Civil Litigation Practice: An Expert Guide

EDITED BY LAURA SLATER
Contents

Executive summary ........................................................................................................ VII

About the authors ................................................................................................…… XI

Reflecting on the Jackson reforms ............................................................................. 1
By Ian Gascoigne, partner at Eversheds LLP
  What did Jackson recommend? ........................................................... 2
  Successes ......................................................................................... 3
  Failures ......................................................................................... 4
  Diversions .................................................................................... 5
  Jackson on Jackson ....................................................................... 6
  Litigants in person ................................................................. 6
  The future ..................................................................................... 7

Disclosure and discovery post-Jackson ................................................................. 9
By Jeffrey T. Shapiro, managed services consultant, Kroll Ontrack
  Too much information .................................................................... 9
  A menu of options ........................................................................ 10
  Discovering relevance ................................................................. 11
  Making disclosure electronic ...................................................... 11
  A collaborative partnership ......................................................... 12
  Areas of opportunity ..................................................................... 13
  Conclusion ................................................................................... 17
## Contents

**For better or for worse** ........................................................................................................ 19

*By Michael Young, author and former expert witness*

- Back to basics ........................................................................................................... 19
- Communication ....................................................................................................... 22
- Cooperation ............................................................................................................. 22
- Teamwork ............................................................................................................... 23

**Evidential reliability: A practical guide for lawyers** .......................................................... 27

*By Dr Hugh Koch, director, Hugh Koch Associates*

- Evidential reliability post-CPR ........................................................................... 27
- The Medico-legal trail and key questions ......................................................... 28
- Improving evidential reliability .......................................................................... 29
- Unreliable pre-index accident history ................................................................ 35
- Improving evidential reliability via Part 35 questions .................................... 39
- Koch’s postulates to enhance robust opinions .................................................. 40
- Conclusions: The way forward to enhance evidential reliability .................. 43

**Litigants in person** ........................................................................................................ 45

*By Joanne Lewis, solicitor at Kennedys*

- Law Society guidelines ....................................................................................... 45
- Practical points to note ......................................................................................... 46
- Preliminary considerations .................................................................................. 47
- Procedural points .................................................................................................. 47
- Communicating with LiPs ..................................................................................... 48
- Costs ...................................................................................................................... 50
- Conclusion ............................................................................................................. 50

**Balancing duties to the court and to the client** ............................................................ 51

*By Jayne Willetts, solicitor advocate at Jayne Willetts & Co Solicitors*

- Inherent jurisdiction of the courts ...................................................................... 51
- Legal Services Act .................................................................................................. 52
- SRA Handbook ...................................................................................................... 52
- Misleading the court .............................................................................................. 53
- Without notice applications .................................................................................... 54
- Disclosure of documents ....................................................................................... 54
- Concluding comments ............................................................................................ 55
Marketing a litigation practice ................................................................. 57
By Douglas McPherson, director of Size 10½ Boots
  1. Internal marketing ........................................................................ 57
  2. Your existing clients .................................................................. 59
  3. New business .......................................................................... 60

Jurisdiction in cross-border disputes: Principles and pitfalls .............. 63
By Richard Dickman, legal director, Pinsent Masons LLP
  Basis of jurisdiction ................................................................. 63
  Challenging jurisdiction ......................................................... 64
  Italian Torpedoes ..................................................................... 66
  Enforcement ........................................................................... 66
  Practical points ....................................................................... 68

Collective investment schemes .......................................................... 69
By John Virgo, barrister at Guildhall Chambers, Bristol
  Basic terminology ..................................................................... 69
  Regulated activities ............................................................... 70
  What constitutes a CIS? .......................................................... 71
  When ‘arrangements’ do not amount to a CIS ......................... 72
Executive summary

LORD JUSTICE Jackson commented on the first anniversary of his eponymous reforms, that ‘Litigation is a process, not an Eleusinian mystery’. It is a process, however, that has undergone radical change in recent years – particularly in the wake of the Jackson Reforms – and many practitioners are still looking for further guidance. While most lawyers are now getting to grips with costs management, have all but given up on DBAs, and are reconciled to the increasing likelihood that they will find themselves opposing an unrepresented party, two years on, we are still a long way from the vision of parties co-operating in a smooth, cost-efficient litigation process that Jackson envisaged. As litigation continues to evolve, this book provides expert insight and guidance to help litigators adapt and succeed in the modern litigation landscape.

*Civil Litigation: An Expert Guide* brings together the experience and advice of practitioners and consultants in the field of civil litigation in a series of useful and straightforward articles. Each contributor provides an update or guidance, insight into a current ‘hot topic’, or practical advice that will aid litigators in their everyday practice. Like all processes, the litigation process can be improved upon, made more efficient and more effective. This expert guide also provides practical guidance on improving litigation processes for the 21st century, and advice on boosting essential skills that all litigators should have in their arsenal.

The report opens with an overview of the litigation landscape post-Jackson, and considers the new regime’s successes, failures, and talking points. Jackson recently assessed his own reforms with respect to costs management in particular, predicting that this will become an accepted part of practice within a decade. He has also acknowledged, however, that there are still problems in the system that need to be addressed, and the opening chapter of this report also looks at how far we have come since compulsory costs management was introduced, and considers the likely future.
With increasing pressure to keep costs down, litigators today need to be more efficient in the way they work and, as with many other areas of law, technology may help them to achieve this goal. The next contributor looks at the role that e-discovery and e-disclosure can play in boosting efficiency and minimising costs, and how litigators can maximise these benefits by collaborating with e-discovery professionals and leveraging their expertise.

Another group with whom litigators would do well to nurture a close relationship is expert witnesses. Two chapters in this guide focus on the essential work of experts in the litigation process. The first shows how a truly collaborative solicitor-expert relationship, where each understands the work and requirements of the other, can help both sides to work more effectively and efficiently – while failure to properly guide your expert can have a severe impact on your time and earnings. The second article covers the crucial issue of evidential reliability and provides a practical guide for lawyers when dealing with experts and their reports.

Not only does today’s litigator have to manage relationships with the client, the court, experts, and other legal professionals, to this growing list can frequently be added the unrepresented opposing party – possibly accompanied by a McKenzie friend. When facing an LiP, solicitors face particular challenges, not least the delicate balancing act between their duty to the court and their duty to the client. The next chapter outlines practical and procedural considerations to take into account when facing an LiP or McKenzie friend.

Dealing with an unrepresented party is only once instance where litigators may face a conduct conundrum; in its ‘Risk Outlook 2014/2015’, the SRA identified ‘the failure to act with integrity or ethics: improper or abusive litigation’ as a priority risk. The next chapter to this guide considers the litigator’s dual duties to client and court and examines some recent cases where these duties have come into conflict.

Relationships are at the heart of marketing and business development efforts, but when it comes to litigation, does anybody actually want to talk about what you do? One article tackles how to market effectively a service that few people want to think about – until they find themselves mired in a dispute a good litigator could have helped them nip in the bud.

Two areas of litigation that have seen a dramatic upswing in activity in recent years are cross-border and banking and financial litigation, and these are both areas that are likely to provide increasing fruit for litigators in coming
years. The final two chapters of this book provide expert insight into these topical areas of litigation, and provide guidance based on recent cases.

As the dust begins to settle on some of the most radical changes in the history of the civil justice system, it is time for practitioners to take stock of the post-LASPO landscape, and to prepare for the future. With more changes likely in the near future, as the post-Jackson litigation system is fine-tuned, it is essential that litigators take steps to adapt to the demands of the new landscape and ensure that they work as efficiently and effectively as possible, whether that means taking the time to properly instruct an expert witness so that they provide you with what you need at the first time of asking, or embracing new technologies that will help save time and money. This expert guide is designed to help litigators achieve those goals.

Reference
About the authors

Richard Dickman
Richard Dickman has considerable experience of complex commercial litigation, international arbitration, and mediation. He has acted for corporates and foreign states in a wide variety of disputes, including commercial, corporate, energy, financial services, international trade and commodities, professional negligence, and shipping matters. Richard is a solicitor-advocate, accredited mediator, and a member of the City of London Law Society Litigation Committee.

Ian Gascoigne
Ian Gascoigne is a member of Eversheds LLP and a partner in the Litigation and Dispute Management Practice Group. He joined Eversheds as a partner in 1998 and practises in the commercial litigation team. Long interested in the training and development of lawyers, Ian is a regular lecturer on a range of litigation issues for Central Law Training. At Eversheds, Ian is the training principal, responsible for overseeing the progress of the firm’s trainee solicitors during their training contracts.

Hugh Koch
Hugh Koch is a clinical psychologist, qualified in 1976. He established Hugh Koch Associates in 1992, since which time it has become the leading and unique organisation providing psychological and orthopaedic expert reporting in the UK (105 locations; 35 clinicians). Hugh has published widely in UK legal journals (150 publications) and is recognised for his robust opinions in personal injury and medical negligence cases.

Joanne Lewis
Joanne Lewis is a solicitor in the Birmingham office of Kennedys, an international law firm with specialist expertise in litigation/dispute resolution and advisory services. Joanne qualified in 2012 and specialises in professional
negligence defence work for a broad range of professionals and their insurers. She deals with claims against solicitors, brokers, accountants, letting agents, surveyors, and construction professionals. Joanne has a particular interest in claims against solicitors arising from private client work but also handles a wide variety of both litigated and pre-action claims arising from property transactions, handling of personal injury litigation, divorce proceedings, criminal proceedings, immigration, and employment claims.

Douglas McPherson
Douglas McPherson has worked with professional service firms for over 20 years, first as head of sales and marketing for Intellectual Property Publishing, then as the commercial director of Lloyds of London’s Marine Intelligence Unit. Doug is now a director of Size 10½ Boots, a business development agency that works solely with professional service firms.

Size 10½ Boots work with law firms, patent and trade mark attorneys, Chambers, and accountancy practices all over the UK. They combine their knowledge of the professional services market and direct in-house experience with the sales and marketing skills Doug and his partner Bernard Savage acquired from past roles in international blue chip sales-led organisations. In addition to providing strategic marketing advice, Size 10½ Boots provide a range of more tactical support, including training and personal coaching for professionals at all levels, copywriting and design services, and targeted PR support.

Doug is a regular contributor to a range of publications in addition to Solicitors Journal, including Managing Partner, Private Client Adviser, Intellectual Property, The Patent Lawyer, and The Barrister.

Jeffrey T. Shapiro
Jeffrey T. Shapiro is a licensed lawyer with successful project management experience in both public and private sectors. With Kroll Ontrack, he provides end-to-end project management and consultancy for e-disclosure and e-discovery clients, with emphasis on providing pro-active, strategic advice on planning, conducting, and delivering document reviews on budget. Prior to moving to the UK and joining Kroll Ontrack, he worked for several years with leading law firms in their international e-discovery practice groups. Jeff received his Juris Doctorate from the Syracuse University College of Law and is licensed to practice law in the State of Virginia.
**John Virgo**

John Virgo is a specialist commercial barrister, with a strong practice emphasis on high-value financial product mis-selling litigation. He has appeared in all the leading mis-selling cases, including: lead counsel appointment in a group pension mis-selling action (*Cocking v Prudential*); acting in a 400-strong group action in the Commercial Court on behalf of Equitable Life’s trapped annuitants (*Abeles and Others v Equitable Life Assurance Society*); acting for Zurich Life to defend claims for product mis-selling arising out of the collapse of the Bahamian Imperial Consolidated Fund (*Seymour v Caroline Ockwell & Co; Zurich IFA Ltd*); acting for investors into the AIG Enhanced Variable Rate Fund who suffered substantial losses following its collapse (*Rubenstein v HSBC Bank*); acting for a number of high-net-worth individuals and businesses in relation to the mis-selling of interest rate hedging products (*Rowley and Green v Royal Bank of Scotland*). He is instructed nationwide in complex and substantial disputes where his advocacy and forensic skills are highly valued.

**Jayne Willetts**

Jayne Willetts is the sole principal of Jayne Willetts & Co (www.jaynewilletts.co.uk), a specialist practice advising law firms and other legal services businesses as well as individual solicitors on all aspects of professional regulation, including SRA investigations and disciplinary issues. Described in Chambers & Partners Directory as ‘a formidable defence advocate’, she appears regularly as an advocate before the Solicitors Disciplinary Tribunal. A former President of Birmingham Law Society and regular columnist in the Society’s Bulletin, Jayne is also Legal Adviser to the Conduct Committee of the Chartered Institute of Architectural Technologists. Jayne is also a director of Infolegal, a law firm compliance and risk management online hub (www.infolegal.co.uk).

**Michael Young**

Michael Young is a former dentist, clinical teacher, and expert witness. He is now a full-time author. His book, *Managing a Dental Practice the Genghis Khan Way*, won the Diagram Prize. The Academy of Experts said that his book, *The Effective and Efficient Clinical Negligence Expert Witness*, ‘deserves to become the Vade Mecum for the clinician acting as an expert witness’. Both books are Amazon Number 1 best sellers. Michael also likes to write fiction in his spare time.