

Pre-Action Letters in the UK (England and Wales): Overview

by Victoria Hobbs, Louise Lanzkron and Jessica Quinlan, Bird & Bird LLP

Practice note: overview | Law stated as at 01-Feb-2022 | England, United Kingdom, Wales

A Practice Note providing an overview of the key issues to consider before issuing or responding to a pre-action letter in the UK (England and Wales).

This Note provides an overview of pre-action correspondence from a potential claimant or their lawyer before initiating legal proceedings, which addresses a potential claim or suit, or defence to a potential claim or suit. In most jurisdictions, there are no requirements to send or respond to a pre-action letter for many types of actions. In those actions, parties can commence proceedings without making an offer of compromise or taking any other step.

Regardless of the pre-action requirements, it is generally customary for parties to send a warning or demand letter to the adverse party before commencing court proceedings. It is also customary for adverse parties to reply, even if there is no requirement to respond. This is the case, however, unless the situation demands otherwise (*see Disputes not Suitable for Pre-Action Letters*).

This Note is a quick guide to the practice of notifying the prospective defendant before an action commences in the UK and its use and effectiveness in resolving disputes amicably. It also provides practical drafting tips for both drafting and responding to pre-action correspondence.

Rules on Pre-Action Letters

It is standard practice for a potential claimant to send a pre-action letter to the potential respondent, although it is not mandatory. General guidelines for parties' pre-action conduct are provided in the Practice Direction on Pre-action Conduct and Protocols (Pre-Action PD). In addition, there are specific pre-action protocols for particular types of claim.

Both the Pre-Action PD and the protocols for specific types of claim are guidelines as to what parties should do before issuing a claim and are not mandatory. However, the court does have discretion to issue sanctions for non-compliance (*see Failure to Respond*).

Before commencing proceedings, the court will expect the parties to have exchanged sufficient information to:

- Understand each other's position.
- Make decisions about how to proceed.
- Try to settle the issues without proceedings.
- Consider a form of Alternative Dispute Resolution (ADR) to assist with settlement.
- Support the efficient management of those proceedings.

- Reduce the costs of resolving the dispute.

(Paragraph 3, Pre-Action PD.)

Therefore, it is good practice to send a pre-action letter before commencing proceedings. The pre-action letter will generally contain the information set out in paragraph 3 of the Pre-Action PD, or the information suggested in a specific protocol.

Disputes Suitable for Pre-Action Letters

All disputes are suitable for pre-action letters apart from a specified few (*see below*).

Disputes not Suitable for Pre-Action Letters

Disputes involving urgency, such as those where a party seeks an application without notice (an injunction) are not suitable for a pre-action letter.

Pre-Action Procedures for Different Types of Disputes

There are separate specific Pre-Action Protocols that should be followed for the following disputes:

- Construction and engineering.
- Media and communication claims (including defamation).
- Personal injury.
- Clinical negligence.
- Professional negligence.
- Judicial review.
- Disease and illness.
- Housing conditions (England).
- Housing disrepair (Wales).
- Possession claims by social landlords.
- Possession claims for mortgage arrears.
- Low value personal injury road traffic accident claims.
- Dilapidation of commercial property.
- Low value personal injury employers' and public liability claims.
- Personal injury claims below the small claims court limit for road traffic accidents.
- Debt claims.

- Resolution of package travel claims.

Where a dispute falls under one of these specific protocols the parties should consider the specific pre-action protocol for that dispute together with the general Pre-Action PD.

On 27 October 2020, the Civil Justice Council launched a review of all the Pre-Action Protocols listed above. An expected time frame for the results of the review is yet to be confirmed. The review will focus on, among other things, whether the Pre-Action Protocols are working effectively and the potential the Pre-Action Protocols to be streamlined. See [Legal Update, Civil Justice Council launches review of pre-action protocols](#) for further information.

Who Can Send a Pre-Action Letter?

Pre-action letters are usually sent by a lawyer but can be sent by the claimant themselves or by an in-house lawyer.

Contents of Pre-Action Letter

For disputes that do not fall within a specific protocol, the claimant should write to the defendant with concise details of the claim (*paragraph 6(a), Pre-Action PD*). This will normally include:

- The basis on which the claim is made.
- A summary of the facts.
- What the claimant wants from the defendant.
- If the claimant wants money, how the amount has been calculated.

Each specific protocol gives further detail as to what needs to be included in the pre-action letter for that particular type of claim, for example:

- In the Pre-Action Protocol for Construction and Engineering Disputes, the names of any experts already instructed by the claimant, as well as confirmation as to whether or not the claimant wishes the Protocol Referee Procedure to apply.
- In the Pre-Action Protocol for Debt Claims, there is a list of information that should be provided in relation to the debt, as well as documents that need to be enclosed.

The Response to a Pre-Action Letter

The response to the pre-action letter should confirm whether the claim is accepted (*paragraph 6(b), Pre-Action PD*). If the claim is not accepted, the reply should include the following:

- The reasons why the claim is not accepted.
- An explanation as to which facts and parts of the claim are disputed.

- Whether the defendant is making a counterclaim. If the defendant is making a counterclaim, details of it should also be provided.

Standard Forms

As with the letter before action, there is no standard form for the response, only that it contains all the requisite information outlined above.

Time Limit for Response

The defendant should respond within a reasonable time (*paragraph 6(b), Pre-Action PD*). This will depend on whether the claim is straightforward or complex.

In a straightforward claim, the response should be made within 14 days of receipt of the letter of claim. If the claim is complex, the response should take no longer than three months.

If the dispute relates to a specific protocol, different time limits may apply. By way of an example, in the Pre-Action Protocol for Debt Claims the response should be provided within 30 days.

Failure to Respond

The court will expect the parties to have complied with a specific protocol or the Pre-Action PD if the dispute proceeds to litigation (*paragraph 13, Pre-Action PD*).

The court will take into account non-compliance when giving directions for the management of proceedings (see *CPR 3.1(4) to (6)*) and when making orders for costs (see *CPR 44.3(5)(a)*). The court will consider whether all parties have complied in substance with the terms of a specific protocol or Pre-Action PD, and is not concerned with minor or technical infringements, especially when the matter is urgent (for example, an application for an injunction).

Paragraph 14 provides examples of the types of situations that indicate there has been a failure of compliance. Paragraph 14(b) confirms that failure to act within a time limit specified in a protocol or within a reasonable period, may be considered a failure of compliance by the court. The court may also consider an unreasonable refusal to consider ADR, or a failure to respond to an invitation to do so, as a failure of compliance (*paragraph 14(c)*).

In the event of non-compliance, paragraph 15 provides that the court may order that:

- The parties are relieved of the obligation to comply or further comply with a specific protocol or the Pre-Action PD.
- The proceedings are stayed while particular steps are taken to comply with a specific protocol or the Pre-Action PD.
- Sanctions are applied.

If the court considers that sanctions are appropriate, it can impose the following:

- Payment by the defaulting party of all or part of the costs of the other party or parties.

- Payment by the defaulting party of costs on an indemnity basis.
- If the defaulting party is a claimant who has been awarded a sum of money, an order depriving that party of interest on that sum for a specified period, and/or awarding interest at a lower rate than would otherwise have been awarded.
- If the party at fault is a defendant, and the claimant has been awarded a sum of money, an order awarding interest on that sum for a specified period at a higher rate (not exceeding 10% above base rate) than the rate which would otherwise have been awarded.

(Paragraph 16, Pre-Action PD.)

In the case of *Aegis Group Plc v Inland Revenue Commissioners* [2005] EWHC 1468 (Ch), the defendant took nearly two months to reply to the letter before action. The claimant later discontinued proceedings so the defendant was awarded costs, but this was capped at 85% recovery only as the defendant's delay was taken into account by the court when making the award.

Suspension of Limitation Period

Complying with either the Pre-Action PD or one of the specific protocols does not alter the statutory time limits for initiating court proceedings (*paragraph 17, Pre-Action PD*). The Pre-Action PD clearly states that if the claimant has issued a claim after the relevant limitation period has expired, the defendant will be entitled to use that as a defence to the claim.

If the expiry of the limitation period is imminent, paragraph 17 allows for proceedings to be started to comply with the statutory time limit. The parties should then immediately apply for a stay of the proceedings to enable them to follow the procedures in the Pre-Action PD or specific protocol.

Effectiveness of a Pre-Action Letter

Under the Pre-Action PD, litigation is seen as a last resort (*paragraph 8, Pre-Action PD*).

Pre-action letters are helpful in avoiding the need for legal proceedings. The efficacy of a pre-action letter will depend on the size and complexity of the claim, and the relationship between the parties.

In some instances, a pre-action letter may encourage discussions between the parties and facilitate a settlement. In others, particularly where the relationship between the parties has broken down, it is likely that the letter before action is a formality and legal proceedings are highly foreseeable.

Practical Tips

The parties should try to adhere to the Pre-Action PD and specific protocols. Proceedings should not be issued without pre-action steps first being taken (unless there are good reasons for this). If a party is unable to follow a pre-action protocol, it should consider whether to explain its reasons for non-compliance to the other party to try and minimise the risk of the court applying sanctions against it for that very reason.

The correspondence should be stated to be in accordance with the Pre-Action PD or a specific protocol. This is particularly important if the other party is not complying with the pre-action steps. If a party has concerns that

it may not be able to comply with a specified deadline, it should consider writing to the other party to request an extension and agree a new time limit.

Given the court's consideration of pre-action conduct in the event of proceedings being initiated, any pre-action letter or response should contain reasonable proposals and comments.

Recent amendments to the Pre-Action PD make clear that a party which knowingly makes a false statement in a letter before action or other documents in anticipation of legal proceedings may be subject to proceedings for contempt of court (*122nd Practice Direction Update*).

Pre-action legal costs only become recoverable from the opposing party once proceedings are commenced. As such, both parties (but particularly the defendant, as the claimant determines whether to commence proceedings) should, while complying with pre-action requirements, be cautious about incurring unnecessary legal costs before an action is initiated.

Under the Pre-Action PD, the parties should exchange the key documents relevant to the dispute (*paragraph 6(c)*). A written request should be made if this is not complied with.

Thereafter, it may be prudent to consider an application for pre-action disclosure under CPR 31.16 (or under CPR PD 51U paragraph 31.16 of the Disclosure Pilot Scheme for the Business and Property Courts) if the other party has not fulfilled this obligation and it is likely that the relevant documents in its possession may dispose fairly of the anticipated proceedings, facilitate settlement, or save costs. However, the documents sought in pre-action disclosure cannot be too broad (*Domestic and General Insurance Plc v HomeShield Direct Ltd [2021] 4 WLUK 287*).

With the UK having left the EU on 31 December 2020, those involved in producing a letter before action should also take into account any data protection implications and applicable obligations in relation to personal data included in a letter before action. See *Practice note, Brexit: implications for data protection: Applicable data protection laws in the UK following the expiry of the transition period*.

Standard Clauses in a Pre-Action Letter

Standard document, Letter before action: Cross-border does not follow the exact requirements of the Pre-Action PD, or of a specific protocol. Parties should look at the Pre-Action PD or a specific protocol rather than relying on this standard document.

In particular, the following amendments should be made to *Standard document, Letter before action: Cross-border*:

- The letter before action should contain a reference stating that it is sent under the Pre-Action PD or the relevant protocol.

For examples of standard documents that comply with the requirements of the Pre-Action PD for specific type of cases, see:

- *Standard document, Letter before action: winding up petition*
- *Standard document, Letter before claim: breach of contract (actual and repudiatory)*
- *Standard document, Letter before claim: common law private nuisance*

- *Standard document, Letter before claim: debt claim (under the Pre-Action Protocol for Debt Claims) (with drafting notes)*
 - *Standard document, Letter before claim: disputed debt claim*
 - *Standard document, Letter before claim: judicial review*
 - *Standard document, Letter before claim: misrepresentation*
 - *Standard document, Letter before claim: negligence or breach of duty*
 - *Standard document, Letter before claim: negligent misstatement*
 - *Standard document, Letter before claim: restitution (mistake or failure of consideration)*
-
- In relation to *paragraph 7* (expert evidence), The Pre-Action PD at paragraph 7 states:

"Parties should be aware that the court must give permission before expert evidence can be relied upon (see CPR 35.4(1)) and that the court may limit the fees recoverable. Many disputes can be resolved without expert advice or evidence. If it is necessary to obtain expert evidence, particularly in low value claims, the parties should consider using a single expert, jointly instructed by the parties, with the costs shared equally."

In addition, the letter before action should not be marked as without prejudice. The document should be open correspondence to show the court that parties have sought to comply with the Pre-Action PD.

END OF DOCUMENT