are assumed to have been content with an order for directions if no application was made to vary it nor any appeal lodged against it within 14 days of its service (PD 28 para. 4.2(2) and PD 29 para. 6.2(2)).

### **3.10 Default and sanctions**

The concept of active case management carries with it an obligation to monitor progress to trial and to ensure compliance with the court's directions.

The rules require a robust attitude towards this, particularly when there are late applications to vacate a trial. All of the possible options need to be considered.



Failure to comply in fast track is dealt with in PD 28 para. 5 and failure to comply in multi-track in PD 29 para. 7.

The principal features of the approach are evident:

- the parties may apply for an enforcement order/sanctions/both
- they must do so without delay
- no postponement of the trial is to be allowed unless circumstances are exceptional
- there will be postponement of a trial only when there is no other option
- the court will order the outstanding steps in the shortest possible time and impose a sanction (e.g. depriving a party of the right to raise or contest an issue or to rely on evidence to which the direction relates)
- the trial of the issues may be split
- postponement will be for the shortest possible time: 'Litigants and lawyers must be in no doubt that the court will regard the postponement of a trial as an order of last resort'

### 3.11 Pre-trial reviews

A multi-track pre-trial review may be held at any time after allocation (r.29.3). It is not obligatory and should be confined to appropriate cases. Practice varies: in some courts, they tend to be confined to cases listed for more than one to two days; in others the approach is either more confined or more general.

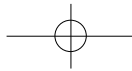
### 3.12 Pre-trial checklists

Checklists must be filed in all fast-track and multi-track cases unless dispensed with. They are in prescribed forms. The time limits for doing so, the consequences of not doing so, and the general provision are in Pt 28 (fast track) and Pt 29 (multi-track).

This is another significant step in the court's management of cases. It is an opportunity to monitor the progress of the case in the important period leading to trial. The date for the filing of the checklist is one that the parties cannot vary by consent.

In practice, the problems are similar to those that arise with the allocation questionnaires. Often the information is vague or the court receives a list of default with no indication about what is to be done about it. Practice differs: invariably, but not always, district judges consider those in fast track and circuit judges consider those in multi-track.

Where there has been default, it is necessary to consider whether an order can be made or whether a listing hearing or, in multi-track, a pre-trial review is necessary. If possible, urgent and peremptory orders can be made specifying what has to be done, the time limits and the



consequences of further default.

It may be appropriate, in a straightforward case where there has been slippage, to direct that the parties themselves are to make arrangements to secure compliance with all outstanding directions within a short specified time or make an application that is then to be listed urgently.

If there has to be a hearing, it must be convened quickly, and there should be appropriate cost consequences.

The emphasis must be to preserve the trial date/window.

### 3.13 Relief from sanctions

The CPR introduced a series of integral sanctions as an essential vehicle for court control over costs delay and complexity.

The concept is that these sanctions are to apply unless relief is obtained. The obligation is upon the defaulter:

- r.3.8 - a defaulter must obtain relief from any sanction
- r.3.9 - when hearing an application for relief, all the circumstances are to be considered including the nine specified matters.

The '3.9 criteria' are applicable more widely, for example, in the case of a failure to serve witness statements (r.32.10). In fact, wherever there is default and the consequences fall to be considered, the criteria are relevant.

In *Sayers v Clarke Walker* [2002] EWCA Civ. 645 the court said that the 3.9 criteria should be considered in any applications for extensions of time.

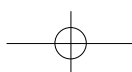
#### 3.13.1 Systematic consideration of the criteria

Systematic consideration is essential (*Bansal v Cheema* LTL 13 September 2000 and *Keith v CPM Field Marketing Ltd*, *The Times*, August 29, 2000). This requirement was emphasised in *Price v Price (trading as Poppyland Headware)* [2003] EWCA Civ 888 3 AER 911 and again in *Primus Telecommunications Netherlands BV v Pan European Ltd & ors* [2005] EWCA Civ 273. Failure to do so may vitiate the decision.

#### 3.13.2 Prospective applications for extensions of time

There is a distinction to be borne in mind between applications for extensions of time made prospectively and those made retrospectively.

In *Robert v Momentum Services Ltd* [2003] EWCA Civ 299, the Court of Appeal saw 'no reason to import the rule 3.9(1) checklist by implication into rule 3.1(2)(a) where an application for an extension is made before the expiry of the relevant time limit.' The distinction was drawn



between applying for relief from a sanction for failure to comply with a rule, practice direction or order where the failure had already occurred and seeking an extension of time before the default had arisen.

### **3.13.3 Striking out a statement of case**

Frequently, but not necessarily, an application for relief will have been prompted by or will have prompted an application under r.3.4(2)(c) to strike out for failure to comply with a rule, practice direction or court order.

The case law emphasises the need to be creative and flexible. *Biguzzi v Rank Leisure Plc* [1999] 4 AER 934 established that the CPR are ‘a new procedural code’ and that ‘Earlier authorities are no longer generally of any relevance...’

Striking out is not the only remedy. The court can order a party to pay costs or interest can be disallowed.

In *Walsh v Misseldine* [2000] CPLR 201, the Court of Appeal developed the approach.

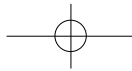
- There is a much lower threshold than ‘inordinate and inexcusable delay.’
- However, there is more flexibility.
- ‘In a case where liability is not in dispute, it is not prima facie just that a tortfeasor should escape all liability for his wrongdoing, though there may be exceptional circumstances where even so, it would be just to strike out the whole action’.
- It may be possible to try the issue of general damages but strike out a belated or exaggerated claim for specials/future loss.
- The emphasis is on flexibility and the overriding objective.

In *Price v Price (trading as Poppyland Headware)* [2003] EWCA Civ 888 3 AER 911, discretion was exercised in the claimant’s favour principally because there was a route available which ‘needed to be more widely used on appropriate occasions’. That was to allow the claimant the extra time on condition that no claim would be made for special or general damages other than what could be substantiated by the original medical evidence.

The emphasis is on the question of whether a fair trial is possible/impossible and upon the flexibility available to the judge.

For a recent review of the 3.9 criteria and the authorities dealing with breach and, in particular, non-compliance with ‘unless’ orders, see *CIBC Mellon Trust Company v Stolzenberg* [2004] EWCA Civ 827.

The following points emerged:



- where relief was sought after entry of judgment, then, by analogy with r.13.3(1) the applicant had to show a real prospect of success
- the consideration of the 3.9 criteria and the power to grant relief had to be exercised in accordance with the overriding objective
- the fact that a fair trial may still be possible does not entitle the applicant to relief.

### 3.14 Without merit orders

The Court of Appeal judgment in *Bhamjee v Forsdick & ors* [2003] Civ 1113 addressed issues arising from litigants pursuing repetitive applications that are totally without merit.

With effect from 1 October 2004 a new PD 3C provides for three new orders to be made under r.3.11. They are a Limited Civil Restraint Order, an Extended Civil Restraint Order and a General Civil Restraint Order. These are orders that may be made when a statement of case or an application is struck out or dismissed and is 'totally without merit'.

The first may be made by any judge where there have been two or more applications that have been dismissed as totally without merit (PD 3C para. 2.1). The order restrains the party from making any further applications in the specific proceedings. The order is in Form N19. Bear in mind that this is the only order you could make.

The other orders have a more extensive effect and can only be made by a Court of Appeal judge, a judge of the High Court or a designated civil judge.

There are two significant practical implications for case management judges. If the court of its own initiative or upon application strikes out a statement of case or dismisses an application and considers that the claim or application is totally without merit then, firstly, the court's order must record that fact and, secondly, the court must at the same time consider whether it is appropriate to make a civil restraint order.

### 3.15 Alternative dispute resolution (ADR)

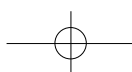
Lord Woolf said in the Final Report Access to Justice:

'The new procedures I propose will emphasise the importance of ADR through the court's ability to take into account whether parties have unreasonably rejected the possibility of ADR or have behaved unreasonably in the course of ADR'.

These intentions are reflected in the specified elements in active case management in CPR r.1.4(2)(e) and r.1.4(2)(f).

There is a twofold consideration – the suitability for ADR and its facilitation.

There are, too, potential costs implications at the conclusion of a case.



CPR 44.3 includes reference to the conduct of the parties ‘before, as well as during proceedings...’. The costs consequences have been considered in a number of cases.

All cases require specific consideration as to whether the issues or any of them are such that some form of ADR is appropriate. The court may invite the parties’ views, convene a hearing for specific consideration, deal with it as part of another hearing or stay for the purpose.

### **3.15.1 The cases**

In *Cowl v Plymouth County Council* [2001] EWCA Civ 1935 [2001] All ER 206 the Court of Appeal emphasised the need for the courts to use their powers to ensure that disputes between members of the public and public bodies were resolved with minimal court involvement. The Court might need to convene a hearing to inquire why an available complaints procedure or some other form of ADR had not been used to resolve or reduce issues. Litigation was to be avoided wherever possible.

In *Dunnett v Railtrack plc* [2002] 2 AER 850 the Court of Appeal refused to award costs to a successful defendant who had flatly refused to engage in ADR at the claimant’s invitation. The court emphasised the obligation upon the parties to help the court to further the overriding objective and that ‘if they turn down out of hand the chance of alternative dispute resolution when suggested by the court... they may have to face uncomfortable costs consequences’.

In *Hurst v Leeming* [2001] EWHC 1051, refusal to mediate was described as a ‘*high risk strategy*’. It did not result in any costs consequence in the particular circumstances of this case because there were shown to be no realistic prospects of its success.

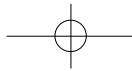
*Virani Ltd v Manuel Revert y Cja SA* [2003] EWCA Civ 1651 is an example where a costs order was made on an indemnity basis because of the paying party’s refusal to mediate.

In *Neal v Jones* [2002] EWCA Civ 1731 the costs were reduced by £5,000 because of a refusal.

However, in *Valentine v Nash* [2003] EWCA Civ 1274, there were no consequences for a defendant in a neighbour dispute who declined an offer of mediation immediately before trial. The claimant had refused all attempts at negotiation in the past and declined the defendant’s offers of settlement. The defendant had not behaved unreasonably.

*Corenso (UK) Ltd v Burnden Group Plc* [2003] EWHC 1805 QB is an example of no penalty despite a refusal to mediate where the parties were nevertheless engaged in active negotiations and showing a genuine willingness to resolve the issues.

In *Halsey v Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576 the Court of Appeal gave guidance about the role of ADR in personal injury cases and the circumstance in which it is appropriate to penalise a party who refuse to participate in ADR.



### 3.15.2 The Guidance

This is as follows:

- Compulsion to mediate would be an unwarranted obstruction to access to court and a violation of article 6.
- The court's duty is to encourage the parties.
- Practitioners should routinely consider with their clients whether their cases are suitable for ADR.
- A refusal could lead to a party being deprived of costs if that refusal was unreasonable.
- The burden of establishing unreasonableness lay on the losing party.
- Mediation remains a confidential process.
- There is no presumption in favour of mediation.

Guidance was also given about the assessment of reasonableness, the court observing that '...most cases are not by their very nature unsuitable for ADR'.

A party who reasonably believes that the case is bound to succeed may be justified in refusing to mediate. Where the costs of mediation would be disproportionately high, or the process will cause prejudice by, for example, delaying trial, a refusal may be justified.

In *Burchell v Bullard and others* [2005] EWCA Civ 358 the Court of Appeal confirmed that an offer to mediate made prior to the institution of proceedings may be taken into account.

As with all aspects of active case management, there is no prescriptive solution or order. The obligation, however, is to encourage the parties to settle their case and to use and facilitate ADR. The appropriate way of doing so will depend upon the particular features of the case, the issues and the value, as well as the facilities available to them.

The DCA has now established the Mediation Helpline full details of which appear on its website and which are accessible from any court. The National Mediation Helpline (NMH) was set up to provide low-cost mediation services to court users. It operates nationally as a source of information about mediation and a mechanism for setting up mediation appointments, with area panels of local mediators on a standard fee scale, all of which are accredited by the Civil Mediation Council. The Courts Mediation Service Toolkit (recently published on the judicial intranet) recommends that the NMH structure is used to support any new mediation schemes to ensure consistency of service around the UK and lift much of the administrative burden from the courts.

