

Before issuing a claim at Court

If you have been unable to resolve your dispute, you may be left with no other option but to issue formal Court proceedings to recover the losses you have suffered or the monies that you are owed. However, before you embark on the formal Court route, there are a number of things that you should consider, which are set out below.

HAVE YOU CONTACTED YOUR OPPONENT IN AN ATTEMPT TO RESOLVE MATTERS?

The Courts like parties to have sought to resolve their differences before resorting to legal action. This could be by way of correspondence between the parties (or their solicitors), meetings to see if the issues can be resolved or narrowed, or even some form of Alternative Dispute Resolution, such as a mediation.

HAVE YOU COMPILED WITH ANY RELEVANT PRE-ACTION PROTOCOLS?

The Civil Procedure Rules include a number of Pre-Action Protocols that the parties are encouraged to comply with prior to the issue of proceedings. Failure to comply with the relevant protocol may lead to costs consequences against a party who failed to comply with the protocol. Amongst the current Protocols, that can be found at <https://www.justice.gov.uk/Courts/procedure-rules/civil/protocol>, are:

- Pre-Action Protocol for Resolution of Package Travel Claims
- Pre-Action Protocol for Construction and Engineering Disputes
- Pre-Action Protocol for Debt Claims
- Pre-Action Protocol for Media and Communications Claims
- Pre-Action Protocol for the Resolution of Personal Injury Claims
- Pre-Action Protocol for the Resolution of Clinical Disputes
- Pre-Action Protocol for Professional Negligence
- Pre-Action Protocol for Judicial Review
- Pre-Action Protocol for Disease and Illness Claims
- Pre-Action Protocol for Housing Conditions Claims (England)
- Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Arrears in respect of Residential Property

There is also a general Practice Direction for all Pre-Action Conduct and Protocols, that sets out some guidance in relation to pre-action conduct and compliance with the Protocols.

DO YOU HAVE THE TIME TO COMMIT TO THE PROCEEDINGS?

Being involved in Court proceedings can be a time-consuming process. Even if you appoint solicitors to act on your behalf, they will still need to take detailed instructions from you and you are likely to have to find the time to produce all relevant documents in connection with your dispute, and also provide witness evidence. If your matter does end up at trial, you may also have to attend the trial to give evidence. If you run your own business or simply do not have enough hours in the day to give your full attention to the legal proceedings, you may wish to consider appointing a solicitor for assistance and support with the process.

DO YOU HAVE THE RESOURCES AVAILABLE TO FUND THE LITIGATION?

As well as being time-consuming, litigation can be expensive, especially if you are funding it yourself. Not only is there the initial fee to pay on the issue of a claim, but there are also further fixed fees to pay at different stages of the litigation process. If you are legally represented, you will also have to pay your own solicitor's costs and possibly those of a barrister to represent you at the trial.

Whilst you may be able to recover a certain percentage of your legal costs from your opponent if you are successful, you also need to factor into account the possible risk that you will not be successful, and could therefore be ordered to pay some or all of your opponent's legal costs, as well as your own legal costs. Again, it may be possible for you to take out insurance to protect against this, but you will still have to pay any insurance premium, which can be expensive.

DOES YOUR OPPONENT HAVE THE ABILITY TO PAY ANY JUDGEMENT COSTS?

Even if you are successful and the Court orders your opponent to pay you money (and costs), there is no guarantee that your opponent has the financial means available to them to pay the judgment.

Whilst you can then seek other methods of enforcing the debt, this can mean further time-consuming and expensive litigation, again with no real guarantee that you will ever be paid.

Prior to commencing litigation, it is always worth checking whether you believe your opponent has sufficient assets to be able to meet any judgment debt (and costs). For example, if they own their own house or car, then it may be possible to seek recovery using those assets. However, if the house is jointly owned and subject to a mortgage and the car on hire purchase, then they may not have sufficient monies available to be able to pay you in any event.

ARE YOU WITHIN TIME TO COMMENCE YOUR PROCEEDINGS?

Depending on the type of proceedings you wish to issue, you may only have a certain timeframe in which to issue proceedings. This is known as the 'limitation period'. The Limitation Act 1980 sets out the limitation periods for most types of proceedings, but if in doubt, you should consult with a solicitor to check you are still able to issue proceedings. Limitation periods for some of the more common types of claim are set out below:

- Action based on a contract – six years from the date of the breach (or when the cause of action accrued)
- Action based on tort – six years from the date the damage is suffered
- Action based on a Deed – 12 years from the cause of action

In most cases, the limitation period will start on the day on which the cause of action accrues, so normally the date that the breach of contract occurs, or the negligent advice is given. However, in some cases, limitation may not start until the date the breach or negligent advice is discovered. If in doubt, then a solicitor will be able to advise you if you are still within time to commence your claim.

GET IN TOUCH



Mark Ovenell

PARTNER

Dispute Resolution

E: mark.ovenell@bindmans.com

T: +44 20 7833 4433



The lawyers have incomparable client service skills. They are very clear and always make sure they understand the picture, even if it is a complicated one.

CHAMBERS AND PARTNERS 2022

BINDMANS LLP

236 Gray's Inn Road | London | WC1X 8HB

T: +44 20 7833 4433 | E: info@bindmans.com | W: bindmans.com