Rules of Evidence (Civil Proceedings) in the UK (England & Wales): Overview

by *Jonathan Speed* and *Louise Lanzkron*, Bird & Bird LLP

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A Practice Note providing an overview of the rules governing disclosure and the admissibility of evidence in civil proceedings. In particular, it looks at the rules on the disclosure obligations of the parties, admissibility of evidence, witness evidence, the burden and standard of proof, as well as issues that arise in gathering cross-border evidence.

Evidence is fundamental to the outcome of any civil litigation case. Usually, the facts in issue in a case must be proved by evidence, and the court will decide the case on the evidence adduced by the parties.

One of the most challenging aspects for any cross-border practitioner is to adapt to the differences in the rules of evidence taking in various jurisdictions. These differences are evident in the manner in which evidence is produced, the issues surrounding relevance and admissibility, the probative value attached by the courts to the various types of evidence and the principles of burden and standard of proof across jurisdictions. Further, such disputes often give rise to situations where one of the parties to the litigation is required to produce evidence located in a jurisdiction foreign to the forum of proceedings. These are important legal issues that a practitioner should be aware of since they largely determine the way litigation is conducted in all the major civil law and common law systems around the world and ultimately influence its result.

This Note provides an overview of the rules of disclosure and evidence in civil proceedings in the UK (England & Wales). In particular, it looks at:

- The rules regarding the disclosure obligations of the parties.
- Admissibility of evidence.
- Witness evidence.
- Expert evidence and the role of experts (court hired independent experts and party hired experts) in civil proceedings.
- The rules regarding the burden of proof and standard of proof in civil proceedings.
- The rules regarding cross-examination.
- Issues that arise in gathering cross-border evidence, including:
    - the applicable international treaties, agreements, and regulations governing cross-border evidence;
    - how to obtain foreign evidence for use in English civil proceedings; and
    - how to obtain evidence located in England & Wales for use in foreign civil proceedings.

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Rules of Evidence and Evidence in Domestic Proceedings

The Civil Procedure Rules (CPR), in particular Parts 31 to 35 and their accompanying Practice Directions (PDs), in addition to the Civil Evidence Acts of 1968, 1972, and 1995 are the main sources of the rules of evidence.

For proceedings that are issued in the Business & Property Courts, a new disclosure pilot scheme (DPS) is currently operational until 31 December 2022**.** This is a new regime for disclosure and operates under PD 51U. For more information on the details of the scheme see *Disclosure Pilot Scheme: toolkit*.

Obtaining Evidence

Disclosure

A party must disclose documents that are or have been in its control (CPR 31.8) and that fall within the scope of the court's disclosure order (CPR 31.5). A party discloses a document by stating that it exists or has existed (CPR 31.2). The standard procedure is for each party to make and serve a list of documents on the other, using form N265 (CPR 31.10). The list must include a disclosure statement which:

- Sets out the extent of the search that has been made to locate documents that the party is required to disclose.
- Certifies that the party understands the duty to disclose documents.
- Certifies that to the best of its knowledge the party has carried out that duty.

For the purposes of disclosure, a "document" means anything in which information of any description is recorded (CPR 31.4) and extends to electronic documents. According to Practice Direction 31B, para.1, "electronic document" means any document stored in electronic form, including email and other electronic communications such as text messages, voicemail, word-processed documents, databases, documents stored on memory sticks and mobile phones, as well as documents stored on servers and back-up systems, Metadata, and other embedded data.

A document will be considered within a party's control if:

- It is or has been in that party's physical possession.
- That party has or had a right to possession of the document.
- That party has or had a right to inspect or take copies of the document.

(*CPR 31.8*.)

An order for standard disclosure will require a party to disclose documents:

- On which they rely.
- That adversely affect their own or another party's case or that support another party's case.
- That they are required to disclose by an applicable PD.

(*CPR 31.6*.)

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A party must disclose all the documents on which they intend to rely but is only required to undertake a "reasonable search" for documents that fall within the second or third bullet points above (*CPR 31.7*).

A party need only disclose one copy of a document, but a copy that contains a modification, obliteration, or other marking or feature that itself falls within the scope of the disclosure order must be treated as a separate document (CPR 31.9) (for example, a modification that adversely affects their own or another party's case, or that supports another party's case).

The parties in multi-track cases (generally, complicated claims with a value of GBP25,000 or more) are subject to additional obligations in relation to disclosure. Parties must file and serve a disclosure report not less than 14 days before the case management conference (CMC). The report should describe:

- What relevant documents exist or may exist.
- Where and with whom those documents are or may be located.
- How any relevant electronic documents are stored.
- The estimated costs of giving standard disclosure in the case.
- Which directions in relation to disclosure will be sought from the court.

(*CPR 31.5(3).*)

Inspection

The general rule is that a party has a right to inspect any document disclosed to it. There are three exceptions to this rule (*CPR 31.3*):

- Where the party disclosing the document has a right to withhold inspection of it. This will be the case where the document falls under a recognised type of legal professional privilege or without prejudice privilege. The disclosure list must indicate those documents in respect of which the party claims a right or duty to withhold inspection (*CPR 31.10(4)(a)*).
- Where the document is no longer in the control of the party who disclosed it. In this case the party should include in its disclosure list a description of those documents and what has happened to them (*CPR 31.10(4)(b)*).
- Where a party considers that it would be disproportionate to the issues in the case to permit inspection of documents disclosed because they adversely affect their own or another party's case or support another party's case. In this case the party must state in their disclosure statement that inspection of those documents would be disproportionate (*CPR 31.3(2)(b)*).

For more information on legal professional privilege see *Practice Note, Legal Professional Privilege and Professional Secrecy in UK (England & Wales): Overview*.

Role of the Courts in the Evidence-Taking Process

The court will make a directions order (normally following a CMC) setting out which steps must be taken by the parties and when, in the run-up to the trial (*CPR 29.2*). This order will include provisions for the submission of evidence; for example, the dates by which witness statements and expert reports must be exchanged and filed.

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The court has the discretion to limit or exclude otherwise admissible evidence.

At the trial, the judge will generally not adopt a major role in the giving of oral evidence by witnesses of fact and expert witnesses. This is chiefly undertaken by counsel for the parties, although the judge is free to ask questions at any point.

Disclosure Pilot Scheme (DPS)

The DPS is a new scheme of disclosure and is independent of CPR 31 (apart from a few exceptions). It operates under PD51U and only affects cases in the Business & Property Courts.

The aim of the DPS is reduce the amount of disclosure provided by the parties. Parties must consider disclosure at an earlier stage of the action than before and co-operate with the other side to agree a list of issues, thereby reducing the amount of disclosure given and the resulting costs. The pilot is designed for use in cases which have huge amounts of electronic data and technology assisted review.

Under the DPS the concept of standard disclosure has been removed; instead there is Initial Disclosure and Extended Disclosure using five different models. The parties are expected to agree a model for each issue in dispute. The models range from disclosure limited to a party's known adverse documents to a full chain of enquiry type discovery. The court will approve the models chosen at a case management conference. Parties are no longer expected to file a disclosure report but instead complete a disclosure review document together. The pilot has been extended to 31st December 2022.

For more information on the details of the DPS, see Practice note, The Disclosure Pilot Scheme in the B&PCs: some FAQs.

Other Mechanisms to Obtain Disclosure from an Adverse Party and Third Parties

Specific Disclosure

If one party considers that the disclosure given by the other is inadequate, that party can apply to the court for an order for specific disclosure (CPR 31.12 and PD 31A.5.1). The court can grant an order under CPR 31.12, requiring a party to do one or more of the following:

- Disclose documents or classes of documents specified in the order.
- Carry out a search to the extent stated in the order.
- Disclose any documents located as a result of that search.

An application for specific disclosure should be made on Form N244 and should specify the documents or classes of documents sought as precisely as possible. The court will not agree to a request that it views as a "fishing expedition." The applicant should explain why the documents are relevant to the issues of the case and why it is proportionate for them to be disclosed. The application should be supported by evidence, for example, of the applicant's grounds for believing that the documents sought exist and are within the respondent's control.

When considering whether to make the requested order, the court will take into account all the circumstances of the case, giving particular regard to the overriding objective (PD 31A.5.4). The overriding objective is the guiding principle to be followed by the English civil courts; essentially, that the court should deal with every case justly and at proportionate cost to both its value and its complexity.

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Specific Inspection

A party may apply for an order for specific inspection

where the disclosing party has identified a class of documents in its disclosure list but asserts that it will not allow inspection because it would be disproportionate to do so. The party to whom disclosure is being provided may challenge this assertion by applying to the court for an order permitting inspection of the document(s) under CPR 31.12(3). In the event that Party A wishes to challenge Party B's assertion that Party B has a right to withhold inspection of a document on the grounds of privilege, Party A may apply to the court to decide whether the claim to privilege should be upheld (CPR 31.19(5)).

A party can also apply to the court to make an order for specific inspection based on its general case management powers under CPR 3.1.

Pre-Action Disclosure

CPR 31.16 gives the court express power to make an order for disclosure before proceedings have started, provided the application is supported by evidence and that all the following points apply:

- The respondent is likely to be a party to subsequent proceedings.
- The applicant is also likely to be a party to those proceedings.
- The documents sought would fall under the respondent's duty under standard disclosure.
- Disclosure before proceedings have started is desirable to:
    - dispose fairly of the anticipated proceedings;
    - assist the dispute to be resolved without proceedings; or
    - save costs.

Commonly (though the court has discretion to vary this general rule), the applicant will be expected to pay the respondent's costs of:

- The application.
- Compliance with any order made.

(*CPR 46.1.*)

Standard Non-Party Disclosure

CPR 31.17 covers applications for disclosure by a person who is not a party to the proceedings (in relation to proceedings which are already in progress). Orders under this rule can only be made where both:

- The documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings.
- Disclosure is necessary to dispose fairly of the claim or to save costs.

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(*CPR 31.17(3)*.)

The list of documents sought must be sufficiently clear and specific, and the application must be supported by evidence. The general rule as to costs for applications for non-party disclosure is that the respondent will be awarded their costs of the application and of complying with the order (CPR 46.1).

Pre-Action Disclosure (Non-Party)

CPR 31.18 expressly preserves the court's powers to make an order for disclosure against a party who is not a potential party to the proceedings, before proceedings have started. Such a disclosure order is made under the equitable jurisdiction of the court and is often known as a "Norwich Pharmacal" order (named after the claimant in a case where this form of order was established).

An application for a Norwich Pharmacal order is traditionally made in a situation where a party:

- Knows that wrongdoing has taken place against it.
- Does not know the identity of the ultimate wrongdoer.
- Can identify a third party who does know the identity of the ultimate wrongdoer.

The application is therefore made against the third party, seeking disclosure of the identity of the wrongdoer to enable the applicant to issue substantive proceedings against them. The order may be made against a party who is mixed up in, or is involved in the wrongdoing, whether innocently or not.

The applicant has a duty of full and frank disclosure to the court, such that the applicant must disclose all matters material to the court in deciding whether to grant an order and, if so, on what terms, and the general rule is that the applicant will be ordered to pay the respondent's legal costs of the application and the costs of complying with the order.

There is no clear rule as to whether a Norwich Pharmacal order can be obtained against a respondent in a foreign jurisdiction. It is in the court's discretion to decide whether such an order can be made in the circumstances before it. It may be more appropriate for parties seeking information from third parties based abroad to look to local law and procedure for assistance.

Standard of Proof and Burden of Proof in Civil Proceedings

The standard of proof applied in all English civil cases is the balance of probabilities. In practice, this means that a litigant must provide enough evidence to convince the court that the facts in issue on which the litigant relies are more likely to have occurred than not.

In most civil claims in the English courts, the burden of proof is on the claimant to establish the claim. One notable exception is in defamation claims, where the claimant only has to assert that a defamatory statement has been published and that it caused the claimant serious harm.

Failure to Give Evidence at Trial: Consequences

The legal principles applicable to drawing adverse inferences from the failure of a witness to give evidence at trial have been summarised (by Brooke LJ in Wisniewski v Central Manchester Health [1998] PIQR P324), as follows:

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- In certain circumstances, a court may be entitled to draw adverse inferences from the absence or silence of a witness who may be expected to have material evidence to give on an issue in an action.
- If a court is willing to draw such inferences, they may go to strengthen the evidence provided on that issue by the other party or to weaken the evidence provided by the party who might reasonably have been expected to call the witness.
- There must, however, have been some evidence, however weak, provided by the former on the matter in question before the court can draw the desired inference, in other words, there must be a case to answer on that issue.

If the reason for the witness's absence or silence satisfies the court, then no such adverse inference can be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of their absence or silence may be reduced or nullified.

Admissibility of Evidence

The main bases for challenging the admissibility of evidence are as follows:

- The evidence is not relevant.
- One of the exclusionary rules applies to the evidence (see *Exclusionary Rules of Evidence*).
- The documents are privileged (see *Privilege*).
- The evidence should be excluded under CPR 32.1 for case management reasons because of the overriding objective to deal with cases justly and at proportionate cost.

When to Apply

Issues regarding admissibility of evidence can be considered by the judge at trial or at an earlier preliminary hearing. Usually, these applications are dealt with by the trial judge.

Exclusionary Rules of Evidence

Opinion

The general rule is that a witness in civil proceedings should give evidence of facts and not of opinions. The two exceptions to this rule are contained in section 3 of the Civil Evidence Act 1972:

- A witness may give their opinion on a relevant matter on which they are qualified to give expert evidence.
- A witness may give a statement of opinion as a way of conveying relevant facts personally perceived by them, and it will be admissible as evidence of what they perceived.

Hearsay

The previous common law rule against the admission of hearsay evidence was effectively abolished by section 1(1) of the Civil Evidence Act 1995 (CEA). The CEA defines "hearsay" as "a statement made otherwise than by a person while giving

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oral evidence in the proceedings which is tendered as evidence of the matters stated." (See *Practice Note, Hearsay evidence in civil litigation*.)

Nevertheless, certain safeguards remain in place under sections 2 to 4 of the CEA with respect to the use of hearsay evidence. These safeguards include notifying the other party of the intention to use hearsay evidence, and that the court can assess the circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence in estimating the weight (if any) to be given to it.

Privilege

A party must disclose all documents within their control that fall within the scope of standard disclosure. However, they can refuse to permit inspection of documents which are legally privileged. See *Practice Note, Legal Professional Privilege and Professional Secrecy in UK (England & Wales): Overview*.

Discretion of Court to Exclude Evidence

The court has discretion to exclude otherwise admissible evidence under CPR 32.1(2). Under this rule, the court can control the evidence by giving directions as to:

- The issues on which it requires evidence.
- The nature of the evidence which it requires to decide those issues.
- The way in which the evidence is to be placed before the court.

More specifically, under CPR 32.2(3), the court can give directions:

- Identifying or limiting the issues to which factual evidence may be directed.
- Identifying the witnesses who may be called or whose evidence may be read.
- Limiting the length or format of witness statements.

There is no express limit on the court's discretion to control evidence, but it should be exercised in support of the overriding objective of enabling the court to deal with cases justly and in proportion to the costs involved and the complexity of the issues (*Grobbelaar v News Group Newspaper Limited, CA, 9 July 1999*).

Witness Evidence: Oral and Written

Requirements for the Content of Written Evidence (Witness Statement or Affidavit)

Witness Statement

Witness statements are the standard form in which evidence is given in civil proceedings. The requirements for the format of a witness statement can be found in PD 32.17 to 32.25, and the requirements for witness statements to be used at trial in the Business and Property Courts can be found in the new PD 57AC. These include (but are not limited to) the requirements that:

- The full name, address, and occupation of the witness must be included.

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- Formalities as to exhibits must be followed (found in PD 32.18.3 to 32.18.6).
- It is fully legible and typed on one side of the paper only.
- It has consecutively numbered pages.
- It has all dates expressed in figures.
- It is in the witness's own words.
- A statement should be included which confirms that the witness believes that all the facts in the witness statement are true (statement of truth).
- For trial witness statements in the Business and Property Courts, a confirmation signed by the witness in the form specified by PD 57AC.4.

CPR 32.14 provides that proceedings can be brought for contempt of court against a person if they make, or cause to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth. In addition, for witness statements drafted for use at trial, PD57AC and the accompanying statement of Best Practice should be read carefully as parties will be sanctioned if they are non-compliant and have not explained the reason for their non-compliance (see *Blue Manchester Ltd v Bug-Alu Technic GmbH and another [2021] EWHC 3095 (TCC) (19 November 2021)*).

Affidavit
An affidavit is required in place of a witness statement in the following circumstances:

- If specifically required by the court, CPR, or a PD.
- In an application for a search order.
- In an application for a freezing order.
- In an application for contempt of court.

(*PD 32.1.4.*)

The requirements for a valid affidavit can be found in PD 32.1 to 32.16 and closely follow the requirements for drafting witness statements. The key points of difference are:

- There are certain requirements as to the form of the heading (*PD 32.3*).
- The deponent must show in the affidavit whether they are a party to the proceedings or employed by a party to the proceedings (*PD 32.4.1(4)*).
- There are specific requirements as to how exhibits should be referenced (*PD 32.4.3*) and how to exhibit documents (*PD 32.11 to 32.15*).

An affidavit should include a "jurat," which is a statement set out at the end of the document authenticating the affidavit. It must be signed and dated by the deponent and following immediately on from the text above it (that is, not on a separate page) (*PD 32.5.2*).

Oral Evidence in Support of Written Evidence

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Whether or not witness evidence is to be written or oral depends on the type of hearing at which the evidence is to be used. CPR 32.2(1) provides that if the witness' evidence is to be used at a trial, the evidence must be oral and given in public. At any other hearing, the evidence must be given in writing.

At Trial

Generally, the court will order a party to serve on the other parties a witness statement of the oral evidence which the serving party intends to rely on in relation to any issues of fact to be decided at trial. The witness statement contains the evidence which the witness would be allowed to give orally (*CPR 32.4*).

The party must still call the witness to give oral evidence unless either:

- The court directs otherwise.
- The party put the statement in as "hearsay evidence".

Where the witness is called to give oral evidence, their witness statement will stand as their evidence in chief unless the court orders otherwise (*CPR 32.5(2)*). This means that the witness is not taken through their evidence line by line by their own side's advocate; rather, the witness merely confirms that it is their evidence, signed by them, and will be asked to correct any errors that have come to light since signing it. For cases in the Business and Property Courts to which PD57AC applies, the witness statement will include evidence that the witness would have been allowed to give orally without having provided a statement, thereby saving time as it allows the court to move straight into cross-examination. For more guidance on PD57AC, see *Practice Note, Requirements for trial witness statements in B&PCs under Practice Direction 57AC*.

The witness is only allowed to amplify their statement or give evidence in relation to new matters with the permission of the court (*CPR 32.5(3)*). Permission is only granted where there is good reason not to confine the evidence of the witness to the contents of their witness statement.

The witness can be cross-examined on anything in their witness statement, regardless of whether it was referenced in their evidence in chief (*CPR 32.11*).

At Other Hearings

CPR 32.6 provides that the general rule is that evidence at a hearing other than the trial is to be by witness statement, unless the court, a PD, or any other enactment requires otherwise. Examples of hearings other than a trial will include, among others:

- Hearings of summary judgment applications.
- Applications to extend time.
- Applications seeking security for costs.

Where a party wants to cross-examine a witness at a hearing other than a trial, it can apply to the court for permission to cross-examine the witness. If the witness does not attend as required, this evidence cannot be used without the court's express permission (*CPR 32.7*).

Timing for Filing Written Witness Evidence

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Parties can serve written evidence with an interim application at any time after proceedings have started.

In relation to witness statements to be relied on at trial, it is important that parties follow directions and orders given by the court. If a party is late in filing a witness statement, it will not be allowed to call that witness to give evidence unless the court gives permission to do so (*CPR 32.10*).

The parties can also agree to extend the time period for filing witness statements by up to 28 days, provided a hearing date is not threatened as a result (*CPR 3.8(4)*).

If a party wishes to adduce further evidence after the time for filing the original evidence has expired, that party must apply to the court for permission to rely on the additional evidence.

Evidentiary Value of Witness Evidence

In general, contemporaneous documentary evidence can be preferred over witness evidence relating to the same events occurring in the past. However, this is fact-specific, and it is for the judge to assess both types of evidence and make a decision as to its value. The Appendix to PD57AC contains a Statement of Best Practice setting out a number of principles which should be followed, including the principle that many matters of fact do not require witness evidence, either because they are common ground or because the evidence will add nothing to the disclosed documents. Witness evidence is not necessarily required where there is an issue regarding the meaning or import of disclosed documents.

Cross-Examination and Re-Examination

The evidentiary value of this is also considered on a case-by-case basis.

Witness Unwilling or Unable to Provide Evidence or Attend Court

If a witness is unwilling to provide evidence, the party that wants to rely on that witness' evidence can either:

- File a witness summary.
- Apply for a witness summons.

Witness Summary

A witness summary (under CPR 32.9) is used where a witness statement is required but the party who would have given the witness statement is unable to do so. The summary identifies the witness and summarises the issues the evidence would have covered.

If a party wishes to use a witness summary, permission from the court must be sought (*CPR 32.9(1)(b)*). The application is made without notice.

In terms of format, the witness summary should follow the same format as a witness statement and include the witness' name and address.

The summary must be served within the period for service of the witness statement. If served late, the party wishing to rely on the summary will need to apply to the court for relief from sanctions (*CPR 3.9*) and for permission to use the summary.

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In most cases, a witness summary will also need to be accompanied by a witness summons.

Witness Summons

A witness summons is a document issued by the court requiring a witness either to:

- Attend court to give evidence.
- Produce documents to the court.

(*CPR 34.2.*)

The summons is binding if it is served at least seven days before the date on which the witness is required to attend the court. If the summons is served fewer than seven days before the hearing, it is possible for the court to direct that it is nevertheless binding (*CPR 34.5*).

A witness summons must comply with a number of requirements to be valid, including that:

- The summons must relate to an individual (that is, not a business).
- Any summons requiring a party to give oral evidence must be issued in good faith for the purpose of obtaining relevant evidence.
- Any summons relating to documents must identify the documents to which it relates, and those documents must be both admissible and relevant to the issues in the action.
- The documents requested must be in the actual possession or custody of the person to whom the summons is addressed.
- The request for documents must not be overly broad; it must be limited to what is reasonably necessary for fairly disposing of the issues in the action.

If a witness fails to comply with a witness summons, the consequence will depend on what court the matter is being heard in:

- If the County Court, the witness may be liable to pay a fine of up to GBP1,000 (*section 55, County Courts Act 1984*).
- If the High Court, the witness may be found to be guilty of contempt of court, which could result in committal or sequestration.

Any attempt to serve a witness summons outside English and Wales will not be binding.

The court has suggested that a witness summons may be used to retrieve information from a third party. In Richard v BBC and others, the court chose not to order third-party disclosure, instead ordering the third party to either produce a witness statement providing a narrow class of information or to attend a hearing to provide information (*[2017] EWHC 724 (Ch)*).

Witness Immunity

Witnesses are protected from liability for things said or done:

- In the ordinary course of proceedings.

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- Outside of court in preparing to give evidence (*Darker v Chief Constable of The West Midlands Police [2000] UKHL 44*).

However, witness immunity does not necessarily extend to the exhibits to a witness statement (see *Accident Exchange Limited v Autofocus Limited [2009] EWHC 3304*) or to proceedings for punishment for contempt of court (see *KJM Superbikes Ltd v Hinton [2008] EWCA 1280*).

Expert Witnesses

Expert witnesses owe their client a duty to act with reasonable skill and care. This duty must be balanced with their duty to the court. CPR 35.3 provides that it is the duty of experts to help the court on matters within their expertise; this duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

The Supreme Court decision in Jones v Kaney abolished an expert witness's immunity from suit in respect of both their performance at trial and the contents of their expert reports (*[2011] UKSC 13*). However, an expert witness is still immune from claims against them by the opposing party (*Baxendale-Walker v Middleton & others [2011] EWHC 998 (QB)*).

Expenses

A solicitor is permitted to pay a witness:

- Reasonable expenses.
- Reasonable compensation for loss of time.
- Conduct money on service of a witness summons, to compensate for expenses incurred in attending court.

(*O(5.8) and IB(5.10), SRA Code 2011.*)

What amounts to "reasonable" compensation for loss of time is not clear from the case law. A solicitor must take care when dealing with witnesses demanding large sums of money for their testimony. The payment of a large sum may open a solicitor to personal criticism, alongside creating a risk that the judge will devalue a witness' evidence if the judge believes that the witness is being overpaid for their time.

It is not unusual for a witness who is an employee of a company to be paid their normal wages plus expenses while giving evidence on behalf of their employer.

A solicitor is not permitted to enter into an agreement with a witness that their pay will differ depending on the evidence they give (*see Energysolutions EU Ltd v Nuclear Decommissioning Authority [2016] EWHC 1988 (TCC)*).

Expert Witnesses

Court-Appointed Experts

Court Experts

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No party can call an expert or put in an expert's report without the court's permission (CPR 35.4).

Generally, experts are appointed by the parties.

CPR 35.7 provides that, where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by a single joint expert.

When considering whether to direct that expert evidence be given by a single joint expert, the court will take into account all the circumstances including whether:

- It is proportionate to have separate experts for each party.
- The instruction of a single joint expert is likely to assist the parties and the court to resolve the issue more speedily and in a more cost-effective way than separately instructed experts.
- Expert evidence is to be given on the issue of liability, causation, or quantum.
- The expert evidence falls within a substantially established area of knowledge which is unlikely to be in dispute, or there is likely to be a range of expert opinion.
- A party has already instructed an expert on the issue in question and whether or not that was done in compliance with any PD or relevant pre-action protocol.
- Questions put to the expert are likely to remove the need for the other party to instruct an expert if one party has already instructed an expert.
- Questions put to a single joint expert may not conclusively deal with all issues that may require testing prior to trial.
- A conference may be required with the legal representatives, experts, and other witnesses which may make instruction of a single joint expert impractical.
- A claim to privilege makes the instruction of any expert as a single joint expert inappropriate.

(*PD 35.7.*)

Generally, the single joint expert will be agreed between the parties, but if the parties are unable to agree then the court may give directions as to how the expert is to be selected or even select an expert itself.

If a single joint expert is appointed, the court may give directions about the payment of the expert's fees and expenses (*CPR 35.8*).

Party-Hired Experts

No party can call an expert or put in an expert's report without the court's permission (CPR 35.4).

In advance of the first CMC, a party will complete a directions questionnaire (DQ). In the DQ the parties are asked to set out whether they require expert evidence, the issue the party would like the expert to consider, and if known, the name of the expert they would like to instruct. A court may agree to this request at the CMC, if the other party has not previously consented to this.

The court is under a duty to restrict expert evidence to that which is reasonably required to resolve the proceedings (*CPR 35.1*).

Fees of Expert Witnesses

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If a single joint expert is appointed by the court, the court may give directions as to how payment will be split. Often this will be shared between the parties.

Expert fees in the small claims track cannot exceed GBP750 (*PD 27A.7*).

Role of Party-Appointed and Court-Appointed Experts

The expert's overriding duty is to the court. This duty overrides any obligation that an expert may have to the instructing client.

Any evidence given by an expert should be the independent product of the expert and should not be influenced by the pressures of litigation. The expert is expected to assist the court by providing objective, unbiased opinion on matters within their expertise, and cannot assume the role of an advocate or lawyer. Experts must make it clear when a question or issue falls outside of their expertise or if they are not able to reach a definitive opinion (*PD 35.2*).

Presentation of Expert Evidence

CPR 35.5 provides that expert evidence is to be given in a written report unless the court directs otherwise. If a claim has been allocated to the small claims track or the fast track, the court will not direct that an expert should attend a hearing unless it is necessary to do so in the interests of justice.

Guidance is given in CPR 35.10 and PD 35 as to what should be included in an expert's report. The primary requirements are that the report must:

- Give details of the expert's qualifications.
- Give details of any literature or other material on which the expert has relied in making the report.
- Contain a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or on which those opinions are based.
- Make clear which of the facts stated in the report are within the expert's own knowledge.
- Contain a statement that the expert understands and has complied with their duty to the court.
- State the substance of all material instructions, whether written or oral, on the basis of which the report was written.
- Where there is a range of opinion on the matters dealt with in the report, summarise the range of opinions and give reasons for the expert's own opinion.
- Contain a summary of conclusions reached and, where relevant, state any qualification necessary for those conclusions.
- Include a statement of truth in a particular form.

(*PD 35.3*.)

Documentary Evidence: Certification of Documents

A party is deemed to admit the authenticity of documents that have been disclosed to them under *CPR 31*, unless they serve a *notice to prove documents at trial*, effectively requiring the documents in question to be proved at trial. This must be done by the last date for serving witness statements or within seven days of disclosure, whichever is the later (*CPR 32.19*).

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Legal Framework Governing Cross-Border Evidence

Taking of Evidence Regulation

Following Brexit, The Taking of Evidence Regulation no longer applies to the UK in respect of new requests made after 1 January 2021.

Hague Evidence Convention

The UK is a party to the Hague Evidence Convention.

Any Other International Instruments

Letters of request between the various jurisdictions within the UK (that is, England and Wales, Scotland and Northern Ireland) are governed by the Evidence (Proceedings in Other Jurisdictions) Act 1975 (EPOJA).

Bilateral conventions with the UK should also be considered, as they may provide assistance (or limitations) for taking evidence abroad.

The Foreign and Commonwealth Office website lists some of the bilateral civil procedure conventions to which the UK is a party.

This list is by no means exhaustive. It is advisable to contact the Foreign and Commonwealth Office Treaty section directly by telephone, as they maintain a list of all treaties to which the UK is a party and can provide information on whether a relevant treaty exists and how a copy can be located.

The Hague Evidence Convention

Central Authority

For contact details of the designated Central Authority and the additional authorities, see *Authorities, Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.

Reservations, Declarations, and Notifications

See *Status table, Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, for a complete list of reservations, declarations, and notifications made by the UK (England & Wales) in relation to:

- Language of letter of request (*Article 4*).
- Execution of letter of request in the presence of judicial personnel (*Article 8*).
- Evidence by diplomatic officers, consular agents, and commissioners (*Articles 15-17*).
- Pre-trial discovery (*Article 23*).

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Request from Foreign Litigants

For oral and documentary evidence, the time taken for a letter of request to be executed is usually between 6 and 12 months (see *Hague Conference on Private International Law: Authority*).

The UK has made a declaration under Article 8 that judicial officers of the requesting court may be present at the execution of letters of request in the jurisdiction. No previous authorisation is required.

The main procedure for executing a letter of request under the Hague Evidence Convention is to instruct an English lawyer to apply for an order giving effect to the request. An application to the Senior Master of the Queen's Bench Division of the High Court can be made under section 2 of EPOJA and CPR 34.17. This is likely to be the most efficient method.

Neither the Hague Evidence Convention nor EPOJA affects the taking of evidence given voluntarily to foreign diplomatic or consular officers or other persons appointed by foreign courts to take evidence or to legal representatives taking evidence in this country for the purpose of proceedings abroad.

There is in England no legal objection to the taking of evidence in this country for use outside the jurisdiction without the intervention of the High Court. So long as the witnesses are willing to attend to give evidence, the examination may be completed and the depositions returned to the foreign court without the intervention of the court in England. (For further information, see The White Book: Civil Procedure, (*Sweet & Maxwell, 2021), Rule 34.16.*)

Domestic Requests

See *Obtaining Evidence from Another Jurisdiction*.

Obtaining Evidence from Another Jurisdiction

Form or Application Along with the Documents

Letters of request between the various jurisdictions within the United Kingdom (that is, England and Wales, Scotland, and Northern Ireland) are governed by EPOJA.

When the English court receives a letter of request from a non-UK court, EPOJA applies to the English court's handling of the request.

For letters of request received between January 2004 and 31 December 2020 from a requesting court in an EU member state other than Denmark the Taking of Evidence Regulation applies. The Taking of Evidence Regulation ceased to apply to the UK on 31 December 2020. For details on the Taking of Evidence Regulation see *Practice Note, Letters of Request*.

In England and Wales, an application for a letter of request is made to the High Court, even when the evidence is sought for County Court proceedings (*CPR 34.13*).

The application must be made on notice under CPR 23 (*PD 34A.5*). Practice form N244 may be used.

The application will be dealt with by the Senior Master of the Queen's Bench Division of the High Court.

The application should include the following documents:

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- A draft letter of request in the form set out in Annex A to PD 34A.
- A statement of the issues relevant to the proceedings.
- A list of questions or the subject matter of questions to be put to the proposed deponent.
- A translation of the above documents, unless the proposed deponent is in a country of which English is an official language or a PD has specified that country as a country where no translation is necessary.
- An undertaking to be responsible for the expenses of the Secretary of State.

(*PD 34A 5.3.*)

In addition to the documents listed above, the party applying for the order must file a draft order.

Once an order has been made, it is presented (as a further application to the Senior Master) at the Foreign Process Section (Room E16) at the Royal Courts of Justice, together with an undertaking for costs in the prescribed form (see Form PF78QB).

The Senior Master must sign off on the letter of request before transmission. Once that has been done the letter of request will be passed to the Foreign & Commonwealth Office for onward transmission to the receiving court. However, where the matter is urgent, it may be sent directly to the relevant court. If the evidence is required from a person within the jurisdiction of a US District Court then it may be possible to use a provision called section 1782 of title 28 of the US Code. This approach bypasses diplomatic channels and so obtaining the evidence required may be quicker and more direct.

Notice Requirements

The application notice and supporting documents must be served on all parties as soon as is practicable after the application has been issued (*PD 23.4.1*).

Grounds

The English court has discretion whether to issue a request. The court will want to avoid delay, expense, and inconvenience. In deciding whether to exercise its discretion, the court may consider, among other things:

- The relevance of the evidence sought.
- The health of the witness.
- The cost of obtaining the evidence.
- Whether providing the evidence sought would be illegal under the law of the receiving court.
- Whether the exercise of obtaining the evidence is likely to be, disproportionate in terms of cost, time, and disruption to the benefit to be obtained.

Costs and Expenses

The fee for the application is GBP108.

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If the government of a country allows a person appointed by the High Court to examine a person in that country, the High Court may make an order appointing a special examiner for that purpose.

An examiner of the court may charge a fee for the examination (*CPR 34.14*). The examiner need not send the deposition to the court unless the fee is paid. The examiner's fees and expenses must be paid by the party who obtained the order for examination. If the fees and expenses due to an examiner are not paid within a reasonable time, the examiner may report that fact to the court.

The court may order the party who obtained the order for examination to deposit in the court office a specified sum in respect of the examiner's fees and, where it does so, the examiner will not be asked to act until the sum has been deposited.

The usual rules of evidence will apply if the evidence will be relied on in an English court (see *Admissibility of Overseas Evidence*).

Application and Procedure Irrespective of the Applicable International Instruments

The application and procedure set out above applies irrespective of whether an international convention applies.

While an English court may, in principle, issue a request to a court in a country with which the UK has no treaty relationship, a party seeking the issue of such a request should consider whether the receiving court is likely to comply with the request in the absence of any treaty obligations and, if so, how long it will take. Local law advice should be sought.

Admissibility of Overseas Evidence

There are no specific rules in the CPR regarding the admissibility of evidence obtained overseas. It is at this point that the other party can challenge the weight the judge will place on the evidence. The judge will consider the evidence in the same way as evidence obtained in England and Wales and will decide whether to allow it to be admitted (based on whether the correct application and procedure was followed to obtain it), and what weight should be allocated to it. For example, if a witness is able to provide a witness statement but is unable to attend trial, an application to the court should be made to adduce the statement as hearsay evidence. The judge will then decide the weight to be given to the evidence.

Willing Witness (Unable to Travel)

It is possible to arrange for evidence to be given by video link or deposition.

The general rule is that witnesses should give their evidence at trial, orally and in public, subject to any order of the court, but the court has a discretion to order evidence to be taken by deposition before trial, or by video link (see *Video-Link, Teleconference, or Depositions*).

If a witness is unable to travel, a letter of request can ask for production of documents rather than oral evidence.

Video-Link, Teleconference, or Depositions

Video Conferencing

CPR 32.3 provides that the court may allow a witness to give evidence through a video link or by other means. Annex 3 to PD 32 contains guidance on the use of video conferencing in the civil courts, especially in situations where the witness is located abroad. The COVID-19 pandemic has also resulted in the introduction of PD51Y on the use of video or audio hearings and this should also be referred to if evidence is to be given via video link.

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Depositions

CPR 34.8 allows any party to apply for an order for a person to be examined before the trial. The court has discretion and there is no general rule as to when it should be exercised. The primary purpose is to obtain evidence from a witness whom it would be impossible to bring to the trial.

The evidence obtained is referred to as a deposition. The order will provide for examination before a judge, or an examiner of the court. It must be conducted in the same way as if the witness were giving evidence in court and will therefore normally include cross-examination. The deposition may then be given in evidence at the trial. CPR 34.13 provides for the court to issue a letter of request to the judicial authority of the foreign country to arrange for the examination where the witness is in a foreign country.

Obtaining Evidence in Support of Foreign Litigation

National Rules

The taking of evidence in the English courts from residents in England and Wales is largely governed by:

- CPR 34.16 to 34.21.
- PD 34A.
- EPOJA (this governs the powers of the courts in England and Wales, Scotland and Northern Ireland to act in aid of each other and in aid of a court outside the UK).
- Treasury Solicitor: Guide to Letters of Request (June 2007) (the TSol Guide).

Direct Application

EPOJA governs the process national courts should follow on receipt of a request for evidence, whether from another jurisdiction within the UK (for example, a Scottish court to an English court) or between states (for example, a US court to an English court).

Procedure to Enforce Request for Witness Evidence

Under EPOJA, courts are given a power (but not a duty) to comply with letters of requests from judicial authorities in other states and international judicial bodies. However, it has been said that "it is the duty and the pleasure of the [English] court to give all such assistance it can to the requesting court" (United States of America v Philip Morris Inc [2004] EWCA Civ 330).

The party making the request should instruct English solicitors to make the necessary application to the court.

CPR 34.17 states that an application for an order under EPOJA for evidence to be obtained must be made to the Senior Master of the Queen's Bench Division of the High Court, supported by written evidence, and accompanied by the original letter of request as a result of which the application is made (usually signed by the judge who made the request), and where appropriate, a translation of the request into English (see PD 34A.6.3 for details of the evidence required). A Master is a procedural judge who deals with all aspects of a civil action until it is ready for trial by a trial judge.

The application is usually made without notice and the Senior Master will generally dispose of it without the need for a hearing.

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If the party making the request has not instructed an English solicitor then the Senior Master will forward the request to the Treasury Solicitor, who may apply for the order.

The court may make the order as it sees fit to give effect to the request (so far as it wishes to do so). Section 2(2) of EPOJA allows orders for:

- The examination of witnesses.
- The production of documents.
- The inspection, preservation, and custody of property.
- The taking of samples from, and the carrying out of experiments on, property.
- The medical examination of, and testing blood samples of, a person.

After the order is made, provided it was made without notice, the proposed witness can make an application under CPR 23 to amend or discharge the order.

The court will usually appoint a practising lawyer to act as the examiner, and that person is usually taken from a list of examiners selected by the Lord Chancellor. The fees and expenses of the examiner will be paid by the party that obtained the order for the examination.

Grounds

Requests will not be complied with unless they both:

- Relate to a "civil or commercial matter" under English law, as well as the law of the requesting court (see *Re State of Norway's Application (No. 2) [1990] 1 AC 723*).
- Do not require a person to give evidence which that person could not be compelled to give in English court proceedings.

Generally, the English court will accept a statement from the foreign court that the request is required for civil proceedings. However, if there is any uncertainty, the court is required to examine the request objectively by considering the nature of the testimony sought and what was said in the foreign court when the request for evidence was issued. The English court should not, however, take the foreign court's perspective on the purpose for which the evidence is required at face value.

The English court can withhold the order requested if it is satisfied that the application would be regarded as frivolous, vexatious, or an abuse of the process of the court (see *Rio Tinto Zinc Corporation v Westinghouse Electrical Corporation [1978] AC 547*).

The English court can also accept or reject the request in whole or in part. It should refuse to grant any sections that are unnecessary, either in relation to witnesses or documents or both. It should not grant a request if to give effect to it would be improper or impermissible under English law (section 2(3), EPOJA). For example, courts have refused to allow a "fishing expedition" that would not have been allowed in English proceedings (see *Rio Tinto Zinc Corporation v Westinghouse Electrical Corporation [1978] AC 547*).

For a summary of the general principles which govern the approach of the English courts to applications, see also *Daric Smith v Philip Morris Companies Inc and others [2006] EWHC 916.*

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Time Frame

There are no fixed guidelines. However, once an order has been made and an examiner appointed by the court, the party who made the application must serve the order on the respondent, who is usually the witness that will be examined. This must be done at least seven days before the examination (*CPR 34.5*).

END OF DOCUMENT

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