

# THE BASICS: ARE THERE ANY STEPS I NEED TO TAKE BEFORE ISSUING A CLAIM?

22 January 2019

Articles

What are the pre-action steps you need to consider before issuing a court claim and why does it matter?

We set out the key points you need to know in order to avoid costly delays and sanctions.

- Can I issue a claim at any time?
- What pre-action steps do I need to take to protect my position?
- What is the point of the pre-action rules?
- What are the main pre-action steps?
- Other pre-action considerations

## Can I issue a claim at any time?

In simple terms, yes, but if you have not followed the required procedures and acted in a way that the court considers to be reasonable and proportionate, you may be penalised, even if your claim is successful.

Potential sanctions are an adverse costs award (for example, an order that you pay your opponent's costs incurred as a result of you failing to comply with the prescribed rules) a stay of proceedings until relevant pre-action steps are completed

prescribed rates), a stay of proceedings until relevant pre-action steps are completed and/or awards of interest up to 10% above base rate.

In some cases, your contract will specify a process for dispute resolution and if that is the case, you need to follow the specified process in order to avoid a breach of contract. As an example, your contract may provide for arbitration, rather than litigation through the courts; equally, there might be a stepped process requiring the parties to engage in negotiations and/or alternative dispute resolution (ADR) (such as mediation) before commencing formal proceedings.

There is the possibility that you will need to issue proceedings because the limitation period is due to end. In that case, you may be able to then agree a stay of proceedings with your opponent (or obtain an order from the court) to enable both parties to undertake pre-action steps, as described below.

## What pre-action steps do I need to take to protect my position?

You need to comply with the pre-action rules that apply to your dispute in accordance with the Civil Procedure Rules (CPR) which apply to all civil court proceedings, and set out the steps that must be taken before an action is commenced. The [CPR and pre-action rules are available online](#).

There are specific protocols for certain areas of dispute (for example construction and engineering, professional negligence and certain debt claims); otherwise, [the Practice Direction on Pre-Action Conduct and Protocols](#) (the PD) will apply. Check which rules will apply to your claim before proceeding.

The [CPR](#) prescribe the steps that should ordinarily be taken before proceedings are commenced, by reference to the pre-action protocols or the [PD](#). There are certain exceptions to the requirement to follow these rules, but in most cases, they will apply.

## What is the point of the pre-action rules?

Overall, the intention behind the pre-action protocols and PD is to ensure that parties give full consideration to the strengths and weaknesses of their position

parties give full consideration to the strengths and weaknesses of their position before proceedings are commenced, leading (hopefully) to more resolutions at the pre-action stage and a reduction in legal costs that will be incurred.

The rules aim to ensure that:

- sufficient information is exchanged (details of each party's position and possibly key documents) so that claims and defences are clear;
- the parties actively consider (and where appropriate take part in) alternative dispute resolution; and
- if proceedings are then commenced, the steps taken in compliance with the prescribed pre-action steps will assist in an efficient and cost-effective process going forward - for example, the issues between the parties may have been narrowed during the pre-action process.

## What are the main pre-action steps?

- The claimant sends a letter to the defendant setting out clear details of the claim and requiring a substantive response within a reasonable (specified) period of time.
- The defendant responds in writing, again with sufficient detail to set out clearly its position.
- Key documents are exchanged.
- The parties actively consider a without prejudice meeting and/or a mediation - one or both of these may then take place.

As is evident from the steps listed above, you will need to have a clear understanding of your claim at the pre-action stage, including the amount of the claim and what you consider to be the basis of the entitlement. You will also need to have collated relevant documents and information.

Remember throughout that in due course, you may need to evidence the fact that you have acted reasonably and proportionately in relation to your claim.

## Other pre-action considerations

- Over and above the applicable pre-action steps, you should ensure that you have

carefully considered the potential risks and benefits of court proceedings before committing to a formal process.

- Consider your overall strategy and goals, taking into account the time commitment needed and the level of legal costs that will be incurred, a substantial portion of which are likely to be irrecoverable, even if you succeed at trial.
- Bear in mind the potentially irrecoverable management costs of being involved in a formal dispute, an issue covered in more detail in our [article on contractual damages](#).
- Review funding options for costs, the likelihood of success, and balance the potential gains of litigation against the possible benefits of an early pragmatic settlement which will give conclusivity and remove the risk of an adverse outcome.
- Even before the pre-action requirements take effect, consider the possibility of making an early offer of settlement by way of a [CPR Part 36 offer](#), "without prejudice" negotiations and/or mediation.

Failure to follow the prescribed actions and steps before starting proceedings can end up needlessly costing your business both time and money.

The pre-action process may appear cumbersome but use it to your advantage by proactively seeking an advantageous resolution. Even if you end up having to issue a claim, you will have taken steps to protect your position on costs as you will be able to evidence your committed attempts to reach a settlement, or at least narrow down the issues in dispute at an early stage.

If you have any queries on this or related topics, please contact [Ashley Pigott](#) or [Helen Davenport](#).

NOT LEGAL ADVICE. Information made available on this website in any form is for information purposes only. It is not, and should not be taken as, legal advice. You should not rely on, or take or fail to take any action based upon this information. Never disregard professional legal advice or delay in seeking legal advice because of something you have read on this website. Gowling WLG professionals will be pleased to discuss resolutions to specific legal concerns you may have.

## Author(s)





**Ashley Pigott**  
Partner - Birmingham

 Email	 Phone	 vCard
---	---	---



**Helen Davenport**  
Director - Birmingham

 Email	 Phone	 vCard
---	--	---