Issues to Be Aware of in Contemplation of Litigation: Multi-Track Cases

1. Introduction

This is a brief overview of matters you should consider before taking steps into litigation and even before sending a Letter of Claim or Defence in accordance with the Practice Direction (on Pre-Action Conduct) or any of the Pre-Action Protocols governing particular kinds of disputes. Engaging in this formal correspondence is now a mandatory pre-cursor to litigation. It is part of the new "cards on the table" regime. The idea being that both parties should know and understand the case against them well enough in advance so that they can decide whether to settle or fight.

A Letter of Claim must set out the basis of the legal claim and attach the key documents relied upon. It must be formally acknowledged and answered within 14 days (unless the matter is complex and requires further time). That is the Defendant must reply and formally explain his defence, if he has one. The parties will be held to these statements in this formal exchange of correspondence by the Court and may be penalised by costs sanctions if they behave unreasonably or put forward a hopeless case or one they later abandon.

2. Decisions

Once these formal pre-action letters have been exchanged, the potential litigant (and his lawyer) must decide whether to sue. This note aims to set out some of the issues which should be kept in mind when making that decision.

3. Insurance

Before sending a Letter of Claim or making any offer to settle the claim, the potential litigant should check any 'Before the Event' (BTE) insurance policies to determine whether he/she may be insured for the legal costs of the claim. These are often standard Home & Contents or Business policies. BTE may pay a party's own lawyer's fees and any costs or damages awarded against him if he should lose. If covered, the insured must notify the insurer promptly and comply with their requirements as to notification and handling before taking *any* action. The lawyer can help explain the nature of the claim to the insurer. Once notified –the insurer should provide written confirmation of cover and advice on ongoing reporting and/or disclosure requirements. In some cases, the insurer will select the lawyer and take on conduct of the case.

If there is no BTE insurance, it may still be possible to obtain After the Event (ATE) insurance for the claim. This is highly advisable in order even if just to obtain some cover against a loss. Often the payment of the premium can be delayed (although in most cases it can no longer be recovered from an opponent on a win). Some ATE insurers will require an independent legal opinion on the merits of the case before deciding to quote.

We often recommend that before commencing proceedings such advice is taken on the merits in any event. Even if not used to seek ATE cover immediately, a positive opinion will enable a client to obtain it in future. Note also that premiums can increase significantly as a case proceeds and it is often significantly more cost effective to insure at the very outset.

Some ATE insurers require that your solicitor must act on a Conditional Fee Agreement (CFA) but we do not offer these. Any element of uplift or success fee can no longer be recovered from your opponent on a win either.

4. Procedural Steps

The High Court and the County Courts have financial and other jurisdictional limits and the relevant court will depend on the nature of your claim. Cases between £50,000-500,000 are likely to be transferred to the County Courts unless falling within certain classes of

specialist claim, like defamation. There are three kinds of Tracks for claims, Multi (General), Fast (Disputes mainly as to the law and not the facts) and Small (£10,000 or less). The Court will make the allocation to a particular track, often only some time after the start of proceedings following close of pleadings (formal statements of case) and completion of questionnaires which will help it to allocate. The rule of thumb is that if a money claim is over £25,000 or the claim is complex, it will be allocated to the Multi-Track. This notes deals with cases on that track. A variation of these procedures applies in relation to the other tracks.

Actual litigation commences by the filing of Statements of Case. These are the Claim Form and the Defence respectively. These set out the facts and case of each party and must be signed with a Statement of Truth, that is, a formal statement of belief that the facts stated are true. This is a serious matter and the statement should only be signed by a person with direct knowledge of the facts alleged who is satisfied that they are true, after proper investigation.

After the exchange of Statements of Case, the court will send out a notice requesting a Directions Questionnaire within 28 days. The parties must try to agree the steps and the timetable for them leading to trial—working from a model with various options. The Court can also just decide on and issue directions of its own accord.

Directions deal with the following:

1. a timetable for the preparation of the case up to and for trial;
2. fixing a Trial date or period;
3. providing for mutual disclosure of documents; and
4. making provisions about exchange and filing of evidence.

An order for Directions if not already agreed or made will be made by the Court at the first 'Case Management Conference' (CMC).

In advance of the CMC the parties submit case summaries identifying the main issues. If parties wish to call expert evidence, they must obtain permission at the CMC and will have to justify the cost. The Court may limit or otherwise direct the format and content of expert and factual evidence.

At least 7 days before the first CMC, the parties must exchange and try to agree detailed Costs Budgets. These are itemised costs already incurred and projected costs through to trial presented in a special form. The idea is that the parties will then know at the start of the case their own lawyer's total likely costs and their opponent's costs (which they might have to pay if they lose.

Based on these budgets, in most cases, the Court will make a Costs Management Order (CMO) recording the approved budget at the CMC. The parties will be held to these budgets and if they are about to exceed them they must apply to revise the CMO.

The orders to pay costs at the end of the trial will be limited to the sums in the CMO. Any failure to file a budget means costs cannot be recovered except for Court filing fees. The cost for preparation of the cost budget cannot exceed £1000 plus VAT in most cases.

The CMC will be held by telephone or just but submitting the papers if possible and the parties agree. In some cases it may be necessary for an actual in person hearing.

14 days before the CMC, the parties must also exchange reports (verified by statements of Truth) on the relevant documents that they have and in what format, the likely costs of disclosing it, what disclosure they seek from their opponents, and no later than seven days

before the CMC, the parties must try to agree on disclosure. The Court will decide at the CMC what level of disclosure is proportionate and order it accordingly. Unless a party makes an application out of the ordinary, no costs will usually be awarded for the CMC and this is important as these interim hearings can be costly otherwise.

After the CMC the parties will prepare for trial by completing the steps in the directions according to the timetable.

A checklist is then filed before a Pre-Trial Review (PTR) conference, held to make arrangements for the trial itself.

At the PTR, the Court will give directions about:

(a) the precise time and place of trial;
(b) any final orders about evidence;
(c) a trial timetable and the order of witnesses;
(d) the preparation of a trial bundle (documents submitted by both parties); and
(e) any other matters needed to prepare the case for trial.

These (above) are the basic steps, however the parties' approach to the litigation, the sum in issue and the complexity of the matter will determine the extent of additional applications etc.

5. Publicity

Non-parties, including the media, can view and copy Statements of Case, some other documents filed at Court, Judgments and Orders and information on the court register. In addition, documents read in open court and other documents can also be obtained by non-parties with permission of the Court. The media can then publish fair and accurate reports or extracts from these documents (and from hearings in public) with strong protection from libel laws (the defence of statutory qualified privilege). It is possible to seek orders from the court to seal parts of the Court file or otherwise protect highly sensitive data and trade secrets as well as private information but the default rule is 'open justice.' Parties should think carefully about ventilating their dispute in the public domain with all the detail and scrutiny that may bring. They should also keep in mind that often it is the defence case that gets the initial coverage and the public can lose interest by the time the claimant's position is in focus.

6. Disclosure

Parties aware of potential litigation must not destroy and must immediately act to preserve documents that could be relevant to the dispute and must suspend routine document destruction under any document retention policy. Failure to do so may result in adverse inferences that may seriously harm their case.

Parties should also take care not to create any *new* documents or annotate or amend any existing documents in such a way as could damage their case, as they may have to be disclosed as part of the ongoing obligations to disclose.

Indeed, *all* new documents created about the case should be addressed to a lawyer and marked 'Confidential and privileged: Subject to Legal Advice and Litigation Privilege'.

Electronic Disclosure may be ordered where proportionate and before the CMC the parties must discuss these issues and where possible agree on the technology and methodology to be employed in any electronic disclosure, if any. What is reasonable will be determined by accessibility of electronic documents and back-up systems, the likelihood of locating relevant data and –most importantly, the cost of the exercise. If applicable, the parties often agree which keyword searches should be conducted if a full review is unreasonable. The Court expects that documents should be

exchanged in a format that allows them full functionality and access to metadata. If yours is a case where electronic disclosure may be appropriate, it will be necessary to engage experts to deal with all aspects from capture, preservation and forensic collection, as well as sampling, review and analysis and production.

7. Costs

The UK has a loser pays costs system. A litigant should plan in the case of a loss to have to pay the sum ordered in costs to the successful opponent within 14 days of the last day of any application, hearing or Trial.

Costs are immediately assessed at the end of short hearings and trials –known as 'summary assessment.' These orders may be enforced against a party's assets or by bankruptcy proceedings.

A party can estimate their potential exposure by reference to the CMO made at the CMC. It is unusual to have to pay 100% of your opponent's costs on a loss and usually the recovery is between 60-80%. If the trial takes longer than 2-3 days, then the costs may go to a separate hearing for 'detailed assessment.' This is conducted by a costs draftsman and can be a lengthy and expensive process in itself and also has a loser pays rule.

By making an early formal 'Part 36 offer' to settle—a party can shift the risk of costs to his opponent. That is, if a party makes an offer to accept a sum in settlement and it is not accepted and he is then awarded that sum or more at trial; the other party must pay all his costs from the date of the offer on –on an indemnity basis. This is to encourage and reward early reasonable offers and penalise those who refuse them.

8. Outcomes

There are and can be no guarantees of success in litigation. Even very strong cases often have a high litigation risk –up to 25% as a rule of thumb. Very often things can go either way. Parties should think carefully about the likely consequences of a loss.

9. Mediation

The Courts strongly encourage mediation before a claim. These very often lead to amicable settlements –if not on the day, then often later. They usefully serve to clarify the real issues, business concerns, provide the parties with an opportunity to feel heard and to narrow the areas of contention –as well as identify a likely range of settlement figures. If a party proposes mediation and the opponent refuses, he gains some protection on costs. We often recommend an offer to mediate is made before proceedings are commenced. This can be in or at the same time as the Letter of Claim.

10. Escape

Do not start litigation unless prepared to see it through as once you commence a claim –it cannot be withdrawn or discontinued without either a Court order or the agreement of the opponent –and neither are likely to be given without an agreement to pay the opponent's costs up to the date of withdrawal or discontinuance.