

## Success Starts Here Free Information Guide

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# Legal Disputes



When we put our trust in a professional person, for example a solicitor, accountant or surveyor, we rely upon their expertise to do a good job. However, professionals may sometimes deliver their service in a less than satisfactory way, which can often lead to disputes.

## Breach of contract

When you instruct a professional to act for you, normally you will sign an agreement setting out exactly what the professional is to do for you and how much you will have to pay for the service.

The contract sets out the express fundamental terms of agreement between you and the professional. If the professional does not comply with the terms of the agreement you may have a claim for "breach of contract".

## Negligence

In addition to a claim for breach of contract, you may also have a claim against the professional for negligence. In order to pursue a claim for negligence you have to demonstrate that:

### 1 - A duty of care was owed

When instructing a professional, the professional does owe duties of care to you and the first element will often be easy to prove. For example, solicitors owe duties to act in accordance with a client's instructions and in their best interests.

### 2 - The duty of care was breached

Once a duty of care has been established, you then need to prove that the professional has breached that duty. Each case turns upon its own facts, however, it is often quite clear when a duty has been breached. For instance, in the case of a solicitor who does not issue proceedings within a limitation period, it is often relatively easy to demonstrate that the solicitor is in breach of the duty to act in the client's best interests.

Of course, there will be cases when a solicitor gives advice but a client chooses not to accept that advice and, in that event, there would be no breach of duty.

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## 3 - The breach of duty caused you to sustain losses

Proving that a breach has caused particular losses is often very difficult, particularly where there are other factors which might have affected the situation.

In the case of a solicitor who misses a limitation period, arguably the client has lost the opportunity to pursue their claim. However, cases of loss of a chance are very difficult since you would need to prove:

- (i) That you are actually prevented from bringing your claim. It may be that you could obtain the court's permission to bring your claim out of time or it may be that your opponent would be willing to allow the claim to proceed. Limitation is a defence to a claim, not an absolute bar. In some cases, such as claims for breach of contract, the limitation period is absolute, however, in other cases, such as personal injury claims, there can be arguments as to when a particular limitation period expired and whether the court should disapply the limitation period.
- (ii) That had you been able to proceed with your claim you would have succeeded. It is often very difficult to prove that a claim would have succeeded since, with most claims, there will always be a litigation risk.
- (iii) The compensation you would have recovered if your underlying claim had succeeded. Again, with most claims it is unclear exactly how much you would recover if your claim were to succeed.

The courts approach loss of a chance claims on the balance of probabilities. Using the example of the claim against a solicitor who missed a limitation period if, for instance, the underlying claim had a value of £100,000 and if the prospects of the client actually recovering that sum were say 80%, the court would often value the lost chance at £80,000, i.e. 80% of £100,000.

The purpose of this factsheets is to summarise the main issues to be considered, however, the issue of causation is extremely complicated and, in each case, you will need to obtain formal advice.

## 4 - The losses you have sustained are not too remote

It is not sufficient merely to establish a causal connection between the act of the professional and the damage which you suffer. It is also necessary to establish that the damage was not too remote, which is a matter of law and rules have been formulated to determine the question of remoteness.

Essentially, the professional is liable for all the direct consequences of the negligent act and all damage of a type which is reasonably foreseeable. However, damage which is "reasonably foreseeable" is often an area challenged in litigation.

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## 5 - You have taken all reasonable steps to mitigate your losses

A claimant must take reasonable steps to mitigate the losses they sustain as a result of a professional's negligence since they are not entitled to profit from their own neglect. This neglect may take the form of either failing to take reasonable steps or allowing an act to continue that would have increased loss.

Where a claimant takes measures to mitigate loss, the professional is entitled to the benefit of those steps, such that the defendant is required to pay the reduced measures of damages resulting from the steps made in mitigation. In this way, the claimant must hand over the benefit of the steps made in mitigation to the defendant. This applies even if the claimant would have been entitled to recover the losses if the particular steps made in mitigation had not been made.

### Steps you should take

Whenever you instruct a professional, it is important that you keep an accurate record of all communications with that professional, for example, by keeping copies of all letters and emails and making a note of all telephone conversations.

Such evidence can be crucial if you need to pursue a claim against the professional since it will evidence what happened at any particular time.

### Letter of Claim

If you have a viable claim against a solicitor then you will need to follow the correct procedure to pursue a claim. The courts have set a pre-action protocol to be followed in professional negligence claims. Under the protocol, the Claimant is required to send a "letter of claim" to the professional" setting out the following:

- The identity of any other parties involved in the dispute or a related dispute.
- A clear chronological summary (including key dates) of the facts on which the claim is based. Key documents should be identified, copied and enclosed.
- The allegations against the professional. What has he done wrong? What has he failed to do?
- An explanation of how the alleged error has caused the loss claimed.
- An estimate of the financial loss suffered by the Claimant and how it is calculated. Supporting documents should be identified, copied and enclosed. If details of the financial loss cannot be supplied, the Claimant should explain why and should state when he will be in a position to provide the details. This information should be sent to the professional as soon as reasonably possible. If the Claimant is seeking some form of non-financial redress, this should be made clear.
- Confirmation whether or not an expert has been appointed. If so, providing the identity and discipline of the expert, together with the date upon which the expert was appointed.
- A request that a copy of the Letter of Claim be forwarded immediately to the professional's insurers, if any.

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The professional should acknowledge receipt of the Letter of Claim within 21 days of receiving it. The professional then has three months from the date of the Letter of Acknowledgment to investigate the claim. This is not a strict period of time and the parties can agree to extend the period if necessary.

## Letter of Response

As soon as the professional has completed his investigations, the professional should send to the Claimant a letter of response setting out his/her position on the allegations (if liability is denied) or a letter of settlement if liability is admitted.

Sometimes the professional will send a letter of response and a letter of settlement if, for example, liability is denied but the professional wishes to offer something to avoid court proceedings.

If the Letter of Response denies the claim in its entirety and there is no Letter of Settlement, it is open to the Claimant to commence proceedings.

In any other circumstance, the professional and the Claimant should commence negotiations (or alternative dispute resolution such as mediation) with the aim of concluding those negotiations within 6 months of the date of the Letter of Acknowledgment (not from the date of the Letter of Response).

If the claim cannot be resolved within this period:

- (i) The parties should agree within 14 days of the end of the period whether the period should be extended and, if so, by how long.
- (ii) The parties should seek to identify those issues which are still in dispute and those which can be agreed.
- (iii) If an extension of time is not agreed it will then be open to the Claimant to commence court proceedings.

The Letter of Claim and Letter of Response are not intended to have the same formal status as Statements of Case. However, if the letters differ materially from the Statements of Case in subsequent proceedings, the Court may decide, in its discretion, to impose sanctions.

## Issue Court proceedings

If the matter does not settle under the pre-action protocol the next step would be to issue court proceedings. However, given the complexity involved in this type of claim and the fact that you are attempting to pursue professionals, you would be advised to instruct solicitors to act for you.

## I am in dispute with a professional, what should I do?

If you are concerned about the way in which a professional has acted for you, then you should seek legal advice as soon as possible. Fisher Meredith's Civil Litigation Department has substantial expertise in claims against all professionals.