

Title	Tactics and costs in Commercial Litigation	
Level	4	
Credit value	7	
Learning outcomes The learner will:	Assessment criteria The learner can:	Knowledge, understanding and skills
1 Understand the procedures for making an interim application to the court	1.1 Explain when it is necessary and appropriate to make an interim application to the court	1.1 An issue has arisen between the parties not capable of resolution through discussion e.g., parties are not able to comply with court directions, applicant needs more time, applying for sanction against opponent who has missed deadline, applying for a costs capping order (CPR 3.20), applying for relief from sanction, opponent has failed to respond to Part 18 request; understanding link between court's case management powers and power to make orders of its own initiative and to sanction misconduct (CPR 3) and compliance with overriding objective (CPR 1); Other procedural matters requiring permission in certain circumstances, e.g. amendment of name of party, substitution of party, addition of party. CPR 17 and 19
	1.2 Analyse the range of possible interim applications available in relation to disclosure and inspection	1.2 Requiring understanding of distinction between disclosure and inspection; understanding of legal professional privilege; application necessary where party has failed to serve list on time or disclosure is inadequate ; specific disclosure: CPR 31.12; pre-action disclosure: CPR 31.16; 3 rd party disclosure: CPR 31.17; applications challenging right to withhold

		documents from inspection: CPR 31.19;
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	1.3 Evaluate the basis upon which the court may order a party to provide security for costs	1.3 Meaning of security for costs; conditions to be satisfied and procedural requirements under CPR 25.12-13; court's discretion e.g. what factors will be considered; terms of the order and its effect
	1.4 Explain the procedure for making an interim application to the court	1.4 Procedural requirements under CPR23 and PD23A e.g. as to content of application notice and service (CPR 23.6 and 23.7); need for evidence in support either on N244 form or separate witness statement; requirement for and meaning of statement of truth (CPR 22); when appropriate to apply without notice; applications which may be dealt with without a hearing(CPR 23.8); options available to set aside or vary
	1.5 Complete an application notice for a simple interim application to the court	1.5 Completion of N244 for simple application, e.g., because opponent has failed to comply with court directions
	1.6 Explain the range of costs orders which the court could make on an interim application	1.6 Understanding court's discretion in relation to costs CPR 44.2 and 44.6; understanding types of costs orders and what they mean PD44 4.2 e.g. Claimant's/Defendant's costs in any event, costs in the case, Claimant's/Defendant's costs in the case, costs reserved, no order as to costs; requirement to notify client (CPR 44.8) Understanding that if interim applications are made which, reasonably, were not included in a costs budget for a multi-track matter, the costs of such interim applications shall be treated as additional to the approved budgets (PD2E 2.9)

	1.7 Explain the procedure for the summary assessments of costs	1.7 Understanding court's discretion as to costs (CPR 44.2); understanding procedure for summary assessment of costs PD44 (rule 9.1, 9.2, 9.4) and duties of the parties and representatives (rule 9.5) e.g. requirements for completion and service of statement of costs; basis of assessment and factors to be taken into account (CPR 44.4); meaning of guideline hourly rates; effect of non-compliance PD44 (rule 9.6) (failure to serve statements of costs) and of misconduct PD44 (rule 44.11)
	1.8 Review and/or correct a sample costs schedule for summary assessment	1.8 Identifying relevant fee-earners and their rates, summarising hours spent by each fee-earner on attendances on client, attendances on opponent, attendances on others, work done on negotiations, site inspection; preparation of documents, preparation for hearing, travelling to court and waiting, attending hearing and identifying relevant disbursements (court fees, travel expenses, Counsel's fees); calculating VAT if applicable (if both parties are VAT registered VAT not to be claimed)
	1.9 Apply knowledge of interim application procedures to a given situation	1.9 Application to a complex scenario

<p>2 Understand the circumstances in which it is possible to conclude an action before trial</p>	<p>2.1 Explain the procedure for obtaining judgment in default</p>	<p>2.1 Understanding what is meant by judgment in default e.g. judgment for fixed sum (including what may be specified under CPR 12.5) or judgment with damages to be assessed followed by directions for assessment of quantum; understanding circumstances when judgment in default might be ordered CPR 12; understanding conditions to be satisfied; understanding procedural requirements for obtaining default judgment , including claiming interest (CPR 12.6).</p>
	<p>2.2 Evaluate which interim applications could result in termination of the proceedings before trial</p>	<p>2.2 CPR 3: application to strike out statement of case grounds for application e.g. that it discloses no reasonable grounds for bringing/defending claim; that it is an abuse of process or there has been a failure to comply with a rule, PD or court order</p> <p>CPR 24: Meaning of Summary Judgment; grounds for application; link with CPR 3; procedural requirements; court's powers if matter proceeds</p> <p>CPR 25: Security for Costs; application by Defendant against Claimant only; if court orders security and claimant fails to pay, claim may be struck out</p>
	<p>2.3 Explain how to make a valid Part 36 offer</p>	<p>2.3 Requirements for form and content of valid Part 36 offer taking into account new procedural rules for all Part 36 offers made on or after 6th April 2015 including rules for service PD36A and clarifying, withdrawing or changing the terms of a Part 36 offer CPR 36.8 and 36.9</p>
	<p>2.4 Analyse the implications for both parties of accepting a Part 36 offer</p>	<p>2.4 Time period for acceptance and effect of CPR 36.7 ; when and how offer may be accepted; effect of acceptance CPR 36.11- action</p>

		<p>stayed; effect of automatic costs consequences; requirements for payment of amount due</p>
	<p>2.5 Analyse the implications for both parties of rejecting a Part 36 offer</p>	<p>2.5 If not accepted, understanding interest and costs consequences following judgment (CPR 36.17) for defendant where claimant makes offer which is rejected e.g. claimant has obtained a judgment at least as advantageous as its own Part 36 offer: defendant pays 10% increase in damages subject to cap of £75,000; defendant pays costs on the indemnity basis from the date the offer expired; defendant pays interest on costs at 10%</p> <p>Understanding implications for claimant where defendant makes offer which is rejected and claimant fails to obtain a judgment more advantageous than defendant's Part 36 offer including understanding of the status of offers which are neither rejected nor withdrawn - CPR36.9 - "stacking of offers" and implications for the offeree</p> <p>Understanding of court's discretion and factors to be taken into account including whether the offer was a genuine attempt to settle proceedings</p>
	<p>2.6 Explain the function of "without prejudice" communications</p>	<p>2.6 Understanding link with Part 36.13 and status of Part 36 offers; "Without prejudice" communications can be letters, telephone conversations or meetings; contents of communications cannot be referred to in the legal proceedings; used to make offers of settlement; offers will be kept secret from judge</p>

		<p>“Without prejudice save as to costs” used to preserve right to refer to the offer after judgment has been given; may be used in context of costs arguments</p>
	<p>2.7 Analyse the types of terms which might be included in a settlement offer involving the payment of money</p>	<p>2.7 Typical terms e.g. stay of proceedings with liberty to apply; amount(s)/instalments to be paid, time when to be paid, to whom it is to be paid; precise mechanism for payment e.g., cleared funds, bank transfer</p> <p>Other conditions to be imposed by each party e.g., goods or documents to be delivered, confidentiality of terms</p> <p>Provision for award and assessment basis of legal costs incurred by the parties</p> <p>Brief overview of options if terms are breached e.g. matter to be brought back before the court, enforcement of judgment</p>
	<p>2.8 Draft a valid consent order</p>	<p>2.8 Understanding that consent orders on settlement record terms of settlement; understanding that court cannot order a party to accept a sum of money in settlement; understanding meaning of consent order; requirements of valid consent order CPR 40.6 and PD40B and appropriate circumstances for use e.g. agreement as to payment of money in settlement. Meaning of a “Tomlin” orders and appropriate circumstances for use e.g. where settlement agreed without admission of liability or go beyond what the court has power to order; which settlement terms must be recorded on face of order and which terms should go into schedule in order to gain court approval and which terms are enforceable without further litigation.</p>

	2.9 Apply knowledge of concluding an action pre-trial to a given situation	2.9 Application to a complex scenario
3 Understand the different types of alternative dispute resolution which are commonly used in England and Wales	3.1 Explain what mediation is in a civil litigation context	<p>3.1 Form of non-determinative ADR; mediation used in other contexts (workplace, ACAS, family) – methods used in these contexts are different to “commercial” mediation</p> <p>In civil litigation context, mediation is a tool often used alongside the litigation process to assist parties in settling outside court</p> <p>Although CPR refers to ADR, court has no direct control over mediation and cannot force parties to mediate</p>
	3.2 Explain the role of a mediator in civil litigation	3.2 Mediator explores each parties’ case with them; discovers parties’ needs/wants/expectations; does not express view on prospects of success, but can break deadlock by reality testing; attempts to broker settlement between parties without parties negotiating face to face

	<p>3.3 Explain the procedure adopted in a typical commercial mediation</p>	<p>3.3 Parties agree to mediate; joint instruction of mediator; entry into mediation agreement; position statements exchanged; opening joint session; individual sessions with mediator; possible additional joint sessions/final joint session (flexible process); drafting terms of settlement</p> <p>Who attends, who pays fees, typical length - 1 day</p> <p>Need to find venue for mediation with enough rooms for each party plus mediator</p> <p>Important rules about confidentiality of discussions between parties and mediator; mediator cannot pass on information to other party without express permission; whole process is without prejudice to court proceedings; if settlement not reached, discussions at mediation cannot be referred to in court proceedings. Negotiations likely to continue between the parties post mediation</p>
	<p>3.4 Analyse the criteria for selecting an appropriate mediator</p>	<p>3.4 Direct instruction; use of mediation organisation e.g., CEDR, obtain CV: mediation experience, legal expertise, people skills and expertise relevant to the issues</p>
	<p>3.5 Explain the documents usually required for a commercial mediation</p>	<p>3.5 Mediation agreement: agreement to confidentiality/without prejudice provisions, agreement to pay fees, who will attend</p> <p>Case summary/position statement of each party</p> <p>Bundle of relevant documents usually including court and disclosure documents</p>

	<p>3.6 Analyse the basic features of arbitration, negotiation, expert determination and early neutral evaluation in comparison with mediation</p>	<p>3.6 Overview of the other main alternatives to litigating: determinative (arbitration and expert determination) and non-determinative (negotiation, mediation and early neutral evaluation); involvement of neutral third party (all except negotiation); advantages and disadvantages to each type</p>
	<p>3.7 Outline the effects of an ADR or arbitration clause in a commercial contract</p>	<p>3.7 Such clauses increasingly common in commercial contracts; where parties in dispute are parties to a contract, need to check contract; ADR clause may oblige parties to use, e.g., mediation before litigating; arbitration clause may oblige parties to use arbitration instead of litigating. If court proceedings are issued where there is an arbitration clause, apply to court to stay proceedings</p>
	<p>3.8 Explain the possible costs consequences of refusing to attempt ADR</p>	<p>3.8 Costs may be disallowed at trial even if the party wins where party has unreasonably refused to attempt ADR e.g., <i>Halsey v Milton Keynes (2004)</i>; CPR 44.4; relevance of the requirements of the Practice Direction - Pre-Action Conduct and Protocols (28 July 2015) for consideration of ADR (paras.8, 9 and 10)</p>
	<p>3.9 Apply knowledge of the types of alternative dispute resolution to a given situation</p>	<p>3.9 Application to a complex scenario</p>
<p>4 Understand final costs orders and how those costs are assessed by the court</p>	<p>4.1 Analyse the matters which the court may take into account when making a costs order</p>	<p>4.1. Understanding distinction between deciding whether to make a costs order and the amount of the costs to be ordered; usual rule is that loser pays the winner's costs; understanding that court has discretion to make a different costs order; nature of the court's discretion - CPR 44.2; other factors to be taken into account e.g. whether winner</p>

has succeeded on all issues, offers other than Part 36, conduct; understanding what conduct includes (CPR 44.2); types of costs order which might be made within the court's discretion (CPR 44.2.6.) e.g. costs from or until a certain date, costs relating to particular steps in the proceedings; understanding court's power to order a reasonable sum to be paid on account of costs (CPR 44.2.8)

Understanding that a final costs order may be subject to summary or detailed assessment by the court (CPR44.6); time for complying with a costs order

Understanding link between acceptance of Part 36 offer and CPR44.9 - final costs order deemed to have been made on standard basis

Understanding effect and impact of costs management orders on costs recovery CPR 3.15 e.g. importance of approved budgets and limit on costs recovery with reference to budget including the impact of the new rule CPR 36.23 - sanctioned party now permitted 50% recovery of costs which would have been awarded without reference to the court-fees limitation

CPR 44.4 factors to be taken into account when deciding amount of costs; knowledge of court's powers in relation to misconduct CPR 44.11

Understanding impact on costs recovery of failure to comply with requirements of CPR 3.14 - *Mitchell v NGN Ltd (2013)*

	<p>4.2 Differentiate between the “standard basis” and “indemnity basis” of assessment of costs</p>	<p>4.2 CPR 44.3 - standard basis: costs must be proportionately and reasonably incurred or proportionate and reasonable in amount; any doubt resolved in favour of paying party; meaning of proportionate; any costs which are disproportionate will not be allowed; costs can be necessary but disproportionate</p> <p>Understanding impact of CPR3.18 on assessing costs on standard basis where costs management order made</p> <p>Indemnity basis: court will decide whether costs were unreasonably incurred or unreasonable in amount – any doubt resolved in favour of the receiving party</p> <p>Understanding that in neither case will the court allow costs which have been unreasonably incurred or unreasonable in amount</p>
	<p>4.3 Explain the procedure for the detailed assessment of costs</p>	<p>4.3 CPR 47- knowledge of detailed assessment procedure including serving informal schedule of costs before serving Notice of Commencement; drawing up detailed bill; use of costs draftsman; format of bill; requirements for service of notice of commencement of detailed assessment; time for commencement; service of points of dispute by paying party; replies to points of dispute; request to court to commence detailed assessment proceedings; lodging case files at court</p> <p>Understanding effect of non-compliance with procedural requirements - default provisions of CPR 47 e.g. as to delay in commencing detailed assessment, consequences of not serving points of dispute (application for a</p>

		<p>default costs certificate)</p> <p>Understanding court's powers and procedure under CPR 47.15 to assess costs provisionally without a hearing for costs less than £75,000; court will send bill as provisionally assessed to parties; either party may request court to list assessment for full argument at hearing</p> <p>Procedure at detailed assessment hearing; consideration of any offers made in relation to costs; costs of detailed assessment process</p>
	<p>4.4 Apply knowledge of final costs orders to a given situation</p>	<p>4.4 Application to a complex scenario</p>

Additional information about the unit	
Unit aim(s)	Learners will understand the procedures for making an interim application to the court and how to conclude an action before trial including the use of alternative dispute resolution approaches. They will also understand the costs involved in commercial litigation cases.
Details of the relationship between the unit and relevant national occupational standards (if appropriate)	N/A
Details of the relationship between the unit and other standards or curricula (if appropriate)	N/A
Assessment requirements specified by a sector or regulatory body (if appropriate)	N/A
Endorsement of the unit by a sector or other appropriate body (if required)	N/A
Location of the unit within the subject/sector classification	15.5 Law and Legal Services
Name of the organisation submitting the unit	Chartered Institute of Legal Executives (CILEx)
Availability for delivery	1 st April 2013