It is also worth noting here that the Court of Appeal decided in *Callery* v *Gray* [2001] 1 WLR 2112 and 2142 that the cost of after the event insurance was recoverable even when as in this case proceedings were only in contemplation and in fact never took place.

Sarwar v *Alam* [2001] 4 All ER 541 is also worth noting because in it the Court of Appeal allowed, as part of recovery of costs, the premium on an after the event insurance even though the claimant had before the event insurance (which was recoverable) because the ATE insurance provided additional benefits in that it was custom built for the particular road traffic claim. However, the court warned that all solicitors conducting these no-win, no-fee claims should inquire after and investigate the adequacy of any BTE insurance before advising ATE insurance. This could involve asking the client to bring in any relevant motor policy. Failure to take advantage of an adequate BTE insurance could result in the ATE premium being disallowed as a head of recoverable costs.

Finally, an attempt by the defendant's insurer to refuse to pay an ATE insurance premium as costs in the cause because the premium was not payable at the time the ATE was entered into but only on conclusion of the case if the claim was successful (which it was) was a credit agreement and was void because the formalities of the Consumer Credit Act 1974 had not been observed failed. The ATE was an insurance contract not falling within the statutory framework applicable to credit agreements (see *Tilby* v *Perfect Pizza Ltd* (2002) 152 NLJ 397).

Other disbursements

It is also important that clients understand that, in addition to the insurance premium, there are other 'up-front' payments that will have to be made and which will only be recovered if they win. These include medical reports, experts' fees, accident reports and court fees, which may run into a few hundred pounds. Where the claim has a very good chance of success, the solicitor may cover these payments, but is in no way obliged to do so.

Environmental Protection Act 1990 cases

Conditional fee agreements are available for proceedings under the 1990 Act, s 82 which allows those aggrieved by a statutory nuisance to ask the court for an order to put that nuisance right. An example would be the failure of a landlord to maintain rented housing in a habitable condition. It should be noted, however, that there is no success fee here. The lawyer gets his usual fee if he wins the case for the client but no more and, of course, nothing if he loses.

Formalities

Conditional and contingency agreements between clients and solicitors must be in writing and signed by both parties. Importantly, also an agreement for a success fee must briefly set out the reasons for setting the percentage increase at the level stated. Regulations also require a conditional fee agreement to include a term that a solicitor may not recover from a client any part of the success fee disallowed by the court (see below).

Costs

When it comes to recovery of the success fee from the losing side, it should be borne in mind that the court in assessing costs may reduce it on the ground that it was set at an unreasonable level, given the level of risk of failure of the client's case. The amount of the success fee

in the agreement is thereby also reduced so that the client does not pay the balance up to the original success fee. An unreasonably high insurance premium might also be reduced where better terms might reasonably have been obtained. Here the client will have to pay the balance of the premium from his own funds.

Barristers and their involvement

It should be noted that the above materials relate to the fees of the solicitor in the case. The terms agreed between solicitor and counsel may be on conditional fee terms either with or without success fees. If not on such terms the solicitor is personally liable to pay counsel's proper fees whether or not the proceedings are successful and whether or not the solicitor has been put in funds by the client. If it is thought necessary to brief a barrister, negotiations will be required with the barrister. There is no compulsion upon members of the Bar (or solicitors for that matter) to enter into conditional or contingent fee agreements. However, since September 1999, all barristers and solicitors have acquired full rights of audience on call to the Bar or admission to the Rolls, subject to meeting the requirements of the Bar Council or Law Society. Thus, it may not be necessary to brief a barrister, the solicitor/advocate carrying the case right through. A barrister may be required in a difficult case where, of course, it is unlikely that the barrister will be prepared to enter into conditional or contingency fee arrangements.

Alternatives to a claim in court

There are three major alternative procedures to a claim before a court of law as set out below.

Arbitration

Where the dispute relates to a contract, it may be found that the contract contains an arbitration clause requiring the parties to submit any dispute to an arbitrator rather than to a court of law. In other cases the parties must first agree to proceed by arbitration and then choose an arbitrator. The procedure has already been considered in Chapter 2, to which reference should be made. The procedure is useful where money awards are required, but certain equitable remedies, such as an injunction, are not available if this route is chosen.

The party who obtains an award can apply to the High Court under s 66 of the Arbitration Act 1996 for leave to enforce the award as if it were a judgment of a court. The various methods of enforcing a judgment appear at the end of this chapter. It is currently a defect of the alternative dispute resolution procedures described below that there is no such enforcement of the solution reached if a party does not comply with it.

Alternative dispute resolution (ADR)

Generally

ADR consists in the resolving of disputes by using an independent third party. The object is to help the parties reach their own solution since the third party cannot, as a judge can, impose a solution upon them. The parties can withdraw from the process at any time and they do not have to accept the solution to the problem that was reached.

When ADR is inappropriate

The ADR procedure should *not* be considered in the following situations:

- where an injunction is required;
- where there is no dispute between the parties, as in a case where a debt is owed. In these cases the creditor should issue a claim form (see later in this chapter) or, if the debt is unlikely to be paid in full, consider insolvency proceedings;
- where the law is unclear, so that a ruling by a court is required.

Types of ADR

Mediation and conciliation. In a mediation (also referred to as conciliation) a third party whom the parties have accepted as mediator will receive written statements from the parties and after that the mediator will discuss the case with the parties. The mediator will not disclose confidential matters which one or other party may reveal to him. The discussions are on a 'without prejudice' basis, which means that the matters discussed cannot be raised before a court, should the case end up there on the mediation failing. The discussions do not have to take place at a meeting but may be dealt with in correspondence or by telephone. The purpose of the discussions with the mediator is for the parties to reach a satisfactory solution to the problem without resort to a court. In some types of conciliation, the conciliator may be more pro-active and put forward his own solutions to the parties' disagreement.

Mediation-arbitration. Here the parties agree to submit a dispute to mediation but agree also to refer the matter to arbitration if the mediation is unsuccessful. The parties may agree to use the mediator as an arbitrator should the mediation fail. However, this may not be desirable since the mediator may have confidential information that was supplied to him by the parties and this may compromise him as an arbitrator. The agreement for 'Med-arb', as it is called, should, therefore, contain a right in both parties to object to the mediator taking on the role of arbitrator, should the mediation fail.

Structured settlement procedure

This is sometimes referred to as a mini-trial. The parties appoint a representative each to sit with a neutral chairman. The tribunal will hear or read the submissions of both parties and the representatives will agree a solution with the assistance of the neutral chairman.

Other methods

The most important of these are set out below:

- ***Judicial appraisal***. The Centre for Dispute Resolution in London provides a scheme under which former members of the judiciary and senior barristers are available to give a speedy initial view on the legal position having heard the parties' representations. The parties may or may not accept the conclusions.
- ***Expert determination by contract***. Here the parties select an expert and agree to be bound by his ruling. If a party fails to accept the ruling, he can be sued for breach of contract, *so there is a sanction*. In view of the contract, the expert will have a duty of care to each party and can, therefore, be sued in negligence if his award is affected by negligence.
- ***Employment disputes***. ADR has been available for some considerable time in employment disputes. The Advisory, Conciliation and Arbitration Service (ACAS), which was set up in 1974, has as its objectives the prevention and resolution of disputes, conciliation in actual and possible complaints to employment tribunals, the provision of information and advice and the promotion of general good practice.

Contractual ADR

What has been considered above is a situation in which the parties have reached the point of litigation before deciding to try ADR first. It makes sense, however, to include a provision in a contract that in the case of any dispute it should be resolved by a form of ADR. This is particularly the case where the contract already contains an arbitration clause. In such a case, the contract could provide that ADR be undertaken before proceeding to arbitration if, and only if, ADR has failed to provide an acceptable solution.

In this connection, the Commercial Court has ruled that an agreement to use ADR is binding and enforceable by the courts. In the ruling which was given in *Cable & Wireless plc* v *IBM United Kingdom Ltd* [2002] 2 All ER (Comm) 1041 the court rejected the claimant's argument that an agreement to refer disputes to ADR was simply an agreement to negotiate. The court saw no difference between the reference to ADR and an agreement to arbitrate both of which could be enforced by staying the court proceedings so that the parties could proceed with ADR or arbitration.

ADR and the Civil Procedure Rules

Before leaving the topic of ADR, it is worth noting that under the Civil Procedure Rules 1998, enacted post-Woolf, the courts actively encourage parties to resolve their disputes by some form of ADR and *may refuse a party some of his costs even when he wins his case in court* if he has previously and unreasonably refused to embark upon an ADR procedure.

In this connection, reference could usefully be made to the case of *Dunnett* v *Railtrack plc* (2002) and the cases appearing in the Comment at p 716.

Offers to settle and Part 36 payments in

A defendant (or a claimant where there is a counterclaim, see later in this chapter) may make an offer to settle the claim. Part 36 of the Civil Procedure Rules 1998 applies. The matter is best dealt with by an example. Suppose that our defendant makes an offer to settle the claim for £80,000 believing that our claimant will not be able to prove damage to his business of £100,000. Let us further suppose that our claimant refuses to accept that offer or any other offer that the defendant might make and issues proceedings. Our defendant should then pay the sum of £80,000 into the court office under Part 36 of the Rules. This gives our claimant a problem. If he proceeds to a full trial and does not get more than the offer (a penny would do), he will be likely to have to pay his costs and the defendant's from the time of payment in. The claimant's representatives are informed of the payment in at the time it is made so the possible problems as to costs are known. The judge, in making an award of damages, is *unaware* of the amount of the payment in. The same is true if the claimant decides to accept the payment in before the trial begins or before its termination. Once again, the claimant will have to pay the costs of both sides from payment in to the date of his acceptance of the offer. Permission of the court is required prior to the acceptance of a payment in. The above rules would apply also to the defendant if he had made a counterclaim (see below) and the claimant had made an offer on this. The moral is to accept an offer when it is made if there is a reasonable doubt about a party being able to recover in full his alleged loss.

Written offers

In *Crouch* v *King's Healthcare NHS Trust* [2005] 1 All ER 207 the Court of Appeal ruled that if a written offer is genuine and contains all the relevant information and the defendant is 'good

for the money' at the time the offer is made, the written offer should be treated in the same way as a payment into court under Part 36 of the Civil Procedure Rules. There is no need to support the written offer by a payment. In this connection the Department for Constitutional Affairs has consulted on changes to be made to Part 36 to allow a written offer from certain defendants, e.g. NHS Trusts, in a money claim to be treated as a payment into court.

The commencement of proceedings

If we now assume that our claimant has sufficient funds to proceed with the claim or has arranged a conditional fee funding and is not prepared to accept ADR, the dangers in terms of recovery of costs having been explained to him, and that no offer of settlement has been made or is acceptable, then our claimant will proceed to trial.

The claim form

A party wishing to issue proceedings must complete a claim form (formerly called a writ or a summons). This should be taken or sent to the court office. These forms are issued by the Court Service and the appropriate court office is stated on the form. The relevant offices are county courts designated as civil trial centres – there are some 58 of them in England and Wales or feeder county courts which, in relation to multi-track claims, will transfer the case to a civil trial centre after allocating to track (see later in this chapter) and giving case management directions.

Contents of the claim form

The claim form states:

- the name of the claimant;
- the name of the defendant (or defendants) and the address;
- brief details of the claim and the remedy sought;
- the value of the claim.

The value of the claim is necessary in order to assist the court in deciding to which track to allocate the case. Allocation is considered later in this chapter but, as we saw in Chapter 2, claims which are not worth more than £5,000 will usually be allocated to the small claims track; claims worth more than £5,000 but not more than £15,000 will be allocated to the fast track; and claims for more than £15,000 will be allocated to the multi-track. Also, a fee is payable on issue of the claim form, and this is based on the value of the claim.

Particulars of claim

On the back of the claim form is a section for particulars of the claim. This gives a concise statement of the facts on which the claimant relies. In our case we shall be claiming that the seed supplied was not of satisfactory quality or fit for the purpose, and we shall give particulars of what happened, e.g., the cabbages had no heart and so on, as the details in Case **187** show. The consequences to our claimant will be described and the particulars of loss and damage stated. A claim for interest on the sum involved will be made.

Where the particulars of the claim are not included in or with the claim form, they will be served separately.

Statement of truth

The particulars of claim conclude with a statement of truth. This states: 'I believe the facts stated in these Particulars of Claim are true'. It is signed by the claimant or his solicitor and the address of the firm of solicitors involved is given.

Business claims – the parties

- ***Sole traders***. A sole trader must *sue* in his or her own name and not a business name. A sole trader can *be sued* in his or her own name or a business name.
- ***Partnerships***. A partnership may *sue* in the firm name or in the names of individual partners. A partnership may *be sued* in the firm name or the names of individual partners.
- ***Companies***. A company can *sue* in its corporate name, and can *be sued* in its corporate name.

Service of claim form

If the court serves the claim form on the defendant, it will normally use first-class mail and delivery is deemed effective on the second day after posting. The court will send the claimant a notice which includes the date when the claim form is deemed to be served. If the claimant serves the claim form, he must file a certificate of service with the court within seven days of deemed service of the claim form. If no such certificate of service is filed, there can be no judgment in default (see later in this chapter).

Service may be *personal service* where the claim form is left, e.g., at the principal place of business of an organisation or, in the case of a registered company, at its registered office or a branch of the company at which, e.g., the contract under dispute was made.

Where, as is usual, a solicitor is authorised to accept service on behalf of his client, the claim form must be served on the solicitor.

It is important to note that it is proper procedure for the claimant to send the defendant a letter of claim or other form of advanced warning of his or her involvement in litigation. Failure to do so may result in a penalty in terms of the costs awarded in the case (see *Phoenix Finance Ltd* v *Federation International De L'Automobile (Costs)* (2002) *The Times*, 27 June). Furthermore, the deemed date of delivery mentioned above is not rebuttable by evidence that the defendant did not in fact receive the claim form on the deemed date (see *Anderton* v *Clwyd CC* [2002] 8 Current Law 70). In addition, the court has power under the Civil Procedure Rules to dispense with service of a claim form in appropriate circumstances (*Godwin* v *Swindon BC* [2002] 1 WLR 997).

The consent of the defendant or his representative is required before service by fax is effective (see *Kuenyehia* v *International Hospitals Group Ltd* (2006) *The Times*, 17 February).

The defendant's response to the claim

The defendant will also receive what is called a 'Response Pack' with Notes. These explain how the defendant may deal with the claim form. There are five possibilities as listed below.

- ***Acknowledging service***. If the defendant is not ready to file a defence, he must acknowledge service of the claim form within 14 days of service. If the claimant has chosen to send his particulars of claim separately, acknowledgement is within 14 days of receipt of the particulars.

- ***Filing a defence***. Where the defendant wishes to defend the claim, he must file a defence within 14 days of service of the particulars of claim or, where service has been acknowledged, within 28 days of service of the particulars of claim. The forms which the defendant can use form part of the Response Pack. Where a solicitor is being used, a defence is normally prepared as a separate document. The time for filing a defence can be extended by agreement between the parties by a further period of up to 28 days, but the court must be informed. Our defendant company will deny that it is in breach of contract and will say that the seed supplied was of satisfactory quality and fit for the purpose. As regards the exclusion clause, a phrase such as the following might be used:

  > Further or alternatively, if (which is not admitted) the Claimant has suffered the loss and damage claimed it is within the Defendant's exclusion clause in paragraph X of the contract.

- ***Example***. If the defendant is served with particulars of claim on Monday, 3 September and is ready to file a defence he or she must do so by Monday, 17 September. Defendants wishing to acquire time must file an acknowledgement by that date. These defendants will then have until Monday, 1 October to file a defence.
- ***Filing an admission***. An admission may be for the full amount of the claim, in which case, the claimant will ask the court for judgment. There may also be an admission for part only of the claim. In this case, the claimant may reject what is, in effect, an offer and proceed with the full claim. Alternatively, he may accept the offer and ask for judgment.

  As regards service and timing, an admission of the claim where the claim is for a specified sum of money is sent to the claimant. In other cases, e.g. admission of part of the claim, the form of admission is sent to the court. An admission of claim must be made to the claimant or the court as the case may be within 14 days of service of the claim form if it has on it or accompanying it particulars of claim. Where particulars of claim are served later, an admission may be made within 14 days of service of the particulars of claim.
- ***Defendant fails to respond – the default judgment***. If, following service of proceedings, the defendant fails to acknowledge the same or to file a defence within the time scales allowed, the claimant may ask the court for a judgment in default against the defendant. Such a judgment will be obtained without a trial of the issues involved. There are several situations in which *default judgments cannot be obtained*, e.g., in claims for delivery of goods under a Consumer Credit Act 2006 regulated agreement, such as a hire-purchase agreement and mortgage claims. The court will need to be satisfied that the claim form and particulars of the claim have been served on the defendant and that he has not made a response. A defendant against whom a default judgment has been made can apply to the court to have it set aside.
- ***Counterclaim***. The defendant may make a counterclaim against the claimant. This will not arise in our case, but if our claimant had not paid in full for the cabbage seed but merely paid a deposit, the defendant may well claim for the balance of the purchase price. Particulars of a counterclaim may be filed with the defence. Where this is done, the permission of the court to file a counterclaim is not required. It will be required if the counter-claim is made *after* the defence has been filed. The claimant need not acknowledge a counterclaim, but must file a defence within 14 days. This may be extended by agreement of the parties to 28 days over and above the initial 14-day period.

  A counterclaim is a statement of case and must be prepared as such. Furthermore, if the claim is in the county court a statement of value must be included to ascertain the whole value of the claim and counterclaim.

Reply to the defence

The claimant is not under an obligation to reply to the defence and, if he does not do so, it is not to be taken as admitting anything which is raised in the defence. The most usual reply to a defence is a counterclaim and this may also include a reply as where the claimant wishes to allege facts in answer to the defence which were not contained in the particulars of claim. In general, therefore, a reply should be limited to a statement of new facts the claimant intends to prove to defeat the defence.

Requests for further information

If the information given by a party about his case is unclear, a request for further information can be made under Rule 18 of the Civil Procedure Rules 1998. The request can be made:

- *by the court* if the court feels the need for more information;
- *by a party*. Initially, a party should make the request in writing to the other party, but, if a satisfactory reply is not forthcoming, the party aggrieved should apply to the court for an order. Failure to comply with a request by the court is a contempt punishable by fine or imprisonment.

Statements of case

The above materials starting with the claim form and going through to the Request are referred to in the Civil Procedure Rules of 1998 as 'statements of case'. Before 1998 the documents described were known as 'pleadings' and doubtless this expression will continue in use by practitioners for some time to come. It will be appreciated that the main purpose of pleadings or statements of case is to enable the court and the parties to define and identify the issues in dispute before a trial begins.

Case management and allocation of cases

Throughout the following section we shall be referring to what 'the court' may do. Which court is concerned? Case management and track allocation is a matter for designated *civil trial centres* across England and Wales. These centres will also be the venue for multi-track trials and a portion of fast-track trials. They are, in fact, county courts which operate as civil trial centres. Other county courts are designated as feeder centres and will normally transfer multi-track claims to a civil trial centre after allocating the case to track and giving case management instructions. Multi-track cases may also be heard in the High Court. Those where the value of the claim is £50,000 or more will be held there. Cases where the value is less than £50,000 are also likely to be held in the High Court if they are in the following list:

- professional negligence claims (see Chapter 21);
- fatal accident claims (see Chapter 20);
- fraud or undue influence claims (see Chapter 13);
- defamation claims (see Chapter 21);
- claims for malicious prosecution or false imprisonment (see Chapter 21);
- claims against the police, and where a will is contested.

Our claimant will, because of the size of the claim and the possible complexity of expert evidence, normally be heard in the High Court as a multi-track case.

Striking out

Before proceeding to the mechanics of allocation, it should be noted that the court has power to strike out a claim (or a defence) rather than allocate it for trial. Rule 3 of the Civil Procedure Rules 1998 applies and, for example, all or part of a statement of case (or defence) can, if it discloses no reasonable grounds for bringing or defending the claim, be struck out. If, e.g., the claim is that Fred gave his friend Freda bad advice on the purchase of investments while they were having a drink in the local pub, a claim by Freda in negligence will normally be struck out because it is unlikely that in the casual circumstances of the case there is a duty of care owed by Fred to Freda. This is essential if a claim in negligence is to have a chance of success, and represents a common reason for striking out. The requirement of a duty of care is considered in detail in Chapter 21. Equally, a defence prepared without legal advice which said merely 'I deny I owe the money' would be struck out.

The court may, itself, strike out or it may do so on the application of a party. Where a claim is struck out, the claimant will either abandon his claim or see if it can be based on some other principle(s) of law. Where a defence is struck out, the claimant can apply to the court for judgment, though he may have to wait for up to three days if the court gives the defendant time to submit a full defence.

Allocation – generally

This next stage of case management *begins where a defence has been filed*. On receipt of a defence, the court serves each party with an allocation questionnaire. The parties must return it within 14 days and pay a fee. It is desirable that the parties' lawyers co-operate in the completion of the questionnaires.

The allocation form

The form will ask the parties whether they wish for a stay of proceedings (for up to one month) to try to settle the case without an action in court. The general principle of the Civil Procedure Rules 1998 is for out of court settlement wherever possible. The court will extend the time if any of the parties so requests for a period of four weeks, but further extensions may be granted.

The parties are then asked under the questionnaire which track they consider to be the most suitable for the case. As we have seen, the value of the claim is an important factor. In this connection, where there is a counterclaim, the highest of the value of the claim and counterclaim is taken. Thus, where the claim is for £12,000 but there is a counterclaim for £25,000, the value of the counterclaim governs the case.

Where the allocation questionnaire is not filed

The position is broadly as follows:

- ***If all parties fail to file***. Here the judge will, after the 14-day filing period, order that all claims and counterclaims be struck out unless the questionnaires are filed within three days.
- ***If some only of the parties fail to file***. Here the court will allocate on the information available, or will call an allocation hearing where more information is required and then allocate the case. A party not attending the allocation meeting may be required to meet the costs of any party who has attended it.

Allocation to track

Claims not exceeding £5,000 will normally be allocated to the small claims track. They will normally be heard in the county court by a district judge, with appeal only where there is a serious irregularity affecting the proceedings, to a circuit judge unless a circuit judge hears the case when there may be an appeal to a High Court judge. A serious irregularity could exist where the district judge had, e.g., failed to allow a party to cross-examine a witness.

Claims over £5,000 but not exceeding £15,000 will normally be allocated to the fast track where the trial will take place within 30 weeks of allocation. The length of the trial will be no more than one day and there is a cap on lawyers' advocacy costs.

Where the claim is over £15,000, it will normally be allocated to the multi-track.

However, the track allocation is not purely a matter of the size of the claim and a request can be made at the allocation stage for allocation to a track that is not the normal one. A request for a different allocation may be made by the lawyer representing a party where, e.g., he or she submits that the trial will last for two days because of a counterclaim and the need for oral expert evidence on the matter of liability. This could move a claim for more than £5,000 but less than £15,000 from the fast track to the multi-track.

The case management conference

Where the case has been allocated to the multi-track, the court:

- may give directions as to the management of the case and set a timetable for the various stages to be completed before the trial;
- alternatively, it may fix a case management conference or a pre-trial review or both to consider matters such as which documents should be disclosed and what expert evidence can be reasonably required. The court will fix a trial date or a period of time in which it is to take place. There is no restriction of 30 weeks as in the fast track cases.

Pre-trial review

A pre-trial review will be necessary in multi-track cases if they deal with complex matters involving numerous parties and/or are likely to last for a significant period of time, to ensure that all conference issues have been dealt with. The judge (usually the trial judge) will consider the updated cost estimates and set a budget and a final programme for the trial, including parameters for its length.

Pre-action protocols

These are, in effect, codes of practice for various types of claim and, in general, they provide for more contact and discussion between the parties from the beginning of the dispute so that they can better cope in general and more quickly with, e.g., the case management conference. Up to now, protocols have been issued for guidance, for example, in personal injury cases and medical negligence, construction and engineering disputes, defamation and professional negligence (see p 568), but others will follow. A feature of the first protocols is that a joint expert acceptable to the parties should be instructed. This saves much time (and sometimes confusion) which can be the case where a number of experts appear to give evidence for the parties.

Allocation of track and court for our case example

Because our case example, in terms of claim and defence, involves the law of contract, particularly the sale of goods and exclusion clauses, it is not on the list of cases suitable for the High

Court, but the value of the claim, i.e. £100,000, takes it to the High Court in the Queen's Bench Division.

Court enforcement of timetables

Two recent cases indicate in relation to experts and their availability, that the courts are stressing the need to keep to timetables when fixing cases for hearing and that the expert witness, who is a professional person, owes an overriding duty to the court and not merely to his client. In *Linda Rollinson* v *Kimberley Clark Ltd* [1999] 7 Current Law 37 the claim was for damages for an injury sustained at work. The defendant sought to change the dates fixed for the trial because one of its expert witnesses was not available. The Court of Appeal dismissed the application. It was wholly inappropriate, said the court, for a solicitor to instruct an expert without regard to the expert's availability. Again, in *Matthews* v *Tarmac Bricks and Tiles Ltd* [1999] 7 Current Law 55 the defendant had caused difficulties by failing to give details of when expert witnesses would be available. The matter was, nevertheless, listed for trial. The Court of Appeal dismissed an appeal by the defendant. Lord Woolf's judgment includes a further point: that those holding themselves out as expert witnesses should be prepared to arrange or rearrange their affairs to meet the requirements of the court.

The trial

The parties and their witnesses will assemble for the trial.

Attendance of witnesses

As regards witnesses (except expert witnesses), it is not wise to assume that they will attend voluntarily, and their attendance should be encouraged by service on them of a witness summons. This is issued by the court and it requires a witness to attend court and give evidence or produce documents to the court. It should be served at least seven days before attendance is required. Failure to comply with a witness summons is a contempt of court punishable by fine and/or imprisonment.

Trial bundles and skeleton arguments

Except where the court rules otherwise, the claimant must prepare and file in court a trial bundle not more than seven days nor less than three days before the start of the trial. The bundle will include the documents relevant to the trial such as the claim form and statements of case and witness statements, together with a case summary indicating what points are or are not in issue and the nature of the argument on disputed matters. This summary is referred to in some courts, such as in the Chancery Division, as a skeleton argument.

The contents of the bundle should be agreed between the parties and if agreement cannot be obtained on all of the contents, a summary of points of difference should be included. Either party may, e.g., not agree on the inclusion of a document or documents. Bundles should be supplied for the trial judge, all the parties and for the use of witnesses. The advocates can then refer to the contents of the bundle as required during the trial.