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# Litigation in the U.K.? 5 Things You Need to Know Before Taking Your Next Step

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There are several important principles of litigating in the U.K. which are likely to be alien to counsel in the U.S.A. and other overseas jurisdictions. If your company received a letter about a potential legal action in the U.K., would you know how, when and whether you were obliged to respond? Did you know that Scotland and Northern Ireland are, in fact, separate jurisdictions to England and Wales and different rules of procedure apply? Are you familiar with your rights and obligations regarding the retention and supply of documents? This article looks at five key aspects of litigating in England and Wales which will put you ahead of the game when, and if, a claim arises in the U.K.

### 1. All parties are obliged to assist the Court in dealing with matters justly and proportionately

In England and Wales the court will deal with cases in accordance with what is known as the "overriding objective". This requires the court to deal with cases *"justly and at proportionate" cost*. All parties are required to help the court to further this overriding objective at all stages throughout the litigation. If a party fails to conduct an action in the "spirit" of this objective they can be penalized with adverse costs orders. As a result, the overriding objective needs to be considered at all times.

The aim of the objective is to ensure that any litigation is dealt with expeditiously and fairly by ensuring the parties are on an equal footing, whilst, at the same time, legal and court expenses and time are saved where possible. As a result, the courts take an extremely active role in managing cases from start to finish: regular "Case Management Conferences" for example, ensure that the parties do not allow the court timetable to slip.

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In deciding what is *proportionate,* the courts will consider the value of a claim, the importance of the case (both to the parties and for public policy reasons), the complexity of the issues and, finally, the financial position of each party.

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It is open to the court to make whatever case management order it deems appropriate in order to further the overriding objective. This will often include limiting the extent of searches during discovery, the number of experts or witnesses on which a party is allowed to rely and the costs that a party can recover if successful at trial.

In practical terms, this means that a party with much larger resources cannot simply bury a disadvantaged opponent with motions (applications), documents and demands for witness testimonies to take advantage of their superior means. Likewise, Plaintiffs cannot make disproportionate demands for disclosure of documents.

## 2. You are obliged to take steps even before a claim is filed

In line with the overriding objective, in England and Wales parties are required to carry out investigations and exchange evidence *before* formal court proceedings are commenced. The purpose of this "pre-action" phase is to encourage the parties to narrow the issues between them before the court has to deal with the case, thus saving time and costs, and potentially encouraging settlement.

General pre-action guidance is set out in the Civil Procedure Rules (CPR), which govern litigation procedure in England and Wales. However, there are also specific "pre-action protocols" for different types of actions (such as personal injury, clinical disputes (i.e. medical malpractice claims), professional negligence, construction disputes and defamation).

The steps to be taken before a claim is commenced will vary depending on the relevant protocol. However, the protocols generally follow a similar formula and the impact in practice is to front load the investigation of the claim. Firstly, a Letter of Claim is sent by the Plaintiff (known as the "Claimant") to the Defendant. The Letter of Claim sets out the case against the Defendant and should refer to any relevant documents and, if possible, enclose copies of any documents on which the Plaintiff intends to rely. The Plaintiff's Letter of Claim should include "*sufficient information to enable the Defendant to focus investigations*". The Plaintiff is permitted to further develop allegations before formal Court proceedings are issued and served, but the purpose of the pre-action Letter of Claim is to provide the Defendant with enough information to investigate the claim and decide on the most appropriate strategy – including early settlement.

Following the receipt of the Letter of Claim, there is a short period in which to investigate and then the Defendant is required to provide a Letter of Response. The Response should indicate which, if any, of the allegations are admitted and, if they are denied, the reasons for the denial. It should also include key documents to be relied upon by the Defendant and copies of documents requested by the Plaintiff. Thus, document disclosure is encouraged even before proceedings are filed. The parties may extend the investigative period by consent if investigations are not complete within the requisite timeframe.

Commencement of proceedings in England and Wales is relatively costly, both in terms of fees (the court fee for issuing a claim valued between £10,000 and £200,000 is 5 percent of the claimed value, and the fee for a claim valued over £200,000 is £10,000) and the legal costs in preparing pleadings. As a result, early resolution is often favored.

It is also possible for a Plaintiff to make an application to the court for pre-action disclosure if basic documents that would allow them to plead their claim are not voluntarily provided.

Although failing to comply with the a relevant pre-action protocol will not lead to a claim being barred or a defense being struck out, any failure to follow the protocols by either party may result in a requirement to pay the costs incurred by an opponent in establishing facts which could have been established by voluntary disclosure.

Parties are also obliged to consider whether mediation or settlement discussions are appropriate from an early stage. Failure to do so can result in a party being prevented from recovering its costs as from the date it refused to engage in alternative dispute resolution.

## 3. Pleadings must be sufficiently detailed at an early stage

If a claim is not resolved at the pre-action stage, the Plaintiff will then issue a Claim Form at court. Once the Claim Form is issued, the Plaintiff is then required to serve it on the Defendant within four months together with the Particulars of Claim (unless the Defendant is outside of England and Wales, then the time for service is six months). The Particulars of Claim need to set out the Plaintiff's case in detail. In a case involving injuries, if the Plaintiff intends to rely on the evidence of a medical practitioner, he is also obliged to serve a report dealing with the alleged injuries.

Once a Defendant has been served with proceedings it has 14 days to file (with the court) and serve (on the Plaintiff) an Acknowledgement of Service. The Defense will then need to be filed and served within 28 days of service of the claim. Failure to respond to the Particulars of Claim can lead to the Plaintiff obtaining a Judgment in Default. However, it is open for the parties to agree to extend the time period in which a Defendant must respond by up to an additional 28 days. If agreement cannot be reached, or more than 28 days are required, then the permission of the court needs to be sought.

The requirement to plead with sufficient detail does not rest solely with the Plaintiff. The Defense document filed in courts in England and Wales is commonly substantively more detailed than counsel in other jurisdictions may expect. In effect, the Defendant is forced to take a position on key points at a very early stage.

In the Defense, the Defendant is required to address each allegation individually and either admit or deny it, or state why they are unable to either admit or deny the allegations (for instance

because further investigations are needed or information has not been provided by the Plaintiff). If a Defendant is denying an allegation or fact, it is required to detail the reasons why. It is for this reason that pleadings in England and Wales are far more developed than pleadings in the U.S., for example. As a result, detailed investigations need to be undertaken as soon as a pre-action letter is received. This allows the Defendant to respond in an informed and comprehensive way once formal court proceedings are commenced. Although it is technically possible to apply to the court to amend a Defense at a later date, the court will only grant permission when there are good reasons for doing so, and the process can be costly.

Therefore, in order to ensure that as a Defendant you are not on the back foot when formal court proceedings are received, local counsel should be engaged at an early stage to advise on the scope of the necessary investigations so that a formal position can be adopted prior to filing a Defense.

### 4. Discovery is likely to be different to that which you may expect

The extent of discovery (or "disclosure" as it is known) is far more limited than the procedure counsel will be familiar with in the U.S.A, however it does place an onus on the parties to identify the relevance of their own documents.

If your company is likely to become a party to litigation in the U.K., you should take steps immediately to ensure that any documents which are potentially discloseable are preserved. There is no formal wording for preservation requests – merely an obligation to ensure that documents are preserved.

Parties in English proceedings are required to disclose only *relevant* documents. These are documents on which parties rely on to support their case, but also the documents which adversely affect their own case, adversely affect another party's case, or even support another party's case. It is for the party who has the documents to decide on relevance.

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Documents mean "*anything in which information of any description is recorded*" and include paper and electronic documents, files and emails. The obligation to disclose documents is limited to documents in a party's control. This means that your disclosure obligations will be limited to the documents that are in the company's physical possession, or of which the company has or has had a right to possession, inspection, or been able to or take copies. In determining control, courts will be reluctant to pierce the corporate veil to require group companies to provide documents that are in control of other companies in the group, except in exceptional circumstances. The position is not always clear, so taking early legal advice is key. Unlike in some other jurisdictions, courts will rarely make orders against a party compelling them to provide documents in the control of a related entity.

The standard disclosure process (in addition to any pre-action disclosure), occurs once a claim has been issued and a Defense filed. The process will first involve the parties providing a list of the

relevant documents they have in their control. This is known as a "Disclosure List". The other party can then ask to inspect (or receive copies) of any documents on the Disclosure List. Documents must be provided for inspection within a time specified by the court, usually 14 days.

Like many other jurisdictions, however, a party is able to claim privilege over documents that have been created whilst obtaining legal advice or solely created for the purposes of litigation. The categories of documents over which privilege is asserted also need to be included in the Disclosure List.

The obligation of disclosure continues throughout the litigation. If your company comes into possession of a relevant discloseable document at any point – or if a document is discovered which was not located in an earlier search - it must be provided to the other parties to the litigation. This obligation continues right up to, and including, trial.

In circumstances where a party is aware of a document that is in the other party's possession that they have not disclosed under the process above, they can apply to the court for an order for specific disclosure. This is a relatively straightforward and inexpensive process which quickly produces results (often prior to the court hearing the arguments). Nevertheless, the court will not allow "fishing expeditions" for documents which are not adequately identified.

## 5. The loser pays the winner's costs – in most cases

The usual provision (see the exception for personal injury cases below) is that the party who loses a case pays the winning party's legal costs. However, the court has discretion to alter this principle, for instance if at trial, a party fails to beat a "reasonable" settlement offer that was made pre-trial or due to the conduct of a party. Legal costs are paid in addition to any sum awarded by the court for damages. So it is important to factor in an estimate of the opponent's legal costs when considering the total possible liability a defendant company is exposed to and to keep this assessment up to date as the case progresses.

The "loser pays" principle has a moderating effect in comparison to litigation elsewhere. For example it can prevent spurious claims. A "drop hands offer", in which a Defendant offers to waive their right to cost recovery should a claim be discontinued by a Plaintiff by a specific date, can also be a good tactical tool. It also encourages both parties to compromise sooner rather than later as the legal costs mount on both sides.

A related, rather onerous, obligation with which all parties to a legal action must comply is cost budgeting. This process requires each party to provide a legal costs budget to the court and the opposing party shortly after service of the Defense. This budget sets out both incurred and estimated costs for each stage of the litigation (e.g. disclosure, witness evidence, expert evidence and trial). The court will then hold a Costs Case Management Conference where it will consider the parties' budgets and decide whether the costs at each stage are "*reasonable and proportionate*." The court will then make an order providing an approved maximum budget figure for each of the parties. This will limit the costs the parties can recover at the end of the case if successful. Clearly, it is key for costs budgets to be revised during the course of the litigation if there is to be a chance to make a full costs recovery at the end of the matter. Failure to do so may mean an inability to recover costs incurred.

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Whilst the "loser pays" rule exists for most claims, from April 2013, new costs provisions were introduced for cases involving *personal injury*. These rules affect the recoverability of costs for a successful Defendant against an unsuccessful Plaintiff under a process called Qualified One Way Costs Shifting (QOWCS). In personal injury cases, therefore, the Plaintiff is not exposed to the risk of having to pay the Defendant's costs. Inevitably this means that some of the moderating effect of "loser pays" is lost in these cases. These rules were the result of a compromise which involved limits being placed on the ways in which claims can be funded by Plaintiffs. The QOWCS rules remove the Defendant's ability to recover any legal costs from the Plaintiff except in rare cases (for instance where there has been a fraudulent exaggeration of the claim or where the Plaintiff was offered a settlement that was better than what he/she recovered at trial). In these cases, the Defendant may be able to recover their costs from any damages that are awarded to the Plaintiff.

## Conclusion

The front-loaded nature of litigation in the U.K. means that overseas counsel needs to take active steps to manage potential cases at the earliest possible stage, even if court proceedings have yet to be issued. Local counsel should be appointed, any pre-action obligations addressed, documents should be preserved without delay and liability investigations undertaken at an early stage. A well-considered cost benefit analysis should also be completed swiftly to determine whether settlement may be the best option, before significant legal costs are incurred. This is particularly important in personal injury cases where the new QWOCS rules may prevent a successful Defendant from recovering its legal costs in any event. •

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