

CILEX

CPOQ

**A1 – Dispute
Resolution and
Litigation**

Advanced Stage

2021

A1: Dispute Resolution and Litigation

The aim of this module is to give you the essential knowledge and understanding of how disputes are resolved through the litigation process or through alternative dispute resolution methods. You will cover all stages of a case, from first considerations in dispute resolution through to enforcement of judgments following a trial. You will consider alternative methods of dispute resolution, taking into account the client's wishes, together with the steps that can be taken to protect the client's costs position. You will gain an understanding of how costs underpin the litigation process and be able to conduct the case accordingly.

The module covers:

1. Establishing the cause of action
2. Limitation
3. Funding
4. Obtaining pre-action remedies and information
5. The overriding objective and resolving a dispute without litigation
6. The courts case management powers and costs
7. Damages and entitlement to and calculation of claims for interest
8. Preparing and issuing a Part 7 claim
9. The defendant's response
10. Focus on statements of case
11. Case Management
12. Witness evidence
13. Expert evidence
14. Disclosure
15. Interim applications
16. Focus on discontinuance, negotiation, and settlement before trial
17. Preparations for trial
18. Appeals
19. Enforcement

Learning Outcomes

By the end of this module you will be able to:

1. Identify within the relevant frameworks for alternative dispute resolution and litigation an appropriate means for resolution of issues arising in contract and tort and apply to a set of facts
2. Understand the client's position with reference to the law, facts and evidence and assist the client towards a resolution of their dispute
3. Advise a client with regard to tactical and strategic steps to place the client at an advantage

4. Analyse a situation and make appropriate recommendations to the client which are in their best interests

Linked online assessment: A1

1. Establishing the cause of action	<p>One of the first considerations when providing advice is whether the facts of the dispute give right to a cause of action. Building on the knowledge and understanding of the law of contract and tort covered at Foundation level will help you determine whether a cause of action arises and whether there is a cause of action in both contract and tort. Therefore, you will need to know the following:</p> <ol style="list-style-type: none">a) Multiple causes of actionb) Interrelationship of contract and tort
2. Limitation	<p>It is necessary to establish the cause of action is because the right to bring a claim may become statute barred due to its relevant limitation period. You must know the relevant time limits for bringing a claim and when the limitation period may be extended or excluded. Therefore, you will need to know the following:</p> <ol style="list-style-type: none">a) The purpose of limitation of actions<ul style="list-style-type: none">• To ensure claims are not stale and can still be investigated• Fairness to the parties – prejudice• To adhere to the overriding objective to deal with cases justly and expeditiously• To ensure the parties are on an equal footingb) Limitation Act 1980<ul style="list-style-type: none">• Claims in contract; s.5• Non-personal injury claims in tort; s.2• Personal injury claims• s.11 and s.11A• s.14• s.33• Incapacity; s.28• Fraud and mistake; s.32c) Claims for contribution<ul style="list-style-type: none">• ss.1, 2 and 3 Civil Liability (Contribution) Act 1978• s.10 Limitation Act 1980

<p>3. Funding</p>	<p>Understanding how a litigation matter will be funded is essential. This may determine whether or not proceedings can be commenced. Therefore, you will need to know the following:</p> <ul style="list-style-type: none"> a) Conditional fee agreements <ul style="list-style-type: none"> • Content and terms • Notification requirements • Success fees • Application and calculation of liabilities b) Damages-based agreements <ul style="list-style-type: none"> • Content and terms • Notification requirements • Success fees • Application and calculation of liabilities c) Fixed fees and hourly rate retainers <ul style="list-style-type: none"> • Awareness of Portals for Low Value Personal Injury claims e.g. Road Traffic Accidents and EL and PL claims d) Third party funding <ul style="list-style-type: none"> • Litigation crowd funding solutions e) Legal aid <ul style="list-style-type: none"> • Availability
<p>4. Obtaining pre-action remedies and information</p>	<p>An effective litigation trainee will be able to consider whether a pre-action remedy is appropriate and if so, how to apply for it. Therefore, building further on the knowledge gained at Foundation Stage about remedies, you will need to know the following:</p> <ul style="list-style-type: none"> a) Injunctions <ul style="list-style-type: none"> • Practice Direction 25A • Outline of procedure; making an application; evidence; urgent application without notice b) Pre-action disclosure and non-party disclosure: <ul style="list-style-type: none"> • Part 31.16
<p>5. The overriding objective and resolving a dispute without litigation</p>	<p>Litigation is controlled by the court even before a claim has been issued. This ensures that the parties give full consideration to the possibility of settlement. You must understand the workings and relevance of the Practice Direction – Pre-Action Conduct and Protocols and specific protocols, and the Civil Procedure Rules generally. Therefore, you will need to know the following:</p>

	<ul style="list-style-type: none"> a) The framework for litigation <ul style="list-style-type: none"> • The Civil Procedure Rules • Part 1 The overriding objective b) The Practice Direction – Pre-Action Conduct <ul style="list-style-type: none"> • When it is applicable • Requirements c) Overview of The Pre-Action Protocols including awareness of resolution of personal injury and money disputes through the three stages of the online portals: <ul style="list-style-type: none"> • Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol') • Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims • When applicable • Content of claim notification form • Time scales for response • Obligations on response • Reasons why a claim might begin and then fall out of the portal • Pre-action disclosure of documents • Money Claim Online d) Awareness of methods of Alternative Dispute Resolution (ADR) <ul style="list-style-type: none"> • Litigation as a last resort • The aims of ADR and the court's approach • Consideration and timing of ADR • Unreasonable refusal to consider ADR; <i>Halsey v Milton Keynes General NHS Trust [2004]</i> • Mediation • Early Neutral Evaluation • Arbitration • Negotiation including round table meetings • Online Dispute Resolution
<p>6. The court's case management powers and costs</p>	<p>The courts have wide case management powers and the right to sanction a party which has failed to comply with Rules, Practice Directions and Orders. This can have costs consequences and you must understand how, when and what costs may be ordered, how they are assessed and how a party can be penalised in costs. Therefore, you will need to know the following:</p> <ul style="list-style-type: none"> a) The court's case management powers

	<ul style="list-style-type: none"> • Part 1 The overriding objective • Part 3 General powers (CPR3.1; and 3.1A) <p>b) Sanctions and application for relief from sanction</p> <ul style="list-style-type: none"> • Types of sanction • When sanctions might apply • The duty of the court to enforce compliance with rules, Practice Directions and Orders • Power to make orders of own initiative • Power to strikeout of own initiative or on application contrasted with an outline of applications for summary judgement • Application for relief against sanction and factors to be taken into account (Denton) • Costs consequences <p>c) General principles of costs and orders relating to costs</p> <ul style="list-style-type: none"> • Parts 44 and 45 • Court’s discretion • Basis of assessment • Factors to be taken into account • Cases where costs orders deemed to be made • Court’s powers in relation to misconduct • Scope and effect of Qualified One-way Costs Shifting <p>d) Costs management and budgeting</p> <ul style="list-style-type: none"> • Court’s case management powers (Part 3) • Filing and exchanging budgets and budget discussion reports; precedents • Costs management order • Costs management conferences • Cost capping orders <p>e) Outline of applications for security for costs</p> <ul style="list-style-type: none"> • Part 25 • Conditions to be satisfied <p>f) Assessment of costs</p> <ul style="list-style-type: none"> • Part 47 • Summary assessment • Detailed assessment
<p>7. Damages and entitlement to and calculation of claims for interest</p>	<p>You must understand the purpose of an award for damages and any entitlement to interest. You must understand how a claim for interest is made and the court’s discretion to award statutory interest. Different heads of claim may attract different rates of interest and, in contract claims, there is an additional statutory entitlement to interest. Therefore, you will need to know the following:</p>

	<ul style="list-style-type: none"> a) Statutory interest <ul style="list-style-type: none"> • Entitlement to interest • Court’s discretion as to rate and period • Unreasonable delay; Part 16: Requirement for a claim for interest to be stated • Senior Courts Act 1981 • County Courts Act 1984 b) Claims in tort <ul style="list-style-type: none"> • Generally: the purpose of an award • Personal injury claims: <ul style="list-style-type: none"> ○ Outline of types of awards for general damages including provisional damages; applicable rate of interest and calculation ○ Outline of awards for special damages and applicable rates of interest and calculation c) Claims in contract <ul style="list-style-type: none"> • Generally: the purpose of damages • Contractual entitlement to interest • Late Payment of Commercial Debts (Interest) Act 1998 <ul style="list-style-type: none"> ○ Rate of interest ○ Calculation ○ Compensation
<p>8. Preparing and issuing a Part 7 claim</p>	<p>If a claim cannot be resolved during the pre-action phase, proceedings may be commenced by the claimant. You must understand how and when the claim form must be filed and be able to identify who should be sued and how they should be described and how to draft, issue and serve a claim form. Therefore, you will need to know the following:</p> <ul style="list-style-type: none"> a) Jurisdiction of the court and allocation of business b) Identify and describe the correct parties c) Joint and several liability d) Part 16 Contents of the claim form (N1) including the required statement of value <ul style="list-style-type: none"> • Part 7 issuing proceedings including documents to be sent to the court • Part 6 <ul style="list-style-type: none"> ○ Service of a claim form within the jurisdiction ○ Methods of service ○ Time limit for service and where to serve ○ Deemed dates of service and time limits for serving Proceedings

	<ul style="list-style-type: none"> ○ Service of a claim form outside the jurisdiction, with or without the court's permission ○ Service by an alternative method and technology permitted
<p>9. The defendant's response</p>	<p>Usually, the particulars of claim are served at the same time as the claim form. You must understand when a defendant is required to respond to the documents received and the defendant's options when responding to the claim in addition to the time limits for response to avoid default judgment. Therefore, you will need to know the following:</p> <ul style="list-style-type: none"> a) Time limits for response b) Part 9 Defendant's options: <ul style="list-style-type: none"> ● Admissions ● Filing an acknowledgment of service, ● Filing a defence ● Consequences of not filing <ul style="list-style-type: none"> ○ Request for default judgment c) Part 12 requesting default judgment d) Part 13 setting aside default judgment
<p>10. Focus on statements of case</p>	<p>You must understand the purpose of statements of case and what they should contain along with the evidence required to enable the court to decide on appropriate case management and track allocation. You must know what is required in a statement of case. Therefore, you will need to know the following:</p> <ul style="list-style-type: none"> a) Statements of case <ul style="list-style-type: none"> ● Examples b) Structure and purpose of the statement of case c) Part 16 <ul style="list-style-type: none"> ● Contents of the particulars of claim ● Contents of the defence ● Part 9 Defendant's options <ul style="list-style-type: none"> ○ The scope and import of admissions ● Inclusion of counterclaims and other additional claims (Parts 15 and 20) ● Reply to defence d) Part 22 and PD 22 Statements of Truth <ul style="list-style-type: none"> ● Purpose of the statement of truth

	<ul style="list-style-type: none"> • Documents to be verified • Form of the statement of truth • Who should sign? • Consequences of failure to verify • Contempt
<p>11. Case Management</p>	<p>As part of its case management role, after a defendant has filed its defence, the court officer will, after an assessment of various factors, provisionally allocate the claim to be the most suitable track. The parties will then be asked to complete a directions questionnaire to help the court firmly decide upon the correct track and the directions for future conduct. You must understand this process. Therefore, you will need to know the following:</p> <ul style="list-style-type: none"> a) Part 26 and PD 26 <ul style="list-style-type: none"> • Preliminary allocation • Directions questionnaire • Content • Requirement for completion • Stay to allow settlement • Agreeing directions <ul style="list-style-type: none"> ○ Varying standard directions ○ Seeking permission to use expert evidence • Scope of the tracks • Matters which are relevant and not relevant to allocation to track b) The Small Claims Track Part 27 <ul style="list-style-type: none"> • The scope and conduct of claims on the small claims track c) The Fast-Track Part 28 <ul style="list-style-type: none"> • Standard directions d) The Multi-track Part 29 <ul style="list-style-type: none"> • case management and case management conferences e) Costs and costs budgets f) Consequences of non-compliance; varying the timetables; extensions of time g) Notice of allocation
<p>12. Evidence</p>	<p>Evidence is required to establish an issue. Any fact which needs to be proved should be proved at trial by a witness' oral evidence. That</p>

	<p>evidence, along with other evidence, such as documentary and expert evidence, provide the basis for the court's decision in the case as to whether to make a finding of liability and award damages. You must get the witness evidence right. Therefore, you will need to know the following:</p> <ol style="list-style-type: none"> a) What is witness evidence? b) Who may give evidence? c) Part 32: court's power to control evidence d) Part 33 e) The civil burden and standard of proof f) Factual witness statements: <ul style="list-style-type: none"> • Structure of a witness statement • Function of the witness statement at trial • Statements of truth <ul style="list-style-type: none"> ○ Part 22 • Consequences of failure to comply with court direction for exchange of statements <ul style="list-style-type: none"> ○ Inbuilt sanction
<p>13. Expert evidence</p>	<p>The court seeks to restrict expert evidence to that which is needed to be used. Knowing when expert evidence might be necessary, how to obtain the court's permission and how to instruct an expert are important. Therefore, you will need to know the following:</p> <ol style="list-style-type: none"> a) The nature of expert evidence distinct from lay witness evidence b) Part 35 and PD 35 c) Power of court to restrict expert evidence d) Seeking the court's permission e) Determining need for expert evidence f) Choice and instruction of experts <ul style="list-style-type: none"> • Single experts • Single joint experts • The letter of instruction g) Duties of experts <ul style="list-style-type: none"> • The expert's report • Questions to and discussion between experts

<p>14. Disclosure</p>	<p>Documentary evidence is a form of lay evidence. The objective of requiring the parties to disclose relevant documents links to the overriding objective and the need to enable the court to deal with a case justly and at proportionate cost. Even at the pre-action stage, the parties must consider disclosure of documents with the aim of achieving a compromise of the claim at an early if possible. Therefore, you will need to know the following:</p> <ul style="list-style-type: none"> a) Part 31 b) The process of standard disclosure: <ul style="list-style-type: none"> • The meaning of document <ul style="list-style-type: none"> ○ Electronic documents • Duty of disclosure <ul style="list-style-type: none"> ○ Reasonableness of search ○ Meaning of disclosure ○ Meaning of inspection ○ Right of inspection ○ Documents referred to in statements of case c) Withholding inspection <ul style="list-style-type: none"> ○ Legal professional privilege ○ Documents having dual purpose ○ Without prejudice communications d) Consequences of false disclosure statements e) Review of documents on inspection f) Requiring specific disclosure g) Requiring disclosure by non-parties
<p>15. Interim applications</p>	<p>During the course of the litigation process, occasions will arise when a party may need to make an application to the court to ask for the court's assistance, particularly in enforcing compliance with orders which have been made. Knowing how to make an application is important. Therefore, you will need to know the following:</p> <ul style="list-style-type: none"> a) Part 23 b) General applications <ul style="list-style-type: none"> • Outline of common reasons for applications and examples under Part 18 and Part 25 (application for interim payments) • Completion of the application notice: common orders including unless orders and costs orders

	<ul style="list-style-type: none"> c) Requirements for service and applications which may be dealt with without hearing d) Applications which may be dealt with without a hearing e) Setting aside or varying orders made without notice f) Power of the court to proceed in the absence of a party g) Schedules of costs and summary assessment h) Telephone hearings, video links and conferencing
<p>16. Focus on discontinuance, negotiation and settlement before trial</p>	<p>Following disclosure and exchange of evidence, the parties are in a position to evaluate the claim and consider the strengths and weaknesses on both sides. The possibility of resolution should again come to the forefront of relevant considerations. It may be possible to settle the case in full or at least to minimise the issues between the parties which in turn should minimise costs and wasted court time. There are several options to consider. Therefore, you will need to know the following:</p> <ul style="list-style-type: none"> a) Part 38 b) Discontinuance <ul style="list-style-type: none"> • Why and when a party may discontinue • Procedure • Court's permission • Liability for costs on discontinuance • Effect of QOCS c) Negotiation <ul style="list-style-type: none"> • Without prejudice offers • Calderbank offers • Effect on costs d) Part 36 <ul style="list-style-type: none"> • Effective Part 36 offers • Clarification • Withdrawal and varying terms • Acceptance • Restriction on disclosure • Status of offers outside Part 36 • Costs consequences on acceptance and on judgment <ul style="list-style-type: none"> ○ QOCS in personal injury claims

	<ul style="list-style-type: none"> e) Consent orders and Tomlin orders <ul style="list-style-type: none"> • Purpose and differences • Structure and drafting effective wording f) Claims involving minors and persons under a disability <ul style="list-style-type: none"> • Approval hearings where proceedings have been issued • Approval hearings where proceedings have not been issued (Part 8) • Requirements <ul style="list-style-type: none"> ○ Procedure
<p>17. Preparations for trial</p>	<p>Specific preparations which must be undertaken to ensure that the case is ready for final hearing before the judge including the need to keep the prospect of resolution in focus. You must know how to prepare for trial including awareness of the role of counsel, where instructed. Therefore, you will need to know the following:</p> <ul style="list-style-type: none"> a) Pre-trial checklists <ul style="list-style-type: none"> • Purpose and content b) Trial bundles <ul style="list-style-type: none"> • Purpose • Contents • Obligations for preparation c) Organising and preparing witnesses <ul style="list-style-type: none"> • Refreshing the witness' memory • Arranging attendance of witnesses • Part 34 • Issue and service of witness summonses • Travelling expenses and compensation • Failure of a party or a witness to attend trial • Video links and remote evidence d) Continuing efforts towards resolution <ul style="list-style-type: none"> • Possible need to seek counsel's advice on evidence, liability and quantum • Managing expectations • Explaining possible outcomes • Explaining risks of litigation • Explaining ongoing need to consider compromise
<p>18. Appeals</p>	<p>Each party at trial (or at an earlier hearing) hopes to be the successful party. But at every hearing and every trial, each party runs the risk of an adverse outcome. However, an adverse outcome is not necessarily a wrong decision by the court but occasionally it is necessary to appeal a decision. Therefore, you will need to know the following:</p>

	<ul style="list-style-type: none"> a) Decisions which may be appealed b) Part 52 <ul style="list-style-type: none"> • Grounds of appeal • Permission to appeal • Destination of appeals • Time limits for appeals • Skeleton arguments
<p>19. Enforcement</p>	<p>If a judgment debtor does not pay the judgment sum on time in accordance with the court judgment or order, steps can be taken to enforce the judgment. Therefore, you will need to know the following:</p> <ul style="list-style-type: none"> a) How and when a judgment may be enforced <ul style="list-style-type: none"> • Date when does judgment take effect • Date when judgment may be enforced • Interest on judgment debts <ul style="list-style-type: none"> ○ Judgments Act 1838 ○ Rate ○ Date from when interest runs b) Suitable enquiries to be made as to the financial viability of the debtor c) Part 71 procedure d) Methods of enforcement: <ul style="list-style-type: none"> • High Court and County Court enforcement • Taking control of goods • Attachment of Earnings Orders • Charging Orders • Third-party debt orders