

## 2 Civil procedure terminology

### CIVIL PROCEDURE TERMINOLOGY IN CONTEXT

In a civil dispute, lawyers will often try to help their clients reach an agreement with the other party in order to avoid going to court. However, if the parties to a dispute cannot reach agreement, the lawyers will prepare the case to be heard by a judge. Standard procedures must then be followed. These procedures are governed by civil procedure law.

It is quite possible that you will have to explain in English to a client what happens now. Your client will probably want to know what action you will take, the kind of information he must give you, and which court will hear his case. Finding a good English translation for a particular procedure in your own country is not always easy. To help you, this chapter describes civil procedure in the common law system.

### 2.1 Characteristics of civil procedure in a common law system

There are several major differences between the usual form of civil procedure in common law jurisdictions and that in many civil law systems.

- Traditionally, common law civil procedure has shown an **adversarial** approach to **litigation**. This means that it is the advocates who are responsible for finding and presenting evidence, and for arguing their clients' case in court. For example, examining witnesses should be done mainly by the lawyers, not by the judge. The judge listens and evaluates the evidence put forward by the lawyers, he may ask questions if something is not clear, but he does not take an active role in the inquiry himself. He acts as an umpire. This adversarial

approach has developed because a court case was always played out in front of a jury. It was the lawyer's task to convince the jury his client was in the right.

- Again because of trial by jury, much of the trial was conducted orally. It is still very important for trial lawyers to speak well, as oral presentation, as well as written arguments, are an important part of a trial. In England, only a very few civil cases are now tried by a jury. Nonetheless, civil procedure is still geared up to having a jury present. In the USA, litigants still have the right to jury trial for civil actions.

## 2.2 Updated civil procedure terminology in England

A few years ago, civil procedure underwent a reorganisation in England. Important changes were made and a new set of rules was developed. The aim of these new rules was not only to simplify civil procedure but also to make proceedings less adversarial and more efficient. These civil procedure rules have had a considerable impact upon the terminology of English civil procedure. Certain very old-fashioned terminology has been done away with.

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<sup>N</sup> Note: there has been no such reorganisation in the USA. This means that some of the old terms that have now gone in England are still used in the USA. For example, the one bringing a claim is still called the plaintiff in the USA, whereas England now uses the more modern term claimant. You should bear this in mind if your client is American. For this reason, major differences in terminology are pointed out below.

## 2.3 Civil procedure in England

As in civil law systems, in England the lower courts hear cases that are not very complicated and where the sums of money involved are not very great. The higher courts hear the more difficult cases and those where larger sums of money are concerned. To decide which case will go to which court there is a so-called tracking system. There are three tracks:

1. **Small claims track:** for cases less than £5,000.
2. **Fast track:** for most cases less than £15,000.
3. **Multi-track:** for most cases over £15,000.

The High Court, for example, is a senior court and will only hear the multi-track cases.

## 2.4 Starting a civil action

Take the following case. After years of saving, Mrs Smith has enough money to have a central heating system installed in her house. She agrees to pay Plumbing Cowboys Ltd £900 to install the system. When the system has been installed, it does not work. Annoyed by the attitude of Plumbing Cowboys Ltd, Mrs Smith asks an expert to look at the system. He says that the workmanship is so poor, and the central heating system so defective, that it will cost £500 to put it right. Mrs Smith then informs Plumbing Cowboys Ltd that she will not pay it a penny. Plumbing Cowboys Ltd decide to take Mrs Smith to court.

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We will now follow the progress of the case as it makes its way through civil procedure.

### *The claimant*

When a person decides to have his case heard by a court, he is said to bring a **civil action** (or **sue** the other party). The one bringing the action is called the **claimant**. In our case, Plumbing Cowboys Ltd is the claimant.

<sup>N</sup> Note 1: in some cases there is more than one claimant, as more people have suffered harm. If several claimants bring an action together, this is called **joinder of parties**.

<sup>N</sup> Note 2: sometimes, a very large number of claimants are involved. For example, where thousands of people have used a medicinal drug that turns out to have very serious side-effects. Rather than having many separate court cases, a representative action may be brought. In a **representative action**, the claimant is representing not only his individual interests, but also the interests of those

who have been similarly affected. The American **class action** is based on this model. In England, however, a **group action** is more common than representative action.

**N** Note 3: England up-dated its civil procedure terminology in 1999. The one bringing an action is now called a claimant, but until 1999 he was called a plaintiff. In the USA, the one bringing a civil action is still called a **plaintiff**.

#### *Filing the claim*

To bring an action, a claim must be filed in the right court (depending on which of the three tracks your claim is on). It is also necessary to file the right sort of form in order to start a civil action. In England, most civil actions begin by filing a document called a **claim form**. The client must inform you properly about his case. He must tell you about the relevant facts of the case and the remedy that he wants. These details are put in the **particulars of claim**. The particulars of claim may be on the claim form itself or in a separate document. In our case, Plumbing Cowboys Ltd will explain that it has installed a central heating system at the request of Mrs Smith and it wants to be paid the £900 that was agreed.

The claimant or his lawyer must sign a **statement of truth**, verifying that the claim is a truthful one. Proceedings begin once the claim form has been issued by the court. It must be **served** on the other party. Various modes of service are permissible, for example a bailiff could deliver the claim form to Mrs Smith in person or it could be sent via the post.

**N** Note: a few civil actions are not started by filing a claim form. For example, if you want to get a divorce or liquidate a company, you bring an action using a document called a **petition**.

## 2.5 Defending an action

The one against whom the claim is made is called the **defendant**. If Mrs Smith wants to fight the claimant's case, she must serve a document called a **defence** within a certain time. If she does not file a defence, there will be **judgment in default**. That means

that the judge will find for Plumbing Cowboys Ltd without having heard what Mrs Smith has to say.

The defence should give details of the defendant's case. Mrs Smith must state in her defence that the workmanship was poor and the heating system does not work, which is why she refuses to pay the sum of £900. The claimant can file a **reply** to the defence.

#### *Set off*

The defendant may have a defence of **set off**. The defendant claims he is owed money by the claimant, which he intends to set off against the claimant's claim. In our case, Mrs Smith's lawyer has advised her not to pay any of the £900. Another lawyer may have proposed a different course of action: a set off. Plumbing Cowboys Ltd wants £900, but against that amount a sum of £500 should be set off, as that is the sum of money necessary to repair the heating system. That would mean Plumbing Cowboys Ltd could only recover, at most, £400 from Mrs Smith.

#### *Counterclaim*

A **counterclaim** is where the defendant brings a claim of his own against the claimant. For example, Mrs Smith could claim that because of the faulty heating system it was so cold in the house that she got frostbite in her toes. As Mrs Smith is a dancing teacher, she was not able to work for many weeks and has lost part of her income. She wants to bring a claim of £5,000 against Plumbing Cowboys Ltd for her loss of income and her pain and suffering.

## 2.6 Statements of case

The term **statements of case** refers to all the documents that are sent between the parties, like the claim form, the defence, or any reply to the defence.

**N** Note: the term statements of case is quite new. The old English term for this was **pleadings**. The USA still uses the term pleadings.

## 2.7 Summary judgment

In England, either a claimant or a defendant can apply for a **summary judgment**. This procedure is relatively quick. It enables a judge to **strike out** either the whole claim or defence or part of it. If the whole claim or defence is dismissed, the case ends here and judgment is given immediately either in favour of the claimant or the defendant. It allows a judge to dismiss weak cases without wasting time when it is clear that either the claimant or the defendant has no real chance of success at trial.

<sup>N</sup> Note: the term **summary judgment** illustrates how difficult it can be to use terminology from a different legal system. For example, the term summary judgment is often used to translate a particular type of procedure in Dutch civil procedure, the so-called 'kort geding'. It is not a perfect translation. In Dutch law a case that has been heard at 'kort geding' could go on to be heard at a full trial. In English law, summary judgment means the end of the case because the case has been dismissed. Nonetheless, it is a useful translation because in practice most cases in the Netherlands do not go to trial once a decision has been made at 'kort geding'.

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## 2.8 Settlement

Courts are very much geared up to promoting **settlement**. In a settlement, parties avoid going to trial by reaching agreement on the claim. This will save time and money. Either the claimant or the defendant may make a payment into court or an offer to settle at any time after the start of proceedings. For example, in our case Plumbing Cowboys Ltd could offer to pay the extra money needed to put the heating system right. Or Mrs Smith could offer to pay part of the £900. If the other party accepts, then there is no need to continue with the court proceedings.

## 2.9 Other pre-trial activities

In the common law system, there is a sharp distinction between procedures that take place before the trial and the trial itself. This is because the civil procedure was designed with a jury in mind. For example, this is why documents that a party intends to rely on at trial must be disclosed to the other party and the court before the trial itself.

### 2.9.1 Case management conference

A **case management conference** gives the judge an opportunity to make sure that the claim is clear, that the issues in dispute have been identified and that all agreements that can be reached between the parties about the issues involved have been reached. The judge gives directions and fixes a date for the trial.

### 2.9.2 Disclosure of documents

In English and American proceedings, before the trial itself each party has to draw up a list of all the documents they are going to use in the trial. This list must be served on the other party. For example, in our case one of the documents Mrs Smith will have to list is a letter from her expert setting out all the defects in the heating system. Each party has the right to ask for copies of the opponent's documents. This process is called **disclosure**. In this way, each party can determine before the trial the basis on which the other party will argue his case.

Your client may not have the right to see all the documents on the list, because some documents may be protected. A document could be covered by **privilege**. For example, the other party may not see a confidential letter between Mrs Smith and her lawyer. Documents may also be covered by **public interest immunity**.

<sup>N</sup> Note: in the USA this process of disclosure is called **discovery**.

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### 2.9.3 Interim remedies

A long time can elapse between when a claim is first filed and when the judge finally hears the case. Sometimes, therefore, **interim remedies** may be ordered. Interim remedies include:

- **Interim payment:** this is a payment made before the trial to a person claiming money. In this way, it is possible to prevent hardship to a claimant, as the length of time between starting a civil action and the final judgment can be considerable.
- **Freezing injunction:** this stops a party removing or disposing of assets before trial. This is meant to prevent the situation arising that even if the court finds for the claimant, the defendant no longer has any assets available to pay the claimant's award. In the USA this is called **attachment**.
- **Interim injunctions:** a temporary court order requiring a person to do something or prohibiting a person from doing something until the end of the trial.
- **Search order:** this authorises someone to search and seize items and documents relevant to the claim or the defence, if there is a real danger that the other party would otherwise conceal or destroy that evidence.

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### 2.9.4 The collection of written evidence

Before the trial, both parties collect written evidence.

- This evidence is usually in the form of a **witness statement**. A witness statement is the equivalent of the oral evidence which that witness would give if called to give evidence at the trial. The witness making the statement writes down the facts of the case as he experienced them. A witness statement may be in the form of an **expert opinion**, where the witness involved is considered to be an expert in the field. For example, in our case Mrs Smith's expert would be asked to make a statement about the defects in the heating installation.
- A party may apply for an order for a person to be examined before the hearing takes place. The witness gives evidence before an examiner and he may be **cross-examined** as if it were the trial itself. The evidence so given is then written down and put into evidence at the trial. This evidence is referred to as a **deposition**. It is also more convenient to col-

lect the evidence this way if the witness lives in a different country from the one where the trial will be heard.

- Sometimes a witness has to give his written evidence in the form of an **affidavit**. Taking an affidavit is more expensive than an ordinary witness statement, as it is a statement sworn before an independent third party.

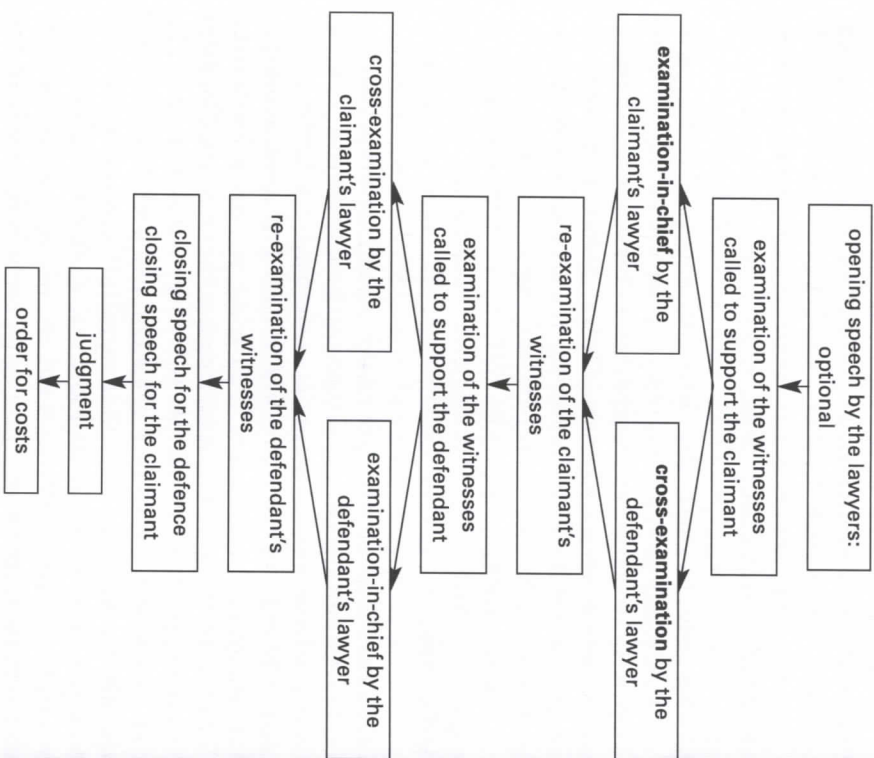
<sup>N</sup> Note: even if a witness has given a written witness statement, he can still be summoned to appear in person at the trial. If a witness does not want to attend the trial, he can be compelled to come. In that case, a **witness summons** is issued. In the USA, the old Latin term for a witness summons is still in use, namely the term **subpoena**.

### 2.10 Trial

Civil law systems are more geared up to handling a case based on written documents. Long civil trials, with extensive oral presentations by the advocates, are unusual. In England, because cases used to be tried before a jury, it was normal to present evidence and arguments orally rather than using written **submissions**. Today, most trials are heard by judges without a jury. Nonetheless, trials tend to be conducted as if a jury was still present. The trial continues to be heard in a concentrated period of time, as it was when a jury had to be called together. Oral presentation has remained important, although the typical English trial has now become a mixture of oral and written submissions. A so-called **skeleton argument** is usually required from both parties. In this way, the judge knows in advance the main arguments the parties' lawyers will put forward at the trial itself.

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### 2.10.1 The trial timetable



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### 2.10.2 Evidence

There are four main types of evidence:

- **oral evidence:** this evidence is given by the witnesses during the trial. These days, evidence may be given to the court via a video link or even a telephone if a video link is not available. A witness must take an oath or make an affirmation that what he says is true. If a witness deliberately gives false evidence, he is guilty of **perjury**;

- **real evidence:** this covers evidence of a physical nature, for example in our case a faulty piece of piping;
- **documentary evidence:** this covers all evidence that falls under the definition of **document**;
- **circumstantial evidence:** evidence that can be inferred from the facts.

### 2.10.3 The burden and standard of proof

In general, the **burden of proof** falls upon the one who brings the claim. The claimant must be able to prove all the elements required for his claim. If he cannot, then the court must find for the defendant. There are certain circumstances in which the burden of proof may shift to the defendant, for example in a negligence claim (see Chapter 4 on tort).

The **standard of proof** in civil cases is lower than in criminal cases. Whereas in criminal trials the prosecution must prove the guilt of an accused **beyond a reasonable doubt**, in civil cases the standard is **on the balance of probabilities**.

<sup>N</sup> Note: in the USA, the usual formula for the standard of proof in civil cases is a **preponderance of evidence**. (The formula for the standard of proof in criminal cases is the same as in England: beyond a reasonable doubt.)

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### 2.11 Appeal

In England, if the judge has found against you, you need the court's **permission** to bring an appeal in a civil case. For example, if the court decides that Mrs Smith does not have to pay Plumbing Cowboys Ltd anything because it did not perform the contract properly, Plumbing Cowboys Ltd could ask for permission to bring an appeal. An appeal is normally heard by the next court up in the hierarchy. A court that can hear appeals may be referred to as an **appellate court**. The party bringing an appeal is referred to as the **appellant** (in our case Plumbing Cowboys Ltd) and the other party is the **respondent** (Mrs Smith).

<sup>N</sup> Note 1: in the USA, the losing party usually has the right to one appeal, being an appeal to the next court in the hierarchy. The one bringing an appeal is referred to as the **appellant** and the one defending an appeal is referred to either as the **respondent** or as the **appellee**.

<sup>N</sup> Note 2: there is a difference between **appeal** and **cassation**. Some countries, like the Netherlands, have both appeal courts and cassation courts. The Supreme Court of the Netherlands is a court of cassation. So what is the difference between appeal and cassation? Put simply, an appeal court acts as if the case had not been heard before. It hears disputes about the facts of the case or points of law or both. It may substitute its decision for that of the court of first instance. A cassation court deals with a point of law only. It does not review facts. If it thinks that a lower court misinterpreted the law, it must send the case back to the same or a different lower court, so that the case can be heard again, bearing in mind the decision on the point of law made in the court of cassation. The traditional model for this type of system was developed in France and this system has influenced a number of civil law systems.

## 2.12 Costs

It is a simple fact of life that litigation is expensive. The value of the claim to the claimant can be completely overshadowed by the costs of the action. Costs are awarded at the discretion of the court. In England, the so-called **cost-shifting rule** applies: whoever loses the case has to pay not only his own costs, but also the costs of the other side.

<sup>N</sup> Note: this is not the case in the USA: the practice known as the **American rule** is that the parties pay their own costs, whether they win or lose. There are only a few exceptions to this rule.

### *Legal fees*

If your client is poor, he may qualify for legal aid. English lawyers may now also enter into **conditional fee** agreements with their clients. This is similar to the 'no win, no fee' approach to litigation common in the USA.

<sup>N</sup> Note 1: conditional fees are the English version of the American **contingency fees**. However, strict rules mean that the conditional fee system tends to be less advantageous to English lawyers than the American system of contingency fees.

<sup>N</sup> Note 2: some countries do not approve of the 'no win, no pay' approach to paying legal fees. If that is the case in your country, you may have to explain to your client that payment on a contingency fee basis is not allowed.

## 2.13 Enforcement of judgments

A **judgment creditor** is the name given to the winning party, who has been awarded a money judgment by the court. This judgment is enforceable against the loser, the **judgment debtor**. In our case, if Plumbing Cowboys Ltd loses, it will be the judgment debtor. It will have to pay the legal costs of both parties and any money judgment that may be awarded to Mrs Smith. How does the winning party get his money?

### *Seizure of goods*

If necessary, the court makes use of a **writ of execution** that authorises the sheriff to seize the goods of the debtor and to sell them. The judgment creditor is then paid his court award out of the proceeds of the sale. The debtor is only allowed to keep certain personal items and other items necessary for his work.

### *Third party debt orders*

A **third party debt order** enables the judgment creditor to divert money that would normally have been paid by a third party to the judgment debtor. For example, the Plumbing Cowboy's bank can be ordered to pay the judgment debt to Mrs Smith out of the Plumbing Cowboy's bank account.

<sup>N</sup> Note: the Americans still use the old terms **garnishment** and **wage garnishment** for these orders.

**Adversarial proceedings:** proceedings involving a real dispute between two opposing parties. These opposing parties are responsible for finding and presenting evidence.

**Affidavit:** a sworn written statement made by a witness.

**American rule:** is that the parties pay their own costs, whether they win or lose. There are only a few statutory exceptions.

**Appeal:** the losing party appeals to a higher court for a review of the decision reached by the lower court.

**Appellant:** the party bringing an appeal.

**Appellate court:** an appellate court acts as a court of second instance, hearing the issues afresh, whether of fact, or law or both. It may substitute its decision for that of the court of first instance. Note, however, that although reference is made to the term 'appeal' in the USA, the function of the American appellate courts more often resembles that of the civil law courts of cassation.

**Attachment:** in the American sense of the word it is a writ authorising seizure of property, which will be held until the final decision in the case at issue.

**Burden of proof:** in general, it is the claimant who must prove all the elements required for his claim against the defendant. If he cannot do so, then the court must find for the defendant.

**Case management:** the judge makes sure that the claim is clear, the issues in dispute have been identified and that all agreements that can be reached between the parties about the issues involved have been reached. At the **case management conference**, the judge gives directions and fixes a date for the trial.

**Cassation:** a court of cassation is only competent to make a decision upon a point of law. In the English system there are no courts

of cassation, as the appellate courts have the right to hear issues of fact and law.

**Civil action:** where the lawsuit involves civil, private, law rather than criminal law.

**Claim form:** the usual way of commencing proceedings in England, replacing the former use of writs in the High Court.

**Claimant:** the one bringing an action in English proceedings is now referred to as a claimant. The old term 'plaintiff' is no longer in use in England.

**Class action:** is used in the USA to bring a lawsuit on behalf of a whole group of individuals who have been affected.

**Conditional fee:** the English version of the American contingency fee, which is based on a 'no win, no fee' approach to litigation.

**Contingency fee:** American term where the attorney has entered into an agreement with his client that he will only receive his fee if he wins.

**Cost-shifting rule:** English rule stipulating that whoever loses the case has to pay not only his own costs, but also the costs of the other side.

**Counterclaim:** a claim brought by a defendant in response to the claimant's claim in the same proceedings.

**Cross-examination:** questioning of a witness, by a party that has not called the witness, about statements made by the witness during the examination-in-chief.

**Defence:** document produced by the defendant in response to the claim form.

**Defendant:** the one against whom the claim is brought.



**Deposition:** prior to the trial itself, the witness gives evidence before an examiner and he may be cross-examined as if it were the trial itself. The evidence so given is then written up and put into evidence at the trial. This is called a deposition and the one giving evidence in this way is referred to as the **deponent**. In the USA it is not usually the case that an examiner will be present, just the party being examined and the lawyers.

**Disclosure:** in English procedural law standard disclosure requires the disclosure of any document that a party intends to make use of at trial. Standard disclosure is achieved by making a list of these documents available to the other party. This process was formerly referred to as discovery.

**Discovery:** the American term for disclosure.

**Document:** defined in English proceedings as anything in which information of any description is recorded.

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**Evidence:** there are four main types of evidence: **oral evidence** given by witnesses during the trial; **real evidence** of a physical nature; **documentary evidence** and **circumstantial evidence**, which is evidence that can be inferred from the facts.

**Examination-in-chief:** is the term given to direct examination, where the advocate calls a witness to support his client's version of events.

**Expert opinion:** evidence given by a witness who is a specialist in a certain subject.

**Fast track:** this is the track used for claims for a value above that for small claims, but less than that for multi-track claims. It will usually be heard in the County Court.

**File:** a document is filed if it is delivered, by post or otherwise, to the court office. It may have to be **re-filed** if it was not submitted to the appropriate court.

**Freezing injunction:** order of an English court to stop a party removing or disposing of assets before trial.

**Garnishment:** term still used in the USA where a writ of garnishment allows the judgment creditor to seize the property of the judgment debtor which is in the possession of a third party.

**Group action:** where a number of individuals bring an action as a group.

**Interim injunctions:** an interim injunction is a temporary court order.

**Interim payment:** this is a payment made before the trial to a person claiming a money judgment.

**Interim remedies:** are discretionary and may be ordered any time after the court has issued a claim form. Interim remedies include interim payments, a freezing injunction, a search order and interim injunctions.

**Joinder of parties:** uniting parties in a single action, whether as claimants or defendants.

**Judgment creditor:** is the name given to the party who has been awarded a money judgment by the court.

**Judgment debtor:** the one against whom a money judgment has been ordered.

**Judgment in default:** where the defendant has failed to serve a defence within the required time.

**Litigation:** where a dispute is taken to court. The parties are then the litigants.

**Multi-track:** this track is for claims for a value higher than that specified for the fast track. A multi-track case will be heard either by the county court or the High Court.

**Particulars of claim:** may be on the claim form itself or served as a separate document. The particulars must contain certain information about the nature of the claim and the remedy required by the claimant.

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**Perjury:** telling lies in court while under oath.

**Permission:** here used in English legal terminology to indicate that permission must be given before a civil case can be appealed. This is in contrast to the USA, where there is usually a right to appeal once.

**Petition:** means of commencing certain specialist proceedings such as an action to wind up a company.

**Petitioner:** the one submitting a petition.

**Plaintiff:** the term still in use in the USA to indicate the one bringing an action.

**Pleadings:** this word refers to all the documents exchanged between the parties setting out their claims and defences.

**Privilege:** the right of a party to refuse to produce documents or answer questions on the ground of some special interest recognised by law.

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**Public interest immunity:** this allows a party not to disclose matters on the grounds that disclosure would be injurious to the public interest, for example with respect to matters of national security.

**Reply:** a document in which the claimant replies to the answers given by the defendant.

**Representative action:** this term is used in England where the claimant is representing not only his individual interests, but also those of others who have been similarly affected.

**Respondent:** when a case is appealed, the one bringing the appeal is called the appellant and the other party is called the respondent. A respondent is also known as an **appellee** in the USA.

**Search order:** authorises the representatives of the applicant to enter the defendant's premises for the purpose of searching and seizing evidence where there is a risk that it will be concealed or destroyed.

**Seizure of goods:** the court issues a writ authorising the sheriff to seize the goods of the debtor and to sell them to satisfy the judgment debt.

**Service:** documents used in court proceedings must be brought to the attention of the other party. The delivery, or service, of documents can take various forms, for example personal service on the defendant/claimant or via the post.

**Set off:** the defendant claims he is owed money by the claimant which he intends to set off against the claimant's claim.

**Settlement:** parties avoid going to trial by reaching agreement on the claim.

**Skeleton argument:** both parties have to set down in a written document a summary of the **submissions** to be put forward during the trial.

**Small claims:** claims of under a certain specified, relatively low value are allocated to the small claims track. It will be heard in the country court.

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**Standard of proof:** this is lower in civil cases than in criminal cases. Whereas in criminal trials the prosecution must prove the guilt of an accused beyond a reasonable doubt, in civil cases the English standard is on the **balance of probabilities** and in America the usual formulation is a **preponderance of evidence**.

**Statement of truth:** a statement of truth is added to statements of case or a witness statement to verify that the contents of the statement are accurate and honest.

**Statements of case:** in England, this is the collective term for all the documents exchanged between the parties such as the claim form, particulars of claim, a defence and any reply to the defence. The old term was the 'pleadings'.

**Strike out:** to delete a claim, or cancel an action, for example, because the claim reveals no grounds for bringing an action.

**Submission:** an argument to be pleaded before the court.

**Subpoena:** in the USA a court order requiring a witness to appear in court. In England this term is no longer used and has been replaced by the term 'witness summons'.

**Sue:** to start legal proceedings to take someone to court.

**Summary judgment:** it enables a claimant or a defendant to obtain judgment on the whole claim or on a particular issue without going to full trial when it is clear that either the claimant or the defendant has no real chance of success at trial.

**Third party debt order:** new English term for a **garnishee order**. It enables the judgment creditor to receive money that would normally have been paid by a third party to the judgment debtor.

**Third party proceedings:** where a person other than the original claimant and defendant becomes an additional party to the proceedings. For example, where the defendant brings a claim against a person for a contribution or indemnification.

**Trial:** hearing of the issues in contention tried either by a judge alone or by a judge and jury. Common law trials are a mixture of oral and written submissions. Juries in civil trials are now rare in England, but usual in the USA.

**Wage garnishment:** American term indicating that a certain proportion of the judgment debtor's earnings is subject to garnishment. In other words, part of the judgment debtor's income will be paid to the judgment creditor.

**Witness:** person who gives evidence to the court either as to facts or in the form of an expert opinion.

**Witness statements:** whether as to facts or in the form of expert opinions these statements are prepared in a written form. The document states the evidence that the witness would give if he were called to testify in court.

**Witness summons:** witnesses can be compelled to attend a trial. This is the term now used in England but before the new rules, this summons was referred to by the Latin term **subpoena**.

**Writ of execution:** directed to the sheriff of the county. Writs of execution in the USA can be obtained against all types of property belonging to the judgment debtor, both real and personal, although some property is exempt.

#### CIVIL PROCEDURE CASE DISCUSSION

Sally books a skiing holiday in Austria with Messup Tours. The holiday was described in Messup Tours' brochure as being a fun house party arrangement. There would be a bar, a welcome party, a disco, a candlelight dinner, a fondue party, and après ski get-togethers. All the guests would speak English. Being a sociable person, Sally was really looking forward to her house party skiing holiday.

When Sally gets there, she finds that the bar is only open until 6.00 p.m. There are three other people in the house and none of them speaks English. That makes the welcome party rather boring. The disco planned for the next day is cancelled because there are too few people. Two days later, the other guests leave and Sally has to spend ten days on her own! Although she has enjoyed the skiing, the house party has been a disaster. Disappointed and annoyed, Sally decides to sue Messup Tours.

Describe the civil procedure that will now be followed.

#### CIVIL PROCEDURE KNOWLEDGE QUESTIONS

1. In the USA, the one bringing a civil action is generally called the **plaintiff**. What name is given to the one bringing a civil action in England?
2. In England, what is the usual document used to start a civil action?
3. What are **statements of case**? What term is used in the USA instead of statements of case?
4. Explain the difference between a **counterclaim** and a **set off**.
5. What is a **summary judgment**?
6. The English term **disclosure** and the American term **discovery** refer to what sort of pre-trial procedure?
7. Explain the term **freezing injunction**.
8. What is meant by the term **standard of proof**?
9. What is the difference between the **American rule** and the English **cost-shifting rule** with respect to costs?
10. What term is given in the USA to fees paid on a 'no win, no fee' basis? How is this referred to in England?