Civil Litigation Course

Module 3: Before the claim begins

The aim of this module

In this module, you will learn about the actions a potential claimant is obliged to take prior to commencing a claim. These actions are contained in a series of pre-action protocols and the Practice Direction, Pre-Action Conduct.

You will learn that a failure to abide by the objectives of pre-action conduct may result in cost sanctions for the defaulting party.

In addition, you will learn that the guiding principles of pre-action conduct are proportionality and reasonableness.

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Before the claim begins

So far you have met your client, you believe, on the basis of what you have seen and heard, that a valid claim may exist, you are able to put a provisional value on that claim, and in your opinion the claim has merit. You have also worked out how the claim is to be funded. You are ready to issue a claim – or are you?

Pre-action conduct and protocols

A number of types of claim now have a pre-action protocol attached to them, including professional negligence, personal injury, judicial review, mortgage possession and road traffic accidents. In each case, the relevant protocol prescribes the sequence of actions which parties must attempt to follow before issuing a claim (urgent situations may call for exceptions in some cases). Some types of claim require compliance, not with a protocol but with the Pre-Action Conduct Practice Direction (PACPD). [1] For example, a money claim does not require adherence to a protocol, only to the above Practice Direction (PD).

Note that in the event of expiry of a relevant limitation period being imminent, the claim should be issued as soon as possible, with an immediate application to the court to stay the claim (Paragraph 17 of the PACPD).

The purpose of the relevant pre-action process (whether in the form of a protocol or a PD) is to ensure, firstly, that a defendant understands what the case against him is, and that he has adequate time to investigate the nature of the complaint before the claim is issued. This will mean that by the time he is served with the particulars of claim, he will be able to respond promptly with his defence. However, he will be required to give an indication of his defence before then.

The start of the process, for claims which do not use a pre-action protocol, is set out in the PACPD as the requirement in the first instance for the claimant to write to the defendant "with concise details of the claim". These should include "…the basis on which the claim is made, a summary of the facts, what the claimant wants from the defendant, and if money, how the amount is calculated" (PACPD 6a). This initial letter is usually referred to as a 'letter before claim' even though the PACPD does not specifically make reference to letters before claim. In several professional books you will also see references to the 'letter of claim'.

[1] Information on this chapter relates to the PACPD published on 28 July 2015.

The claimant should allow the defendant a reasonable time to respond. At Paragraph 6(b) of the PACPD, 14 days is suggested for responding to“straightforward claims”, with up to three months’ response time being considered reasonable for a 'very complex one'.

When replying to the letter before claim, the defendant should indicate whether he admits the claim – either the whole claim or part of it, what his reasons for not accepting any part of the claim are, and which facts and parts of the claim he disputes. If the defendant is making a counterclaim he should say so, and give details of the counterclaim (PACPD 6b). Parties should disclose key documents relating to the matters in dispute.

Reasonable and proportionate

Note that these pre-action communications should not contain unnecessary detail. The operative word is ‘concise’ because, as the PD states, all that is really needed is that the parties should “understand each other’s position” (PACPD 3a); this in turn would help the parties to “make decisions about how to proceed” (PACPD 3b), for example whether to “settle the issues without proceedings” (PACPD 3c). In particular, parties must not use the pre-action process “as a tactical device to secure an unfair advantage over another party”. Only "reasonable and proportionate steps should be taken” (PACPD 4). It is also important to realise that if expert evidence is thought to be necessary, the court’s permission is required before expert evidence can be relied upon. Courts encourage the use of single joint experts (PACPD 7).

Alternative dispute resolution

Increasingly, courts take the view that in many, if not most cases, trials can and should be avoided. The PACPD states quite clearly that “litigation should be a last resort” (PACPD 8). For these reasons it is important that clients are made aware of the realities of litigation:

1. It is rare for any party to get everything they want from a court;
2. Evidence which appears to be sound may not prove to be so once under the scrutiny of the court’s forensic processes, or may be inadmissible;
3. Witnesses may prove to be less reliable and less credible than might at first seem to be the case;
4. Even if a party succeeds on all of the issues, they are not likely to recover much more than 75 per cent of their costs.

Because of the hazards of litigation, parties are encouraged to attempt some form of ADR, the most frequently used of which is mediation. A party which fails to consider mediation is

likely to be penalised on costs. Rule 1.4e expressly requires the court to encourage the parties to seek alternative methods of resolving the dispute. The PACPD states that one of the purposes of pre-action conduct is that the parties will exchange sufficient information in order to enable them "to consider a form of Alternative Dispute Resolution (ADR) to assist with settlement" (PACPD 3c).

The message is clear: if a party does not consider mediation it may be penalised. A court will expect to see proof that mediation was considered, and will listen carefully to any reasons a party gives for failing to consider mediation. CPR Rule 44.11 states that, if "it appears to the court that the conduct of a party or that party's legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper", the court may "disallow all or part of the costs which are being assessed". Included in such conduct is an unreasonable refusal to consider mediation, which includes misuse of the mediation process.

Suitability of mediation

Despite the above, the courts do not consider that every case is suitable for mediation. For example, in the case of *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 [2004] 1 WLR 3002, the court held that the defendant health trust had "reasonable grounds" for believing "that it had a strong defence" to the claim and was therefore entitled to refuse the claimant's offer of mediation. [2]

In *Halsey*, the court laid down certain criteria to enable future courts to determine whether a refusal to mediate would be unreasonable:

a. *The nature of the dispute*: if the dispute is on a point of law, or relates to an allegation of fraud, then it would be more appropriate for the court to deal with the matter, and in that case it would be reasonable to refuse mediation;
b. *The merits of the case*: if a party reasonably believes it has a strong case, then a refusal to mediate would usually be a reasonable response;
c. *Other settlement methods have been attempted*: if the first party has made an effort to settle in other ways, but the second party has not responded – perhaps because it has an unrealistic view of its own prospects of success – then mediation may not be appropriate, and the first party may be acting reasonably in refusing to mediate;

[2] In *Halsey*, it was determined for the first time that the burden of showing that another party had unreasonably refused mediation was on the unsuccessful party.

d. *The costs of mediation would be disproportionately high*: if the sums at stake are relatively small, it may not be cost effective to mediate, and thus a refusal in these circumstances might not be unreasonable;

e. *Delay*: if mediation would delay the trial, then it would not be unreasonable to refuse to mediate;

f. *Whether the mediation had a reasonable prospect of success*: a party refusing mediation on this ground would need to be sure that there was indeed no reasonable prospect of success because the mediation process itself often brings about a more "conciliatory attitude on the part of the parties" (as Lightman J. noted in *Hurst v Leeming* [2001] EWHC 1051 (Ch), [2003] 1 Lloyds Rep 379 at 381).

In another case, the court held the view that mediation would most probably have resolved the issues between the parties. This was the case of *Burchell v Bullard* [2005] EWCA Civ 358, [2005] 3 Costs LR 507, [2005] BLR 330. In this matter, a builder sued his clients, the Bullards, for £18,000 for non-payment of work. The Bullards complained about the quality of the work and refused to pay. They counterclaimed for £100,000. Mr Burchell offered mediation, but the couple refused, saying the matter was "too complex" for mediation. In the end, this refusal cost the couple dear. They paid their entire costs, plus the cost of the appeal, plus 60 *per cent* of the builder's costs. The legal bill was said to be over £170,000, with the cost of the appeal alone amounting to £22,000. The court observed that the couple's claim that the matter was too complex for mediation was "plain nonsense" (at Paragraph 41 of the transcript). In Ward LJ's view, "a small building dispute is *par excellence* the kind of dispute which…lends itself to ADR". His Lordship described the court's investigation of the matter as revealing an "horrific picture" regarding the costs (at Paragraph 23 of the transcript).

Cases like that of *Halsey* and *Burchell* reveal that courts will closely investigate a party's pre-action conduct, specifically with regard to efforts made by the parties to settle the dispute without the necessity of a trial.

The purpose of mediation

Clearly, the purpose of mediation [3] is to avoid the necessity of a trial, but how does one go about this? If a step-by-step approach is taken, a great deal can be achieved. As will be seen

[3] Note: in referring to 'mediation', the reference, by implication, includes references to other appropriate ADR methods.

from the following sections, we begin with determining those matters about which the parties differ, also known as 'the issues'. Once we have enough information to understand the issues, we will be better able to decide whether a basis for entering mediation exists or not.

For more information on how to cite cases, see the supplementary module, Legal Citations.

Preliminary investigation: narrowing the issues

There is little point in entering mediation until you know what exactly it is that the parties are arguing about. This brings us to the issues in the case.

By 'issues' we mean those points on which the parties differ: for example, in a dispute about an oral contract each party may hold a different view as to the agreed price of the goods purchased, whereas in a personal injury road traffic accident claim, one of the issues may be a dispute about the speed at which one of the vehicles is alleged to have been travelling.

In any dispute there are usually several issues, some of them relatively minor. It is a good idea to focus on efforts to minimise or even remove the minor differences: "If you concede X, I will concede Y".

The reason for doing this is that if all of the issues were to be tried in court, a great deal of time might be wasted on points which do nothing to solve the underlying difficulties. So, the process of trying to dispose of these less important matters during mediation or negotiation can be a valuable exercise in saving time and money. Also, disposing of the minor issues clears the way towards resolving the central issues.

A good rule of thumb is to think in terms of every hour in court costing anything between £200 and £2,000 depending on the size of the claim, the amount of preliminary work required for a hearing, the number of legal representatives present for each party, and the level of judge adjudicating the matter. The client needs to ask himself whether a part of the dispute which is only worth £100 needs to be addressed in the presence of the full court, probably taking up several hours of the court's time. And at the end of those several hours, what is the likelihood of the client succeeding? Aside from the potential financial loss in pursuing a particular issue, the client also needs to be reminded that when considering costs a court will take into account "whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue" (CPR 44.2(5)(b)).

Once you are left with the important issues in the claim, consider how the law regards each of those issues, on a case by case basis. Was the contract breached? Did Party X have a duty of

care? Was the harm caused by Party Y? What have the courts said about matters of this type in recent, or landmark, judgments?

Next, ask yourself how difficult it would be to prove your client's case on each of the issues. Does your client have witnesses? Are they likely to be reliable? Will they have credibility with a court? What evidence does your client have? Is that evidence likely to be admissible in court?

Summary

Before issuing a claim you need to be sure that the appropriate pre-action steps are carried out, whether contained in a relevant pre-action protocol or the PACPD. Mediation should continue to be considered throughout the pre-action period, and beyond. Before entering mediation, you need to have a thorough understanding of your client's case, both with regard to its strong points and its weak points. We have not spoken about 'offers to settle' in this unit - in particular, what are known as Part 36 offers. We will be doing so in Module 6 of this course. All you need to bear in mind for now, however, is that a Part 36 offer may be made even before proceedings are issued.

There is a test at the end of every module.