

When are orders for directions made and what is the purpose of them in litigation?

This podcast is intended to reinforce your understanding of 'directions' in litigation.

Listening to this podcast will require about 20 minutes of your time.

You may not be one of these students but my experience of reading hundreds of assessment answers on the topic, and hearing students, and newly qualified legal practitioners try to explain 'directions', it appears that many find the real place and purpose of 'directions' difficult to explain with coherence or confidence. Listening to this podcast, though repeating much of what you have read, but in a different medium, will hopefully improve your level of understanding and enable you to be one of the few students who can explain this topic confidently and correctly, or be one of the young practitioners to handle this practical topic in your work well and in your client's best interests.

I will consider first the 'time' when directions or the directions orders may be made in an action. I will then consider the purpose of a directions order. Finally I will consider some of the more common types of directions orders. These are often referred to as 'standard directions' and I will also consider some specific directions orders that are outside those contained in 'standard directions' but which are quite commonly sought by a party in an action.

So, firstly, let's consider the time when an order for directions is usually made in an action.

The directions orders that the court makes in an action are the means by which the court manages a case. As the court has 'control' of a case from issue to, and sometimes beyond, trial it may make an order for directions at any time. Sometimes directions will be made by the court of its own initiative but most commonly directions will be made at certain times in the progress of an action. They may also be made at other times upon the specific application of any of the parties.

It is important to understand that no action will proceed without directions being given unless it is an action that has ended summarily before a defence has been filed. A case might end summarily when the defendant has admitted the claim (this is likely to be in his acknowledgment of service but it could also be when there has been some other binding admission of the claim) or when there has been a successful application for summary judgment under CPR 24. Unless an action has been ended summarily then directions will be imposed on it by the court.

The most common time when the court will make directions for the future management of a case will be at the same time it allocates the case to a track. Indeed 'allocation' to a track is one of the first management directions the court will make for the future conduct of a case as allocation to track itself will bring with it the 'standard directions' that will normally apply in a case within that track which guide how that case is to proceed. But, more of 'standard directions' later in this podcast. For now we are looking at the 'time' when such orders are made.

As I have said the court will first allocate a case to a track then having done that the court will make further directions. These directions will guide and direct what steps the parties need to undertake to progress the action, and they will most importantly also set a period of time or a date when each of the steps directed should be completed.

The directions that the court will impose after allocation to track may set down all the tasks that the parties must complete right up to the trial date or alternatively the court may prefer to manage the case in a two stage approach – first setting down all the tasks the parties must complete up until the pre-trial review and then after this review make further directions of all the tasks the parties must complete from the pre-trial review until the trial date.

Whichever method the court uses, the idea of all the directions orders (or tasks if you like) that have been imposed by the court is to make the case ready for trial efficiently, justly, and proportionately. That is within the aims of the overriding objectives – the cornerstone of all the management decisions the court makes.

So, we can see that there are two common times when directions orders are made – at allocation and at pre-trial review. Before both of these occasions – allocation or pre-trial review – the court will have sent out a detailed form to all parties which it expects the parties to complete and get back to the court before it makes the directions orders. Before allocation this form is Form N 150 (also called the allocation questionnaire) and before the pre-trial review this form is form N 170 (also called the pre-trial checklist). The very important purpose of both these forms from the party's perspective is that proper completion of the form enables the parties to influence the directions orders the court will make. This is a crucial part of the legal representatives role in assisting their clients in litigation – unless the court is aware of the particular needs of the case the party's have little hope, or later opportunity, to influence the management decisions that the court imposes on them to make the case ready for trial, and just as importantly, the date or time by when the steps or tasks imposed on them must be completed.

Most cases will have directions orders imposed on them at one or both of these occasions – at allocation and in the pre-trial review. The distance, in terms of time, between the two occasions will depend entirely on the number of tasks the courts have directed that the party's should fulfil and the time allocated for each task. In the fast track we know that the time between allocation and trial must be no longer than 30 weeks. In the multi-track the time scale is not fixed and the length of time between allocation and the pre-trial review and on to trial will vary considerably. Because the court seeks to manage cases 'efficiently' and 'proportionately' those lower value cases in the multi-track are likely to have timescales imposed on the party's that are not too dissimilar to a fast track case.

The court will not only give directions for a case at the two common points I have discussed – at allocation and at the pre-trial review. The court can, and will, make directions orders at other times when it is necessary to do so. These will often be at the instigation of a party in the action when that party (or all the parties) have identified a situation that requires guidance by the court that is not contained within the directions orders already made. Because the court will manage all cases within the aims of the overriding objectives whenever a party wishes the court to make a further directions order, or amend one it has already made, that party will have to justify why the order it seeks

should be made. In accordance with the aims of the overriding objectives – it will need to show that the order it seeks would be ‘fair’, ‘just’, ‘proportionate’, and ‘efficient’.

The other times when directions orders can be made include the few orders that can be sought from the court even before proceedings have been issued, or, after issue but before allocation. Before proceedings have been commenced the court has power under the CPR to make orders for pre-action disclosure (CPR 31.16), orders granting interim remedies, for example an injunction or order to preserve or inspect property (under CPR 25). If a case has been issued but not yet allocated to a track there are some applications that the court can hear that can result in it making directions orders before allocation to track – for example in an application for summary judgment. If such an application succeeds then the case will have ended summarily as discussed earlier, and no directions orders will be made, but if the application fails then the court is likely to use that hearing to make directions orders for the future management of the case. The directions made at this stage may then take the place of those that the court would have made at allocation. Another example when the court may make a direction order after issue but before allocation would be when a party seeks more time to file the defence. We know that the parties can agree an additional 28 days for the defendant to file its defence but if that extension is not enough or is not agreed then the defendant will have to apply to the court for the extra time it needs and can justify needing.

So, we have discussed the most common time in an action when directions orders are made, and considered other occasions when orders may be made, now let us look at the ‘purpose’ of directions.

The directions that the court makes in any case are the way that the court manages a case and ensures that it is ready for trial. In any decisions the court makes about the steps or tasks the party’s must fulfil to get ready for trial it will also consider what steps or tasks it is ‘fair’, ‘proportionate’, or ‘efficient’ to make in that particular case.

Nearly all cases require the same, or similar, steps or tasks to be completed in order to make in ready for trial – these include the disclosing of documents between the parties, the exchange of witness evidence and the exchange and handling of any expert evidence the court has permitted use of. Some cases will need other, or additional, steps to be completed to be ready for trial – as we have already said these additional steps will have to be justified as necessary. If the court does not think the additional or amended steps are justified it will readily refuse the request. Equally, the court can, and often will, impose sanctions against a party who has been unable to fulfil a task within the time the court originally set down.

So, to summarize, the way to think of the ‘purpose’ of directions is to see them as a series of ‘hoops’ each party must get through. A party will get through each ‘hoop’ by completing the task set in the time set for that task. By getting through each hoop, on time, the parties will arrive at the trial at the time the court intended the case to be ready and be fully prepared for that trial.

So, there are common ‘times’ when directions orders are made and they all have a common ‘purpose’ – to get the action ready for trial. There is also a ‘normal’ diet of directions orders that will fit most cases. These ‘normal’ directions orders will be all that is

needed to make most cases ready for trial. These are what are known as ‘standard directions’.

So let us now, finally look at the actual directions orders that the court makes. I will consider the common directions orders made but briefly also consider some of the less common directions orders that may be made.

I have already used the definition ‘standard directions’. Most cases require pretty similar actions that the parties must complete to be ready for trial. In litigation there should not be any major surprises at the trial – by the time the case gets to trial both or all parties in the action should be fully aware of the numbers of witnesses being called and what those witnesses will say, what documents the parties are relying on and what documents were available that might support another party. To achieve this degree of knowledge before the trial the court aims to direct that the evidence is revealed to the parties in an orderly way. Making these arrangements is what the directions orders aim to achieve. Because most cases have similar requirements there are standard directions in each of the tracks. The courts will impose these standard directions in most cases – fast-track cases usually having directions selected from the list of standard directions listed in CPR 28 and multi-track cases having directions selected from the list of standard directions listed in CPR 29. Small Claims track case directions are dealt with in CPR 27.

‘Standard directions’ are what is the norm in most cases but as with all the matters we have discussed there are always variations from the norm. So, in seeing what directions orders the court will impose on a case, it is also important to be aware when the circumstances of a particular case require specialised directions orders to be made for *that* particular case to be made ready for trial efficiently, fairly, proportionately, and justly.

If we look at the list of standard direction in the fast track we will see that they state a time for disclosure of documents, a time for inspection of those documents by the receiving party, a time for the exchange of evidence of fact, a time for the exchange of any expert evidence, a date when the pre-trial checklists will be sent out and a date when the checklist (this is form N170) must be completed and returned and a date or trial period when the trial will be listed. Within each of these steps (or ‘hoops’ as we have referred to earlier in the podcast) there will be greater detail for example how long each party has to complete the task, whether the task should be completed simultaneously or consecutively, whether there should be any expert evidence and if so whether this be by a single joint expert, or experts for each party, the field of expertise, whether the experts should meet, what the purpose of the meeting should be, and whether the experts should give their evidence in writing only or be available to give oral evidence too. So, though there are ‘standard directions’ in each of the tracks the exact detail of the order the court will make about a specific task the parties must fulfil will be made by reference to the information the parties have given the court (in their allocation questionnaire and pre-trial checklist) and by the courts own initiative and aim to ensure the case is managed efficiently and proportionately.

Where a party feels that it needs a direction order outside the selection contained within standard directions then that party should be fully prepared to be able to explain that need, and most importantly, justify that need within the provisions of the overriding objectives.

Outside the norm of standard directions, there are other directions the court may make – there are many examples of this. If a party needs more time to do something it will have to apply to the court for that extra time, always being fully aware of the need to justify why it is needed and that giving the extra time would comply with the overriding objectives. If an opponent is not co-operating with the directions orders then the other party will ultimately have to apply to the court for guidance; whereupon the court will make such orders as it feels are just including the ultimate sanction of preventing the party in the wrong from being able to proceed with their claim or defence. If a case has a particular requirement, perhaps for example a need for an interpreter to be present at the trial then the court will need to know about this and suitable directions made to accommodate this need.

Students and practitioners should see the directions orders as the ‘recipe’ for the case. They should also always appreciate that the court has the control of the case thus any step a party wants must be justified and applied for in a timely, efficient way. This is why the allocation questionnaire and pre-trial checklist is so important – giving the parties the best opportunity of informing the court of the particular needs of the case.

Students should see ‘directions’ as the recipe for a case we must remember that compliance with protocol in the pre-litigation stage of a case has often pre-empted many of the directions orders a court will make within the litigation stage – in which case details of this should be provided to the court in the allocation questionnaire so the court knows it can reduce the length of time needed to complete that step as the case prepares for trial. Sometimes a case needs more time for a step to be fulfilled – perhaps because the claimant’s injuries have yet to stabilize, in which case, again it will be for the legal representative to make sure the court is aware of this at the right time so that any directions orders it makes are reasonable and able to be fulfilled by the date the court sets for that step.

You are advised to read Chapter 12 of the handbook again and have a more detailed look at paragraph 12.7 and the appropriate parts of CPR 27, 28 and 29.

Thank you for listening.