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Preparing to issue proceedings

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Introduction

This note 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. The civil justice system in England expects 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 short as three months (in matters of judicial review) to as long as fifteen years (with long stop dates). Apart from limitation rules, courts will also apply equitable rules in cases of delay which may prevent a claim being brought in certain circumstances.

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: sometimes a claim is issued urgently simply to protect against limitation.

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 and jurisdiction clauses. These tend to appear towards the end of the document in the "boilerplate" section. Usually the choice of law and jurisdiction provisions are separate and the two may not even match. These provisions will determine whether or not the assistance of foreign lawyers is required and whether the dispute is to be resolved before English or foreign courts.

Who to sue

It is most important to ensure that the correct defendant is being sued and to give some consideration as to whether they are good for the money. From a commercial perspective, there may be little point issuing a claim against a defendant who has limited resources or if their assets cannot be located. A potential 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 company A, their contract was in fact with (sister) company B. Sometimes a company's identity does not match details appearing on invoices, agreements, letterhead paper or other documents. In these instances, consideration will need to be given as to which party your contract is with, as this will dictate who you should issue your claim against.

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 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 usually the better target. Commercial factors should be the guiding force in your decision which will include, for example, whether you wish to continue a working relationship.

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

- if the potential defendant is an individual, where do they live;
- what are the defendant's assets;
- are the assets located in the UK or overseas;
- are the assets mortgaged or charged;
- in the case of corporate entities, what is their financial status; and
- 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 helpful. It can sometimes reveal that a potential defendant is already in administration or in the process of being liquidated. This is more common than one might think: if you are not being paid, it is quite likely that there is a whole class or series of creditors who are also owed money.

Gathering evidence and documents

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 manuscript notes);
- file notes, contracts or agreements (whether signed or not) and other documents that are relevant to the issues in your claim. Drafts may also be important, depending on the particular issues in the case; and
- electronic documents. These are likely to outnumber physical/hard copy documents. They will include Word and Excel documents, calendar entries and emails.

As soon as you are aware a claim exists, steps should be taken to preserve all relevant documents, both electronic and physical. In fact there is a duty to do so whether or not the documents are helpful or unhelpful 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 document destruction policies should be stopped with communications sent to employees regarding the preservation of documents. Notices should also be sent to third parties to ensure that documents are retained.

Similarly, you should be cautious when 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 damaging to your case. 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.

Evidence

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. You may wish to formalise evidence in signed statements from employees at an early stage: loyalties and priorities can change dramatically when people change jobs.

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 and, ultimately, your negotiating position.

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 enforcing your rights in court.

Parties may be expected to negotiate at a senior level followed by formal mediations (escalating or tiered clauses). In some cases litigation may not be appropriate at all. For example, there may be a valid arbitration clause. A claimant who ignores an obligation to arbitrate is likely to face an order staying their claim, coupled with an adverse costs order. Consequently, if your agreement contains an arbitration clause or another dispute resolution mechanism which must be complied with before a claim is put before the court, you will need to check whether your dispute falls within the scope of the clause and then commence arbitration or the required dispute resolution mechanism in accordance with the terms stipulated.

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 to achieve a settlement where possible.

A good example is that letters before claim (sometimes called letters before action) should generally set out details of the claim in full and allow a minimum of 14 days for the opponent to respond. This time period will be longer in more complicated cases although should be no more than 3 months even in a very complex case. A simple 7-day letter before action is likely to be frowned upon by the court.

A party that issues court proceedings without engaging in appropriate pre-action exchanges with the other side may face judicial criticism. Judges tend to mark disapproval by depriving such a party of some or all of their costs, even if successful. The courts can also take into account non-compliance with the protocols when making case management directions.

Pre-action dialogue and mediation

Before issuing proceedings, the court expects litigants to take steps to try to avoid the need for court 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.

Mediation is 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 there to help facilitate resolution of the dispute. The process is held on a "without prejudice" basis. This means (subject to very limited exceptions) that the matters discussed cannot later be referred to in open court should the mediation fail.

Sometimes, however, it is inappropriate for mediations to take place at an early stage. The parties may need a better understanding of the issues and the strengths or 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 that determine whether or not a refusal to mediate is unreasonable.

Exchanging documents and information/the letter before claim

A letter before 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 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.

When writing a letter before claim, it is common to request documents from your opponent. Sometimes recipients of letters before claim will, in their reply, ask for more documents than were provided with the letter before claim.

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 and followed a pre-action protocol. Legal representatives also need to confirm that they have advised their clients of the need to try to settle as well as the potential cost risks which arise should they refuse to do so.

Practical tips

- Don't delay - consider limitation periods.
- 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 obliged to engage in some alternative form of dispute resolution by the agreement between you and your opponent.
- Unless there are extremely good reasons not to, 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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20210226 - DR - Preparing to issue proceedings