Managing cases actively

There was a time not so very long ago when a dispute between two parties was sometimes no more than a cat and mouse game between opposing solicitors, aided and abetted by their respective barristers. A powerful defendant in an action would sometimes not even bother to reply to a letter from a litigant or his solicitor, let alone tell the claimant what his defence was going to be. When disclosure was ordered, parties could drag their heels, make incomplete disclosure, ask for adjournments, and generally keep the meter running for as long as possible. For every nine hard working solicitors, there was at least one solicitor who took holidays at the client's expense, leaving the management of cases to 'clerks' not all of whom had the necessary knowledge or experience to cope. Courts always had the option, before the CPR, of striking a case out "for want of prosecution", but this was a somewhat draconian measure and not often exercised.

The regime of the CPR has changed all that: courts now no longer need to press the nuclear button and close down a litigation by striking out the claimant's case, because in the world of the CPR the case is managed by the court from the outset. Active case management includes a number of aspects of litigation which were simply not present in the 'bad old days'. Here, we will deal with just the issues in the case, as an example of case management. The first of these to consider is cooperation between the parties.

(Note: there is more information on case management in Module 5 of the Civil Litigation course, and the rules for this section are at Part 3 of the CPR).

Cooperation

The courts will encourage the parties to co-operate with each other in the conduct of the proceedings. What does 'cooperation' mean in this instance? It might be thought that the last thing a party wishes to do is to 'cooperate' with the 'enemy'. The court is not expecting the parties to become best friends, but at the very least it expects parties not to put obstructions in each other's way.

What many may not realise, however, is that we are entering a new phase in civil justice in this country. The days of naked adversarialism are disappearing in a cloud of judicial smoke. Management is the new watchword. Courts will now seek to manage cases, to ensure that justice is delivered to the parties in accordance with the merits of the case. How does a court

go about this? It begins by considering what the issues of the case are.

The nature of issues

An issue is a point of dispute. For example, in a contract for sale of goods a supplier may be suing a buyer for the price of goods delivered. The buyer, on the other hand, might be counterclaiming on the basis that the goods were not of satisfactory quality. There are two broad issues here: the first is payment for the goods, the second is the quality of the goods. Another issue may relate to the goods having been delivered later than promised, or allegedly promised. Yet another issue may be whether the cost of delivering the goods was included in the purchase price. Hence, the first task is for the parties to identify what the issues are.

Identifying the issues

Which is better? For the parties to identify the issues, or for the court to do so. It is not hard to work out which is the more expensive way. Of course the court will assist with the task where necessary, but the court can never know the case as well as the parties do: so this is where cooperation is essential. Parties will never know what the issues are unless they communicate with each other and identify the scope and nature of their dispute.

Using the contract example given in the previous section, we can see that four issues arise:

- payment for the goods;
- quality or servicability of the goods;
- time of delivery;
- whether the quoted price included delivery.

If the parties can accurately identify the ambit of their dispute, as in this example, they will soon realise that some of the issues they disagree about are not worth litigating over in court and should be resolved before matters get that far.

Deciding promptly which issues can be dealt with summarily

Imagine the cost of taking all of the above issues to court. Would it be worth arguing over something like the delivery time in a case such as this? As for whether the purchase price included the cost of the delivery, let us imagine the cost of that to be £100. To subject that particular issue to trial would take time and effort: inevitably, witnesses would have to be

produced and statements taken to establish what was said by whom to whom regarding whether the quoted price included delivery. Hours of court time could be taken up by arguing this point. The cost of doing so could be as much as £1000, or even more. It would be much better to dispose of an issue such as this either before the trial, or right at the beginning of the trial, summarily. If the parties are unable to resolve questions such as this between them, they will have to put up with the judge's decision and the attendant court costs, not forgetting the preparation before trial of each issue to be litigated. Parties need to ask themselves whether it would be worth risking court time and preparation costs, and then leaving the issue to the judge, who would naturally be asking the parties why they had spent £1000 to recover £100 (see Module 7 in the Civil Litigation course, 'Evidence' and Module 3, 'Before the claim begins').

The order in which to dispose of issues

It is also important to consider the order in which issues should be decided, and this is something that would be better worked out between the parties rather than leaving it to the court: not only in order to save costs, but also to ensure the smooth progress of the trial. Bear in mind, that to work out the best order to deal with the issues in a case, the parties may first need more information.

Let us take a personal injury claim as an example, and let us suppose that there is an issue as to whether the relevant limitation period has expired or, alternatively, whether, if it has expired, the court ought to disapply the limitation period. Other issues in the claim would concern liability and quantum.

In such a case there would be little point in putting the question of liability before the issue of limitation had been disposed of, since neither the parties nor the court would wish to waste time arguing over liability if, in the end, the decision of the court was that the limitation period had expired or, alternatively, that the limitation period should not be disapplied.

So, in an example like this the order in which the issues would be resolved would be:

- Has the limitation period expired?
- If 'no', proceed with the hearing; if 'yes', should the limitation period be disapplied?
- If 'no', the action ceases; if 'yes', proceed with the hearing.
- Is the defendant liable?
- If 'no', the action ceases; if 'yes', calculate quantum.

The future of case management

Litigants need to consider that the best case management is that done by the litigant's representative, if he has one, or the litigant himself if he is not represented. Case management becomes even better if the parties cooperate with each other. This does not mean that parties should be weak, or should give ground unnecessarily. What parties need to do, however, is to focus absolutely on what they are really disagreeing about and why they are disagreeing about it. In the end, a dispute may come down to just a few relatively straightforward points. Thus, parties need to narrow the issues between themselves to the extent that they can, so that they are left with as few issues as possible for the court to deal with.

Finally

Courts will no longer tolerate 'mind games' between parties, unreasonable applications or resistance to reasonable applications; courts will no longer tolerate a powerful, well-endowed party bullying a litigant in person, or intimidating a vulnerable claimant into taking an inferior settlement.

If parties fail to manage the case themselves, they must expect the court to intervene. The more parties take an interest in solving their problem, the less the courts will interfere. We are in the new age of dispute resolution.