

5. Delivery of judgments

5.1 Introduction

The requirement to deliver a judgment¹ can arise at any stage of proceedings and not only at their conclusion; indeed, sometimes more than one judgment may need to be given at any one stage, for example, during a case management conference. In these circumstances it is often preferable to deliver judgment on individual matters separately rather than to wait to give a compendious judgment at the end of all the arguments. Nonetheless, care should be taken to ensure that such individual matters are in fact discreet issues otherwise an earlier decision may skew a decision that is to be taken later.

5.2 Reasons for a decision

It is essential to remember that views expressed by a judge in discussion with an advocate are no more than views (however trenchantly expressed) until an actual judgment is delivered. It is unfortunately not uncommon for a case to go to appeal because the judge has assumed that he has given judgment when, in fact, no definitive reasoned decision has ever been expressed. Always bear in mind that the parties are entitled to know, and to analyse, the reasons for any decision that has been made. It is not necessary to deal with every argument but the judgment must make plain the principles upon which you acted and the reasons that led you to your decision.²

5.3 Giving judgment

It is also essential that each judgment is readily recognisable as such; it may therefore be convenient to begin each judgment with the words 'judgment number one', 'judgment number two', etc. It is often tempting, especially when an argument has little merit, merely to dismiss it without any explanation but this should never be done. A judgment should never be perfunctory but that does not mean that it cannot be brief.

Never hesitate to take time for reflection and to marshal your thoughts and notes. There is nothing more embarrassing than to realise half the way through delivering judgment that you have not fully understood an argument placed before you or that it has more persuasive power than you initially thought. However, if this were to occur, do not hesitate to stop and, after further argument if necessary, to begin again (as long as you make clear what you are doing and that it is the last judgment that is definitive). Better the embarrassment on the day than the embarrassment of reading the judgment on appeal!

5.4 Reserving judgment

Parties obviously want to learn your decision as soon as possible but do not give judgment before you are ready. If necessary, reserve judgment until another occasion. Before doing so, however, bear in mind that a reserved judgment takes twice as long to prepare, because it may well be necessary to reread all the documents in the case as well as your own notes. If you do reserve judgment, ensure that all the files, documents, skeleton arguments, etc. are kept in a safe place together with any notes you have made.

¹ By convention always written with only one 'e' in legal language.

² *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605.

It is often useful to photocopy your notes and to place them with the papers as long as you remember to remove them before returning the files at the end of the case. With the best will in the world notebooks can be misplaced. Equally, when compiling your notes, it may be convenient to insert an aide-memoire about a particular witness to remind you both of his identity and of your impressions of the witness.³ It is surprising how even a judge's memory may dim over a short period of time.

5.5 Matter and context

Every judgment should state the matter that has to be decided and any necessary context. Often this will require the setting out of a chronology; for this reason, if no chronology is provided by the advocates, it may be helpful to compile one when first reading the papers. Indeed, a useful summary of the matters to be decided is often to be found in skeleton arguments and may, in appropriate cases, be utilised by the judge with any necessary amendments.

5.6 Findings of fact

A judgment is likely to depend upon findings of fact. In order to reach such findings it is necessary to set out the relevant evidence for either side (together with relevant arguments) and to state what your findings are and why. Moreover, it is always necessary to set out the reasons for preferring one witness over another. In this regard it is important to remember that demeanour can be misleading and that analysis of the documents and circumstances are a far surer guide. As Robert Goff LJ said in *The Ocean Frost*:⁴

‘Speaking from my own experience, I have found it essential ... when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case and also to pay particular regard to their motives and to the overall probabilities.’

If demeanour is relied upon, it is important to spell out the type of demeanour and the conclusions drawn from it.

5.7 Decisions as to the law

A judgment will also frequently depend upon decisions as to the law. Here it is essential to set out a summary of the arguments on either side (together with relevant quotations and/or legal references) and to set out clearly why one argument is preferred over another. If you are minded to rely upon an argument not raised by a party it is incumbent upon you to give the parties adequate time to consider and to answer such an argument.

5.8 Exercising discretion

If a decision depends upon an exercise of discretion it is essential that the reasons for the exercise in any particular way are clearly set out. The overriding objective⁵ should not be parroted but equally it should not be used as a mantra. Nonetheless it is far better to refer to it

³ Cartoons are to be avoided in case the notes are later disclosed to the parties and/or the Court of Appeal!

⁴ [1985] 1 Lloyd's Rep 1 at 57 (adopted by the Privy Council in *Grace Shipping v CF Sharp* [1987] 1 Lloyd's Rep 207 at 215.

⁵ CPR 1.1.

in the judgment than to take it for granted. As Woolf MR said in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd*:⁶

‘Before the [appellate court] can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale.’

5.9 Aiming for clarity and precision

Every judge will have a different style and approach although it is a brave judge who will depart from the well-tryed and accepted format found in the law reports. However, at the end of the day it is clarity and precision that is likely to be the best guide.

5.10 Fresh evidence prior to judgment

If fresh evidence is discovered prior to judgment being given, be sure that each side has a proper opportunity to see and to comment upon it. Arguments put forward by one party must, of course, be shown to any other party with an opportunity to respond. It may not be necessary to reconvene the court but a strict timetable should be laid down by the judge so that each party knows what is expected.

5.11 Guidance

Guidance on the dissemination of judgments on a confidential basis in the High Court prior to their actual handing down may be found in the White Book 2006 at 40.2.5.

5.12 Permission to appeal

When asked to give permission to appeal, do not give judgment before filling out Form N460.⁷ Having listened to the arguments, complete the form and, if at all possible, ensure that what you then say in your judgment is precisely that which you have written on the form. There is no reason why your judgement should not be very short as you have already delivered a detailed judgment. For example, ‘The applicant argues that I have incorrectly exercised my discretion. However, my decision was made for case management reasons and was well within the ambit of my discretion.’ If your written reasons differ from your oral reasons, you leave the way open for arguments on appeal.

⁶ [1999] 1 WLR 1507 at 1523.

⁷ It is essential to have a stock of these forms to hand.