



Preparing to issue proceedings

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Introduction

This guide provides general guidance on the steps to consider prior to embarking on litigation. There are a number of practical considerations that should be taken into account. In addition today the Court requires parties to take a certain number of steps before issuing proceedings.

This guide runs through these matters in outline.

The clock is ticking...

The law does not allow potential claims to remain alive indefinitely. If you have a right that you want the Court to enforce, you are required to take steps to enforce that right within a prescribed period. The period depends on the nature of the right or remedy required. So, at the very outset, consideration should be given to the question of limitation.

Limitation is not straightforward. The period can vary from as little as three months (in matters of judicial review) to as much as fifteen years (with long stop dates).

It may be that the potential claim is already out of time. Alternatively, there may be very little time remaining before the limitation guillotine comes down. In the latter case, this will dictate the amount of dialogue that you enter into with the defendant prior to issuing proceedings.

What law governs the dispute and where to sue

In cases where all the parties are English and the events giving rise to the dispute occurred in England, the dispute will usually be determined by English law in an English Court. However, in all cases, some thought will need to be given to whether or not English Law governs the dispute and whether the English Courts have jurisdiction to hear the proceedings.

Contracts often contain applicable law clauses which tend to appear towards the end of the document. This is usually separate from a provision setting out which country's Courts are to have jurisdiction over issues arising. The two may not match. These provisions will determine whether or not the assistance of foreign lawyers is required.

Who to sue

It is most important to ensure that the correct defendant is being sued and that he is good for the money. There is little point bringing a claim against a defendant who has limited resources

or if his assets cannot be located. You will gain nothing more than a pyrrhic victory. Consequently the defendant's solvency may well be a determinative factor as to whether to pursue a claim.

On occasion, potential claimants find that, although they thought they were dealing with a company A, their contract was in fact with sister company B. Sometimes a company's identity does not match the details that appear on invoices, agreements, letter headed paper or other documents. In these instances, consideration will need to be given as to which party your contract is with.

There may be more than one potential defendant to your claim. This might be because there is more than one party who has caused you harm or that more than one party may be in breach of an agreement with you. Where there is a choice and where the merits of claiming against each of the defendants are the same, the (potential) defendant with the most money is most likely to make the better target. Commercial factors should be the guiding force in your decision, which will include for example where you wish to continue a working relationship with a potential defendant.

Information about the potential defendant should be obtained. For example:

- > if the potential defendant is an individual, where do they live?
- > what are their assets?
- > are those assets located in the UK or overseas?
- > are the assets mortgaged or charged in any way?
- > in the case of corporate entities, what is their financial status?
- > is the company prosperous or on the brink of insolvency?

In respect of any claim against a UK company, a quick search at Companies House may be telling. It can sometimes reveal that a potential defendant is already in administration or in the process of being wound up. This is more common than one might think. If you are not being paid, it is quite possible that there is a whole

class or series of creditors who are also owed money.

Gathering evidence and documents

You need to gather the documents that are relevant to your claim.

These may include:

- > correspondence, notes of meetings (whether formal board minutes or even manuscript notes).
- > file notes, contracts or agreements (whether signed or not) and other documents that are relevant to the issues. Drafts may also be important, depending on the particular issues in the case.
- > electronic documents. These may well outnumber physical/hard copy documents. They will include electronic files such as Word documents, Excel documents and e-mails.

As soon as you are aware a claim exists, steps should be taken to retain all relevant documents both electronic and physical. In fact, there is a duty to preserve all relevant documents, whether they are helpful or harmful to your case.

This duty will extend to instructing third parties who are holding documents (physical or electronic) on your behalf.

Appropriate internal procedures should be put in place and notices sent to third parties to ensure that documents are retained. Similarly, you should be cautious in creating *new* documents relating to the dispute. If they are subsequently deemed "relevant" to the dispute, you may have to disclose them to your opponent, even if they are potentially damaging to your case. Professional advice should be sought in relation to document creation and how to ensure copies of newly created items will not have to be provided to your opponent during the subsequent disclosure process.

A case may be decided on oral evidence and the most important details may not be recorded in writing at all. People who have relevant knowledge and are therefore potential

witnesses should be identified and a detailed account taken from them at an early stage. This ought to be put down in writing whilst their recollection is at its best.

When planning a proposed action, it is important to ascertain who will be able to recall which facts and how clearly. This may give an indication of how well they are likely to perform when giving live evidence in Court. In turn, this will also help you to analyse the strengths of your case.

A right to go to Court

When reviewing the contract documents, it is important to check whether or not there is a clause requiring the parties to attempt some form of alternative dispute resolution (ADR) rather than immediately enforcing your rights in Court.

If there is, say, a valid arbitration clause and Court proceedings are commenced, the defendant may well apply for a stay of the Court proceedings, which is likely to result in a costs order being made against you. Consequently, if your agreement contains an arbitration clause, you may be best advised to commence an arbitration as opposed to Court proceedings.

Engaging in pre-action procedure/the pre-action protocols

The Civil Procedure Rules (CPR) set out a series of protocols for different types of dispute, which must ordinarily be followed before proceedings are issued.

It is not practical to set out the various protocols in detail here, but the underlying aim in each instance is to encourage parties in dispute to exchange information, attempt to narrow the issues between them and, insofar as possible, avoid litigation by engaging in full and frank communication at an early stage.

A good example is that letters of claim (sometimes called letters before action) should generally set out details of the claim in full and allow a minimum 14 days for the money

demanded to be paid. This time period will be longer in more complicated cases. Today a simple 7 day letter before action is likely to be frowned upon by the Court.

In cases where a party issues Court proceedings without engaging in any pre-action discussions with the other side, the Court may well mark its disapproval by depriving them of their costs, even if successful.

Pre-action dialogue and mediation

In any case, before issuing proceedings, the Courts expect litigants to take steps to try to avoid the need for proceedings. Today the Court sees itself very much as an avenue of last resort. As part of this process, parties are expected to consider ADR. This includes negotiations or mediation.

Mediations are a non binding process during which the parties attempt to find a settlement to their dispute. The parties are assisted in this task by a mediator who is impartial and is there to help facilitate resolution of the dispute. The process is held on a "without prejudice" basis. This means that the matters discussed cannot later be referred to in Court should the mediation fail.

Sometimes, however, it is inappropriate for mediations to take place right at the outset. The parties may need a better understanding of the issues and the strengths and weaknesses of their case. However, there is nothing to stop negotiations and proposals for settlement being put forward at an early stage. These can help to put pressure on the opponent.

Courts will usually penalise a party in costs who unreasonably refuses to engage in mediation, even if that party is ultimately successful at trial. However, the Courts will not penalise a *reasonable* refusal. There are various factors which determine whether or not a refusal is unreasonable.

Exchanging documents and information/the letter of claim

A letter of claim ought to set out your

position in detail and, where appropriate, provide copies of relevant documents that you rely upon.

For example, if the dispute relates to non-payment of invoices, copies of the invoices together with a copy of the underlying contract should be supplied. If there is no written contract, the relevant details of the agreement should instead be recited in the letter. The idea is that the recipient will know exactly what is sought from them and the basis for the claim.

Equally, when writing a letter of claim, it is common to request documents from your opponent. Recipients of letters of claim will also sometimes ask for more documents in their reply.

Where parties refuse to provide documents, the Court's assistance can be sought in appropriate cases.

With the benefit of the additional information, parties ought to be able to identify where they are in agreement and where points of dispute remain outstanding. The Court expects this from parties and, if proceedings are later issued at Court, parties are required to fill in questionnaires stating whether or not they have exchanged information and documents/ followed a pre-action protocol.

Practical tips

- > Consider limitation;
- > Know your proposed defendant: are they good for the money? Where are their assets?
- > Act quickly to collate documents

and information from potential witnesses;

- > Put in place steps to preserve documents. Contact third parties who may be holding documents on your behalf;
- > Stop and think before creating new documents;
- > Consider whether you are required to embark on some alternative form of dispute resolution by the agreement;
- > Unless there are extremely good reasons otherwise, always engage in appropriate pre-action procedure. This includes acting reasonably and exchanging information about the basis of your claim;
- > Once you are in possession of the facts and relevant documents, seek advice on the cost/benefit of pursuing litigation. The decision to proceed must be commercially driven.

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