Wellers Law Group LLP

A GUIDE TO LITIGATION AND COURT PROCEEDINGS IN ENGLAND AND WALES

This guide is intended to be a helpful overview if you are contemplating issuing proceedings or are defending proceedings in England and Wales. The rules for Court proceedings are contained in the Civil Procedure Rules which are continually revised and updated throughout the year and this document should not be relied on for legal advice.

The basic procedure is as follows:-

1. Letter before action

Before proceedings can be issued, a formal 'letter before action' should be sent to the proposed Defendant(s). The letter needs to comply with any Pre-Action Protocol which is applicable to the claim. For example, a debt recovery matter should comply with the Pre-Action Protocol for debt claims.

The letter before action provides formal notification to the Defendant that you are intending to bring proceedings and it should provide as much information as possible to enable the Defendant to respond. The letter must give a reasonable time to respond which is normally between 14 days and three months depending on the complexity of the claim.

Failure to send a 'letter before action' which is compliant with the Civil Procedure Rules can result in costs orders against the defaulting party once proceedings are issued. It is therefore important that the letter is correctly drafted.

Parties are also encouraged to try and settle their case where possible and consideration must be given in the letter before action as to whether the matter should be referred to a form of alternative dispute resolution such as mediation.

Once a Defendant has responded to a letter before action, then there should be sufficient information to decide whether to issue proceedings. There can sometimes be further correspondence if the parties take additional steps to narrow the issues in dispute.

2. Limitation

There are strict time limits for when claims can be brought and it is important to establish before issuing proceedings whether these apply, otherwise the Defendant/s can defend the proceedings on the basis that the claim is time-barred.

A brief overview of the main time limits is as follows although this list is not comprehensive and there are others:-

1. Contract – generally six years from the date of the breach of contract;
2. Tort and negligence – six years from the date of the losses suffered or three years from the date of discovery (or the date that the person should reasonably have acquired the knowledge) with a long stop time limit of 15 years in the cases of latent damage;
3. Fraud – six years from the date of discovery of the fraud or when a person with reasonable diligence could have discovered the fraud;
4. Personal injury – three years from the date of the injury;

5. Defamation – one year from the defamatory statement

These time limits can be extended in certain circumstances. The law of limitation is very complex and depends on the facts of the case and so you should seek specialist advice on this if you have any concerns.

3. Issuing proceedings

If the matter cannot be resolved after the 'letter before' action has been sent, then proceedings can be issued. Court claims are commenced with formal documents known as the "Claim Form" and "Particulars of Claim". The documents will set out your case in a specified manner so that it is clear both to the Court and to the Defendant/Defendants.

A Court fee must be paid in order to issue proceedings and the fee is determined on a sliding scale depending on the value of your claim and/or the type of relief which you are seeking.

Claims which are worth more than £50,000 are generally issued in the High Court whereas smaller claims are usually listed in the County Court. There are also a number of specialist Courts such as the Technology & Construction Court or the Probate Registry.

Once proceedings have been issued, then they must be formally served on the Defendant/s and evidence of this must be supplied to the Court so that it can be established that the Defendant/s have received the claim.

4. Acknowledging and defending the claim

Within 14 days of service of the Particulars of Claim, a Defendant must file at Court and serve on the Claimant an acknowledgment that proceedings have been received in the form of an Acknowledgment of Service. If this step is not complied with, the Claimant can apply to the Court for a judgment in default against the Defendant/s.

Alternatively, the Defendant can file and serve a Defence within the same time limit or within 28 days of service of the Particulars of Claim if an Acknowledgment of Service is filed. A Defence is a formal document which sets out which parts of the claim are disputed and the reasons why.

There are different time limits for Defendants based overseas but these will vary depending on the geographical location of the Defendant/s.

The parties can also agree to extend the time for filing a Defence for up to 28 days.

The Defendant may decide to issue a Counterclaim at the same time as filing and serving the Defence if they considers that it has a claim against the Claimant. Again, there is a Court fee for issuing depending on the size of the Counterclaim issued.

5. Reply to defence and defence to counterclaim

A Claimant may file a Reply to the Defence if there are any further points raised in the Defence which should be dealt with. This must be filed at the same time as the Directions Questionnaire (see below).

A Defence to Counterclaim must be filed and served within 14 days of service of any Counterclaim otherwise the Defendant may be able to obtain judgment in default against the Claimant.

6. Directions questionnaire

Once the formal documents in the claim have been filed and served at the Court, the parties must fill out and file at Court a Directions Questionnaire.

This document is essentially a form to provide the Court with all the information which it needs to be able to deal with the administration of the claim and includes questions about the following:-

- Documents to be disclosed to the Court and other parties to include electronic documents; and
- Any witnesses called to give evidence at trial; and
- Any expert evidence which may be required to determine issues in dispute; and
- Provisions for ADR (alternative dispute resolution).

The Directions Questionnaire will enable the Court to make decisions on which track the case should be allocated to.

7. Allocation

After receiving the Directions Questionnaire, the Court will allocate the case to a track. There are three tracks and decisions made on allocation are generally as follows:-

- Small claims track for cases less than £10,000 in value (or £1,000 in cases of personal injury). These cases usually take six months to reach Court
- Fast track for cases £10,000 - £25,000. These hearings are normally listed for 1 day and usually take one year to reach Court
- Multi track for cases in excess of £25,000 or with a particular complexity. These hearings are usually listed for more than one day and take one to two years to reach Court.

In addition to this, the Business and Property Courts have introduced a Shorter and Flexible Trials Scheme which applies to cases where the parties agree to the Scheme or the Court orders that they should apply.

In these cases, a trial can be listed within eight months of the Case Management Conference and with a judgment delivered six months after trial.

8. Case management conference

Once the case has been allocated, then the Court will issue directions for the management of the claim (in some cases these can be agreed between the parties) and will set certain deadlines for steps to take place.

It is very important to meet Court deadlines. Although it is often possible to obtain an extension, a missed deadline can result in a case being struck out with an adverse costs order being made. It is an option to make an application for relief from sanction but it will increase the costs of dealing with the case and there is a risk that sanction may not be granted.

The Court may also list the case for a Case Management Conference at which the parties have a hearing with the Judge and directions for the case are settled. Typical directions include the following:-

- An order for the disclosure of documents by the parties, there may be a provision dealing with the disclosure of electronic documents
- Directions for the filing and service of witness evidence
- Directions for the instruction of either a single or joint expert
- Provisions for the parties to enter into alternative dispute resolution including, for example mediation.

9. Costs management

Usually at the Case Management Conference, the Judge will have asked the parties to file costs budgets in advance setting out their estimated costs for dealing with each of the steps in the case.

The deadline for filing the costs budget is 21 days before the Case Management Conference unless the Court orders otherwise. The parties must then file an agreed budget discussion report no later than seven days before the first Case Management Conference.

The deadline is a very strict deadline and if it is not complied with then unless the Court orders otherwise, the budget will be treated as if it only contains Court fees. This will mean that the defaulting party will not be able to recover any costs other than the Court fee.

At the hearing, the Judge will order how much each party is allowed to spend on each stage of the litigation and the parties are expected to run the case in accordance with the budget.

In some cases if there are unexpected developments in the litigation, then it is possible to apply to the Court to amend the costs budget. Otherwise, if there any additional costs then these are unlikely to be recoverable from the other side although your legal advisors are still entitled to charge for these.

10. Disclosure

The standard order for disclosure (which the Court can vary) is that parties must disclose the following documents:-

- The documents on which they rely
- The documents which adversely affect their own case, adversely affect another party's case or support another party's case
- Any other documents further to other Court rules.

As soon as litigation is contemplated, parties must preserve discloseable documents and ensure that these are not destroyed. Failure to do so, can result in contempt of Court proceedings which may lead to imprisonment.

Documents do not only include paper documents but also electronic data such as emails, voicemail messages, social media posts etc.

In small cases, there may not be a significant volume of documents. In large cases though (particularly commercial cases) a considerable amount of time can be spent at the outset of the claim to ensure that all documents are preserved.

It is also possible in larger cases for documents to be uploaded onto a central database so that these can be reviewed by teams of lawyers to ascertain which are discloseable.

14 days before the Case Management Conference, parties must file at Court a report which describes briefly what documents exist, where these documents are located, how electronic documents are stored and the likely costs of reviewing the documents. In some cases, parties may also exchange and file an Electronic Documents Questionnaire.

Over the last few years, with the huge increase in electronic documentation, Courts have been looking at ways to make the disclosure procedure less wieldy and expensive.

The Disclosure Pilot Scheme was introduced in January 2019 in certain cases in the Business and Property Courts where the Courts will try to limit standard disclosure. Instead of the standard disclosure, Model D will apply so that the parties and their lawyers are under a duty to co-operate to promote the reliable, efficient and cost-effective conduct of disclosure. The parties must still disclose all adverse documents to their case.

11. Witness evidence

Evidence is generally provided to the Court in the form of Witness Statements (in addition to the disclosure of the documents) which are prepared for each witness who will give evidence at the trial. These contain an account of what happened in the witness's own words although they are prepared in a set format in accordance with the Civil Procedure Rules.

When a witness is called to Court, he/she will be cross-examined on the contents of the witness statement. The witness signs a Statement of Truth at the bottom of the statement to confirm that its contents are true.

12. Expert evidence

In certain cases, it can be necessary to obtain evidence for an expert which can be key to a judgment in very technical cases. For example, it may be necessary to obtain share valuations in commercial cases or a medical expert in personal injury matters.

The use of expert evidence is strictly restricted to only when necessary and the Court's permission must be sought. Where possible, parties are encouraged to make use of a Single Joint Expert as opposed to each party having their own expert.

In cases where parties do each have their own expert, the Court can make an order to "hot tub" the experts so that they give evidence and are cross-examined concurrently. The experts will also then engage in discussion together whilst in the witness box.

13. Applications

Applications can be made to the Court both before and after proceedings have been issued. The most common application made before issue is an application for pre-action disclosure where a party has failed to provide information and documents required to resolve the case.

Other common applications are:-

- An application to serve proceedings out of the jurisdiction
- Application for a freezing order (to freeze assets) or a Search Order (for the preservation of evidence or property
- Application for summary judgment (where the Defendant does not have a reasonable prospect of successfully defending the claim)
- Strike out application
- Application to join third parties into the litigation

14. Pre-Trial review

Once the parties have complied with all of the directions after the Case Management Conference, they must file a Pre-Trial Checklist at Court.

The Judge who is assigned to the case will then often order that the parties should attend Court for a Pre-Trial Review. At the hearing, the Judge will ensure that all the directions have been complied with and will set a timetable for the trial.

15. Offers to settle

Parties are actively encouraged to try and settle a matter from the issue of proceedings until the matter is at trial.

Parties must always consider whether some form of alternative dispute resolution may bring the matter to resolution and failure to do so can result in a party having to pay the other side's costs even if they are successful in trial.

The different methods of alternative dispute resolution are as follows:-

- Informal without prejudice discussions or a without prejudice meeting
- Mediation – a mediator is a neutral third party who will try and assist parties to reach a negotiated settlement
- Arbitration – the dispute is submitted by agreement to an arbitrator who will make a binding decision on the dispute
- Early neutral evaluation – where an expert is instructed to give an early opinion on the case to assist the parties reach settlement.

Parties can put forward an offer at any stage of the proceedings and these are made "without prejudice save as to costs" so that they are only disclosed to the Court when discussing the award of costs at the end of a trial.

Parties also have the option to put forward a Part 36 Offer which is a formal offer (again made on a without prejudice basis). If the other party fails to beat the offer at trial, then the other party will obtain:

- Interest on the date from the expiry of the relevant period in the offer
- Costs on an indemnity basis (ie disputes on costs resolved in their favour
- Interest on costs not exceeding 10% above base rate
- An additional amount of 10% of the amount awarded up to £500,000 and an additional 5% of any amount above £500,000

16. Preparation for the trial

The Court will usually set directions for the trial so that the Claimant has to prepare a bundle which contains the following:-

- Pleadings (Claim Form, Particulars of Claim, Defence, Counterclaim, Reply and Defence to Counterclaim);
- Court Orders
- Disclosure
- Witness statements
- Experts reports
- Relevant correspondence between the parties.

The Court will also usually ask the parties' barristers to file and serve Skeleton Arguments shortly before the trial. These are a summary of the arguments which will be raised at the hearing.

17. The trial

The trial is the culmination of the all the work carried out in preparation for the trial. More often than not, cases do not reach trial and settle in advance.

At the hearing, usually a barrister is appointed to present the case on behalf of each party. The barristers will each have an opening speeches and are given the opportunity to present their case.

Witnesses are then called and cross-examined on their evidence. The barristers will then summarise their arguments and refer the Judge to any relevant law.

At the end of the hearing, the Judge will either give judgment or will reserve judgment until a later date.

18. Appeal

If a party loses a case, it can make an application to appeal the hearing either at the hearing itself or within 21 days to a higher Court. If permission is granted, then the Court will list the matter for a hearing at which the matter will be heard.

19. Costs

The Courts have a wide discretion as to costs but the general rule is that the successful party should be able to recover the majority of their costs from the losing party.

It is possible that the Court may make orders throughout the litigation so that if, for example, a party loses an application then it may be ordered to pay the other party's costs in respect of this.

The Court will take into account factors such as the conduct of the litigation, whether the parties have tried to settle the case and any offers which have been made.

A party may only recover costs which have been reasonably incurred and are of a reasonable amount. Typically, a successful party will only recover 2/3 of their total costs.

If the costs liability is not ordered by the Court or agreed between the parties, then the successful party will commence detailed assessment proceedings to ascertain how much is owed in respect of costs.

The procedure is as follows:-

1. The successful party prepares a Bill of Costs (usually prepared by a costs draftsman) and must serve this on the losing party within three months of the date of the Court Order.
2. The losing party must then serve Points of Dispute within 21 days of service of the Bill of Costs.
3. The successful party then has an opportunity to serve a formal Reply to Points of Dispute within 14 days of service of the Points of Dispute.
4. If the parties are not able to settle the matter, the case will be listed for a hearing before a Costs Judge who will make a ruling on how much should be paid.

20. Enforcement

The normal order for costs is that the costs are payable within 14 days.

If the debtor doesn't pay, then it is necessary to take further action to enforce the judgment which may entail further proceedings. A list of the main options are as follows:-

- Instruct a bailiff/High Court Enforcement Officer to seize the debtor's goods
- Obtain a charging order over a debtor's property to secure the debt
- Once a charging order is obtained, make an application to the Court to sell the property
- Attachment of Earnings order to secure payment from the debtor's earnings
- Commence insolvency proceedings (winding up petition for corporate debtor and bankruptcy proceedings for individual debtor)

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