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Commercial Dispute Resolution
2024



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Commercial Dispute Resolution

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Colour Coding Guide	<ul style="list-style-type: none"> ❖ Blue Text – Reference to statutes and case law. ❖ Green Text – Reference to textbook paragraphs and other notes in this guide. ❖ Orange Text – References to CPR Provisions and Court Guides. ❖ Purple Text – Reference to Professional Conduct Rules or Principles.
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1. Pre-Action and Complex Claims



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Commercial Litigation Case Analysis

Overview	<ul style="list-style-type: none"> ❖ Students on the Commercial Dispute Resolution elective are expected to conduct case analysis of complex litigation. There are three main steps to this process: <ul style="list-style-type: none"> ➤ Step 1: Analyse the facts and prepare a chronology. ➤ Step 2: Analyse the legal position. <ul style="list-style-type: none"> ▪ What is the cause of action? ▪ What defences are available? ▪ Consider any other parties or claims. ▪ Consider where/how proceedings should be issued. ➤ Step 3: Prepare an action list. <ul style="list-style-type: none"> ▪ I.e., the steps to be taken to investigate the case further and protect the client’s position.
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Step 1 – Prepare a Chronology

Chronology ¹	<ul style="list-style-type: none"> ❖ Go through the facts of your question and list the key events in a table giving a chronology. ❖ It can also be helpful to: <ul style="list-style-type: none"> ➤ Prepare a glossary defining terms involved in the litigation in alphabetical order!; and ➤ Prepare a list of the key parties involved and who they are (a “dramatis personae”).
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Step 2 – Analyse the Legal Position²

What is the cause of action?	<ul style="list-style-type: none"> ❖ Consider the following possible causes of action: 				
	Breach of contract ³	Is there a contract?	<ul style="list-style-type: none"> ❖ Is it written? ❖ Is it oral? 		
		If so, what are the terms?	<ul style="list-style-type: none"> ❖ Consider both express terms, and implied terms. ❖ Implied terms to note include: <table border="1" style="width: 100%; margin-top: 5px;"> <tr> <td style="background-color: #fff9c4;">The Supply of Goods and</td> <td> <ul style="list-style-type: none"> ❖ The SGSA 1982 applies to business to business contracts. </td> </tr> </table> 	The Supply of Goods and	<ul style="list-style-type: none"> ❖ The SGSA 1982 applies to business to business contracts.
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¹ [Workshop 1, Prep Task, Part 1](#)

² [Workshop 1, Prep Task, Part 2](#)

³ [Workshop 6, Prep Task, Question 1](#)

			<p>Services Act (SGSA) 1982</p>	<ul style="list-style-type: none"> ❖ It implies the following obligations into contracts where a supplier carries out services (and may, during the course of that, supply goods, for example installation and fitting of a kitchen): <ul style="list-style-type: none"> ➤ The supplier must carry out their service with reasonable care and skill (s13); ➤ Services must be provided within a reasonable time frame (if the contract does not fix this) (s14). ➤ Goods supplied must be of satisfactory quality (s4(2)). ➤ Goods must correspond with their description (s3(2)). ➤ Goods supplied must be fit for purpose (if known) (s4(5)).
			<p>Sale of Goods Act 1979</p>	<ul style="list-style-type: none"> ❖ The goods must be: <ul style="list-style-type: none"> ➤ Of satisfactory quality (s14(2)). ➤ As described (s13(1)). ➤ Fit for purpose where that purpose is known to the seller (s14(3)).
			<p>Consumer Rights Act 2015</p>	<ul style="list-style-type: none"> ❖ The Consumer Rights Act 2015 applies if the claimant is a consumer and the defendant a business. ❖ It requires goods to be: <ul style="list-style-type: none"> ➤ Of satisfactory quality (s9). ➤ Fit for purpose (if known) (s10); and

				<p>➤ As described (s11).</p>
		<p>Have the terms been breached?</p>	<p>❖ If the terms have been breached, explain how this has happened.</p>	
		<p>Remedies</p>	<p>❖ Damages</p> <p>❖ Termination from the date of breach.</p> <p>❖ Specific Performance</p>	
	<p>Negligence</p>	<p>❖ A defendant will be negligent if:</p> <ul style="list-style-type: none"> ➤ The defendant owed the claimant a duty of care; <ul style="list-style-type: none"> ▪ Is there an established duty (e.g., doctor-patient, or solicitor-client)? ▪ If not, did the defendant owe a duty of care on the basis that the claimant was a person was their neighbour (that is, a person who was “<i>so closely and directly affected by [their] act that [they] ought reasonably to have them in contemplation as being so affected when [they are] directing [their] mind to the acts or omissions which are called in question</i>”) (Donoghue v Stevenson [1932] UKHL 100). ▪ If not, the court may still hold there to be a “novel” duty of care that arises, by analogy, with established categories of liability (Poole Borough Council v GN [2019] UKSC 25). ➤ That duty was breached; ➤ The defendant’s breach of duty caused the claimant to suffer loss; and <ul style="list-style-type: none"> ▪ This requires the claimant to establish “but for” causation. ▪ If the claimant would have suffered harm irrespective of the defendant’s breach of duty, then there is no causation (Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428). 		

		<ul style="list-style-type: none"> ➤ The loss suffered was not too remote. <ul style="list-style-type: none"> ▪ Damage must be <i>of a kind which is foreseeable</i>. If the damage is of a <i>kind</i> that is foreseeable, the defendant will be liable for the full extent of this, no matter whether or not the extent of the damage is foreseeable (The Wagon Mound No. 1 [1961] AC 388).
	<p><u>Negligent Misstatement</u></p>	<ul style="list-style-type: none"> ❖ Negligent misstatement is a tort which occurs where a party makes a false or incorrect statement to another, upon which the second party relies and consequently suffers a loss. ❖ It is a common cause of action in claims against professional advisors. ❖ The claimant must show that: <ul style="list-style-type: none"> ➤ The defendant owed the claimant a duty of care in making the statement. <ul style="list-style-type: none"> ▪ This requires the claimant to show that the relationship between the parties was such that the defendant should have reasonably foreseen that the claimant would rely on the information or advice provided. ▪ In other words, the claimant must normally show that the party giving the advice knew or should have known that the defendant would rely upon the advice. ➤ The defendant breached that duty by failing to exercise reasonable care in ensuring the accuracy of the statement. ➤ The claimant <i>relied</i> upon the negligent advice (in circumstances where it was reasonable for the claimant to do so); and ➤ The claimant suffered loss as a result (there must be a causal link between the breach of duty and the loss suffered). ❖ Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465
	<p><u>Misrepresentation</u></p>	<ul style="list-style-type: none"> ❖ A claim for misrepresentation will only generally be relevant, in the context of the Commercial Dispute Resolution elective, where there is a contract.

		<ul style="list-style-type: none"> ❖ One of the parties must have: <ul style="list-style-type: none"> ➤ Made a false representation ➤ Which induces the other party to enter into the contract. ❖ The wronged party may be entitled to rescind the contract and/or damages.
	<p>Breach of fiduciary/other duty.</p>	<ul style="list-style-type: none"> ❖ A claim for breach of fiduciary duty may arise where there is a fiduciary relationship between the claimant and defendant. This may occur, for example, where: <ul style="list-style-type: none"> ➤ The claimant and defendant are partners in a partnership; ➤ The claimant is a company, and the defendant is a company director; ➤ The claimant is a beneficiary, and the defendants are trustees. ❖ The relationship gives rise to certain obligations, for instance, the defendant will generally be under a duty not to make a secret profit; and not to allow personal interests to conflict.
	<p>Nuisance and trespass</p>	<ul style="list-style-type: none"> ❖ A claim in nuisance arises when a defendant is causing an “unreasonable interference” with the claimant’s use and enjoyment of their land. ❖ What is “unreasonable” will depend on the circumstances, including: <ul style="list-style-type: none"> ➤ The duration and frequency of the nuisance; ➤ The character of the neighbourhood (“a nuisance in <i>Belgrave Square</i> would not necessarily be so in <i>Bermondsey</i>” Sturges v Bridgman (1879) LR 11 Ch D 852); ➤ Malice (e.g., a defendant deliberately creating noise in response to the claimant’s music lessons as per Christie v Davey (1893) 1 Ch 316); and ➤ Whether the claimant is abnormally sensitive. ❖ Trespass occurs where the defendant intrudes upon the claimant’s land without permission. A claimant may seek damages for any financial loss suffered, or injunctions to prevent an ongoing trespass from continuing / reoccurring.

	<p><u>Conversion and trespass to goods.</u></p>	<ul style="list-style-type: none"> ❖ Conversion is a tort that is committed where one party interferes with the personal property of another, for example taking it or withholding it without lawful justification. ❖ E.g., if a defendant removes goods from the client’s premises. ❖ Trespass to goods occurs where a party uses goods belonging to another party without permission.
	<p><u>Intellectual Property Claims</u></p>	<ul style="list-style-type: none"> ❖ Intellectual property disputes include disputes as to trademarks; patents, copyrights, and design rights. ❖ Copyright exists automatically in original artistic, literary, musical or dramatic works. It is an infringement to copy a “substantial” part of a work; this is a qualitative and not quantitative judgment. ❖ There is a presumption that the work has been copied if the defendant had access to the original work, and the materials are so similar that copying is the most likely explanation.
<p><u>Which facts support the cause of action?</u></p>	<ul style="list-style-type: none"> ❖ Apply the analysis of the cause of action to the facts of the dispute, step by step. 	
<p><u>Do any of the facts indicate that there is a defence?</u></p>	<ul style="list-style-type: none"> ❖ Has the cause of action been made out? ❖ Are there potential alternative causes for the client’s loss e.g., wider economic factors? ❖ Consider what evidence is needed to indicate the strength or otherwise of the defence. 	
<p><u>Consider other parties or claims</u></p>	<p><u>Other claimants?</u></p>	<ul style="list-style-type: none"> ❖ For commercial claims, you should consider the potential involvement of other parties, including: <ul style="list-style-type: none"> ❖ Is there anyone else with the same cause of action against the defendant or someone else who can bring a claim arising on the facts? ❖ If there is: <ul style="list-style-type: none"> ➤ This can increase the claimant’s bargaining power. ➤ We can apply for an order that one party deals with a claim on behalf of the other parties (a Group Litigation Order). ➤ Alternatively, the existence of other claimants may increase the client’s desire to secure a quick settlement to ensure the defendant has money to pay damages/costs etc.

		<ul style="list-style-type: none"> ➤ This may also increase the client’s desire to keep proceedings confidential.
	Counterclaims?	<ul style="list-style-type: none"> ❖ Consider whether a defendant has a potential counter-claim on the facts or on facts unrelated to the main claim.
	Claims against Co-Defendants	<ul style="list-style-type: none"> ❖ If acting for the defendant; is the defendant jointly liable with another party? ❖ If so, the defendant may be able to claim a contribution or indemnity from a co-defendant. ❖ If a contribution or indemnity is claimed a defendant must serve a notice on another defendant under CPR Part 20.
	Third-Party Claims	<ul style="list-style-type: none"> ❖ If acting for a defendant does the client have a potential claim against a party other than the Claimant? ❖ If so, the defendant could pursue a recovery action against them and seek to recover any losses paid to the Claimant. ❖ Can the client join the third party to the action by issuing an additional claim under Part 20?
Consider how and where proceedings could be issued.	<ul style="list-style-type: none"> ❖ Consider the relevant jurisdiction. <ul style="list-style-type: none"> ➤ Is there a jurisdiction clause in the contract? ➤ Is there an ADR/arbitration clause in the contract? ➤ See notes on Choice of Jurisdiction. ❖ Consider the relevant limitation period. <ul style="list-style-type: none"> ➤ Are there any extensions available if primary limitation has expired (e.g., Latent Damage / 3 years from the Date of Knowledge for Claims in Tort under s14A LA 1980)? 	

Step 3 - Prepare an Action List		
<ul style="list-style-type: none"> ❖ What evidence do we need to collect to support the client’s case? ❖ Do any other steps need to be taken to protect the client’s interest? 		
Evidence	Paper Documentation	<ul style="list-style-type: none"> ❖ Where the evidence is documentary, we need to consider the client’s disclosure obligations in respect of this.
	Electronic Information	<ul style="list-style-type: none"> ❖ Where the evidence is documentary, we need to consider the client’s disclosure obligations in respect of this.
	Physical Evidence	<ul style="list-style-type: none"> ❖ Is an inspection of physical evidence necessary?

		<ul style="list-style-type: none"> ❖ E.g., by an expert? ❖ If so, we need to ensure the evidence is preserved.
	Witnesses of Fact	<ul style="list-style-type: none"> ❖ Who will we call as a witness? Consider credibility.
	Experts	<ul style="list-style-type: none"> ❖ Does the claim require expert evidence? Bear in mind that this: <ul style="list-style-type: none"> ➤ Can be expensive; and ➤ Will require the court's permission. ❖ However, a lack of expert evidence can be a serious barrier to settlement negotiations. ❖ Is advice required on quantum as well as liability (e.g., loss of profits; diminution in value).
Next Steps	<ul style="list-style-type: none"> ❖ Consider whether: <ul style="list-style-type: none"> ➤ Any further information is needed. ➤ What pre-action steps the client must take. <ul style="list-style-type: none"> ▪ Which protocol applies? ▪ What is required? ▪ ADR? ➤ Advice on likely costs and funding options (addressed above). 	

Early Considerations in Commercial Litigation

❖ [Commercial Dispute Resolution, Chapter 2](#)

Overview	❖ When a solicitor is first instructed on a commercial dispute, there are some practical points which they need to consider to protect the client’s position.
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<p>1. Funding Options</p> <p>Commercial Dispute Resolution, 2.2</p>	<p>❖ The solicitor should consider:</p> <ul style="list-style-type: none"> ➤ How will our client fund the litigation? ➤ What are the pros and cons of the available options? 						
	<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="background-color: #e0e0e0;">Funding Method</th> <th style="background-color: #e0e0e0;">What is it?</th> <th style="background-color: #e0e0e0;">Appropriate for a Commercial Dispute?</th> </tr> </thead> <tbody> <tr> <td style="background-color: #e0e0e0; vertical-align: top;"> <p>Conditional Fee Agreement / CFA</p> </td> <td> <ul style="list-style-type: none"> ❖ A CFA is colloquially known as a “no win, no fee agreement”. ❖ If the client loses: <ul style="list-style-type: none"> ➤ They will not have to pay their own solicitor’s legal costs. ➤ But will have to pay adverse costs awarded to the other side. ❖ If the client wins, they will pay: <ul style="list-style-type: none"> ➤ Any of their own solicitor’s costs which the defendant is not ordered to pay. ➤ A success fee of up to 100% of their costs. This is unrecoverable from the losing party. ❖ A CFA may be deemed to be unenforceable if it is entered into where there are significant breaches of a </td> <td> <ul style="list-style-type: none"> ❖ There is higher risk and costs in commercial cases, so a CFA is less attractive to solicitors as there is a higher risk that they will not be paid, and the case will be more expensive to run pending any outcome. ❖ However, a solicitor has a duty to discuss all possible methods of funding with the client and a CFA may be the best option. ❖ The higher cost of the action will increase the cost of the success fee which is unrecoverable from the losing party (s44 LASPO 2012). </td> </tr> </tbody> </table>	Funding Method	What is it?	Appropriate for a Commercial Dispute?	<p>Conditional Fee Agreement / CFA</p>	<ul style="list-style-type: none"> ❖ A CFA is colloquially known as a “no win, no fee agreement”. ❖ If the client loses: <ul style="list-style-type: none"> ➤ They will not have to pay their own solicitor’s legal costs. ➤ But will have to pay adverse costs awarded to the other side. ❖ If the client wins, they will pay: <ul style="list-style-type: none"> ➤ Any of their own solicitor’s costs which the defendant is not ordered to pay. ➤ A success fee of up to 100% of their costs. This is unrecoverable from the losing party. ❖ A CFA may be deemed to be unenforceable if it is entered into where there are significant breaches of a 	<ul style="list-style-type: none"> ❖ There is higher risk and costs in commercial cases, so a CFA is less attractive to solicitors as there is a higher risk that they will not be paid, and the case will be more expensive to run pending any outcome. ❖ However, a solicitor has a duty to discuss all possible methods of funding with the client and a CFA may be the best option. ❖ The higher cost of the action will increase the cost of the success fee which is unrecoverable from the losing party (s44 LASPO 2012).
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		<p>solicitor’s duties under the Code of Conduct (such as failing to act with integrity, or in the client’s best interests when advising on funding) (Winros Partnership v Global Energy Horizons Corporation [2021] EWHC 3410 (Ch))</p>	
	<p>After the Event Insurance (ATE / AEI).</p>	<ul style="list-style-type: none"> ❖ This is an insurance policy which covers the risk of the client paying: <ul style="list-style-type: none"> ➤ The other party’s costs and disbursements; and ➤ Their own disbursements. ❖ It does not cover the risk that the claimant will have to pay their own costs in the event they lose. ❖ Entering into an ATE policy will cost the client a “premium”. These tend to be expensive. 	<ul style="list-style-type: none"> ❖ The cost of cover required will reflect the value/risk of the case. ❖ Therefore, the ATE premium can be very expensive in Commercial Disputes. ❖ For cases post-2013 the ATE premium is not recoverable from the other side (s46 LASPO 2012).
	<p>Damages Based Agreements (DBAs)</p>	<ul style="list-style-type: none"> ❖ If the client succeeds and recovers damages, their solicitor will be entitled to an amount equal to an agreed percentage of those damages. ❖ This amount will be in respect of solicitor’s costs + VAT + counsel’s fees. It will not cover any disbursements which will be owed on top of this sum. 	<ul style="list-style-type: none"> ❖ DBAs have similar risks in commercial cases to CFAs. ❖ The solicitor only gets paid in the event of a win and the higher risks, combined with higher costs of commercial cases may mean DBAs are unattractive. ❖ The solicitor needs to assess the risk vs reward i.e., how much in Damages is likely to be recovered vs the potential risk.

			<ul style="list-style-type: none"> ❖ DBAs can only be used when acting for a party who may recover money in the action (so a claimant, or a <i>counterclaiming</i> defendant) (Candey Ltd v Tonstate Group Ltd [2022] EWCA Civ 936).
	<p>Third-Party Funding</p>	<ul style="list-style-type: none"> ❖ I.e., litigation funding. ❖ This is where a third party agrees to finance a case in return for a share of the money recovered. ❖ If the funder is entitled to recover a percentage of damages recovered, this will constitute a DBA and so must meet the formal requirements of a DBA in order to be enforceable (R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others [2023] UKSC 28). 	<ul style="list-style-type: none"> ❖ This should be seen as a method of last resort as this can be expensive and will diminish the client’s money recovered.
	<p>Consider Code of Conduct obligations.</p>	<ul style="list-style-type: none"> ❖ CFS 8.7 / CFF 7.1(c): A solicitor must provide the best possible information: <ul style="list-style-type: none"> ➤ At the time of engagement; and ➤ When appropriate as the client’s matter progresses. ❖ This includes information about: <ul style="list-style-type: none"> ➤ The likely overall cost of the matter; and ➤ Any costs incurred. ❖ “Costs” = solicitors fees and disbursements - SRA Glossary. 	
<p>2. Limitation</p>	<ul style="list-style-type: none"> ❖ Limitation issues should be considered at the outset of the claim. 		

[Commercial Dispute Resolution, 2.3](#)

- ❖ A failure by a claimant’s solicitor to issue proceedings before expiry of the limitation period set out in the [Limitation Act 1980](#) may result in the defendant being able to raise a **successful defence that the claim is “statute-barred”**, which is an **absolute defence** to the claim. This may lead to a professional negligence claim against the solicitor.
- ❖ The basic limitation periods are set out in our note on [Limitation Periods](#).
- ❖ Limitation issues can be particularly complex in commercial litigation. In particular, the following should be considered:

<u>Latent damage.</u>	<ul style="list-style-type: none"> ❖ “Latent damage” refers to situations where damage that is not apparent or discoverable at the time it occurs but becomes evident at a later point. ❖ Where this is the case, s14A of the Limitation Act 1980 provides that the limitation period for <i>negligence claims</i> is extended to three years from the date that the claimant <i>knew or ought reasonably to have known</i> of: <ul style="list-style-type: none"> ➤ The damage; ➤ That the damage as attributable in whole or in part to the act or omission which is alleged to constitute negligence; ➤ The identity of the defendant; and ➤ If it is alleged that any person has committed a breach of duty, that the harm was attributable to the act or omission of that person. ❖ This is subject to a 15 year “long-stop”, after which no claim can be brought (even if the claimant only has knowledge of the damage less than three years before).
<u>Fraud, concealment, or mistake.</u>	<ul style="list-style-type: none"> ❖ Under s32 of the Limitation Act 1980, the limitation period starts six years from when the claimant discovers <i>the fraud or mistake</i>. ❖ Telling multiple lies may give rise to separate causes of action which <i>may</i>, depending on the facts, mean that limitation may only start to run from the date the claimant discovered the second lie. ❖ However, this will not normally be the case where two related lies are told “as part of the same overall deceit”. In those circumstances, limitation will generally run from discovery of the initial lie, even if the claimant only discovers that a second statement was also false, at a later point (Seedo v El Gamal and others [2023] EWCA Civ 330).

	<p>Contribution claims.</p>	<ul style="list-style-type: none"> ❖ Where multiple parties are liable for the same damage, but only one party pays damages to a claimant (for instance because they settle the claim, or they lose at trial where the claimant brought an action only against them), the defendant may recover a “contribution” from the other liable parties under the Civil Liability (Contribution) Act 1978. ❖ The limitation period for the defendant bringing that contribution claim is two years from the date of judgment in the initial claim against the defendant (or, if none, two years from the date of any settlement agreement in the initial claim).
	<p>Pending actions.</p>	<ul style="list-style-type: none"> ❖ Parties cannot circumvent limitation rules by simply adding new claims or parties to existing proceedings. ❖ The court will only add an additional party if the limitation period was current when the proceedings were started, and the addition or substitution is “necessary” (CPR 19.5(3)). ❖ For this to be the case, the court must be satisfied that: <ul style="list-style-type: none"> ➤ The new party is to be substituted for a party who was named in the claim form as a result of them being mistaken for the new party; or ➤ The claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or ➤ The original party has died or has had a bankruptcy order made against them and their interest or liability has passed to the new party.
	<p>Contractual limitation periods.</p>	<ul style="list-style-type: none"> ❖ Commercial agreements may specify that claims brought under them must be brought within a shorter period of time than the statutory limitation period. Such terms are, in principle, enforceable. ❖ The parties may also have to follow specified procedures for notification of claims. The express provisions of the contract must therefore be carefully considered in addition to the statutory limitation periods.
	<p>Foreign law.</p>	<ul style="list-style-type: none"> ❖ Where the English courts apply foreign law, for example as a result of the parties agreeing to do so under a clause in their contract, then the limitation period will be that governed by the foreign law (Foreign Limitation Periods Act 1984).
<p>3. Capacity</p>	<ul style="list-style-type: none"> ❖ The solicitor must consider: <ul style="list-style-type: none"> ➤ Whether their client has standing to bring a claim; and 	

<p>Commercial Dispute Resolution, 2.4</p>	<p>➤ Whether the intended Defendant can be sued.</p>	
	<p>Does the claimant have standing?</p>	<ul style="list-style-type: none"> ❖ Whether a claimant has “standing” is a question of whether the claimant has the capacity under to sue the defendant. ❖ This involves considerations of matters such as: <ul style="list-style-type: none"> ➤ Is the claimant a foreign party? If so, do they have the right to sue in England and Wales? ➤ Is the claimant dead? If so, does the claim survive? For example, a defamation claim cannot be brought by a deceased person’s estate.
	<p>Can the intended defendant be sued?</p>	<ul style="list-style-type: none"> ❖ Are there any prerequisites that need to be met to sue the defendant? ❖ For example, is approval by a third party required? <ul style="list-style-type: none"> ➤ E.g., if the claimant is insolvent, permission from a liquidator / administrator / the court is normally required for them to commence court proceedings. ➤ E.g., if the claimant is a charity, a trustee may need to give approval when bringing a claim on behalf of the charity. ❖ Is the defendant the correct party to the action? <ul style="list-style-type: none"> ➤ E.g., for partnerships, you should make sure that all the relevant partners involved at the time of the cause of action are named in the action. ➤ Has the business been incorporated since the cause of action accrued? Are we suing the correct legal entity? ➤ Unincorporated associations (such as trade unions) cannot be sued.
<p>4. Complex Actions</p> <p>Commercial Dispute Resolution, 2.7</p>	<p>❖ Commercial disputes tend to be complex, involving multiple parties and multiple causes of action. This gives rise to several considerations as follows:</p>	
	<p>Multiple Causes of Action</p> <p>Commercial Dispute</p>	<ul style="list-style-type: none"> ❖ Commercial claims will commonly involve multiple different causes of action concerning the same facts. ❖ A claimant can use a single claim form for all claims which can be “conveniently disposed of in the same proceedings” (CPR 7.3).

	<p>Resolution, 2.7.1; 2.7.3</p>	<ul style="list-style-type: none"> ❖ E.g., a claim against a firm of solicitors may allege both breach of contract (the firm’s retainer) and negligence. ❖ Consider: <table border="1" data-bbox="568 331 1520 1222"> <tr> <td data-bbox="568 331 755 772"> <p>Ensuring all causes of action are properly pleaded from the outset, where possible.</p> </td> <td data-bbox="755 331 1520 772"> <ul style="list-style-type: none"> ❖ Introducing a new cause of action after serving the particulars of claim will require the particulars to be amended. ❖ This cannot be done without either the written consent of all parties or the permission of the court (CPR 17.1(2)). ❖ The Court will, however, normally allow the action to be added if it can be conveniently dealt with in the original proceedings. </td> </tr> <tr> <td data-bbox="568 772 755 1222"> <p>Limitation issues</p> </td> <td data-bbox="755 772 1520 1222"> <ul style="list-style-type: none"> ❖ Introducing a new cause of action outside of the limitation period is at the court’s discretion. ❖ This will only be exercised if the new claim arises out of the same facts or substantially the same facts as an existing claim (CPR 17.4(2)). ❖ This may, however, allow a Claimant to amend a previously served statement of case to bring a claim that would otherwise be out of time (if a fresh claim was made). </td> </tr> </table> 	<p>Ensuring all causes of action are properly pleaded from the outset, where possible.</p>	<ul style="list-style-type: none"> ❖ Introducing a new cause of action after serving the particulars of claim will require the particulars to be amended. ❖ This cannot be done without either the written consent of all parties or the permission of the court (CPR 17.1(2)). ❖ The Court will, however, normally allow the action to be added if it can be conveniently dealt with in the original proceedings. 	<p>Limitation issues</p>	<ul style="list-style-type: none"> ❖ Introducing a new cause of action outside of the limitation period is at the court’s discretion. ❖ This will only be exercised if the new claim arises out of the same facts or substantially the same facts as an existing claim (CPR 17.4(2)). ❖ This may, however, allow a Claimant to amend a previously served statement of case to bring a claim that would otherwise be out of time (if a fresh claim was made).
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	<p>Adding Parties to Proceedings</p> <p>Commercial Dispute Resolution, 2.7.2.1</p>	<ul style="list-style-type: none"> ❖ An issue that may arise in a commercial case is a need to add, remove, or substitute parties to and from pre-existing proceedings. When <i>adding</i> a party, the solicitor should consider the following: <table border="1" data-bbox="568 1423 1520 1940"> <tr> <td data-bbox="568 1423 755 1940"> <p>Permission is Required</p> </td> <td data-bbox="755 1423 1520 1940"> <ul style="list-style-type: none"> ❖ Once a claim form has been served, the court’s permission is required to remove, add or substitute a party (CPR 19.4). ❖ CPR 19.2: A court may add a new party if it is: <ul style="list-style-type: none"> ➤ Desirable for resolving the matters in dispute. ➤ There is an issue involving both the new party and an existing party, which is connected to the matters in dispute in the existing proceedings. </td> </tr> </table> 	<p>Permission is Required</p>	<ul style="list-style-type: none"> ❖ Once a claim form has been served, the court’s permission is required to remove, add or substitute a party (CPR 19.4). ❖ CPR 19.2: A court may add a new party if it is: <ul style="list-style-type: none"> ➤ Desirable for resolving the matters in dispute. ➤ There is an issue involving both the new party and an existing party, which is connected to the matters in dispute in the existing proceedings. 		
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		<p><u>Is adding a claimant desirable?</u></p>	<ul style="list-style-type: none"> ❖ Adding an additional claimant may boost an existing claimant's bargaining position against a defendant. ❖ However, it may reduce the available resources available for your client (the defendant will have to settle both claims). ❖ A third party cannot be added as a Claimant without that party consenting in writing and filing this at court (CPR 19.4(4)). ❖ Consider, if there are multiple claimants, whether the client can act as a representative for the others to save cost. ❖ This requires the permission of the court. However, if the answer is yes, this would ensure that any judgment or order made against the representative party is binding on all the persons represented.
		<p><u>Adding or Substituting Parties After Expiry of the Limitation Period</u></p> <p>CPR 19.5</p>	<ul style="list-style-type: none"> ❖ Parties may be added if the limitation period has expired, but only if (CPR 19.5(2)): <ul style="list-style-type: none"> ➤ The limitation period was current when proceedings started. ➤ The addition or substitution is "necessary". ❖ "Necessary" is defined by CPR 19.5(3) as being where: <ul style="list-style-type: none"> ➤ A new party is substituting for someone who was named in the Claim Form by mistake; ➤ The claim cannot properly be carried on by or against the original party unless the new party is added; ➤ The original party has died/been made bankrupt and his interest/liability has passed to the new party.
	<p><u>Removing Parties</u></p>	<ul style="list-style-type: none"> ❖ The court may remove parties if it is not desirable that they should be one (CPR 19.2(3)). 	

	<p>Commercial Dispute Resolution 2.7.2.2</p>	<ul style="list-style-type: none"> ❖ PD19A, para 4: where the court makes an order for the removal of a party, the claimant must: <ul style="list-style-type: none"> ➤ File an amended claim form and particulars of claim; and ➤ Serve a copy of the order on every party to the proceedings and on any other person affected by the order.
	<p>Substituting parties</p> <p>Commercial Dispute Resolution 2.7.2.3</p>	<ul style="list-style-type: none"> ❖ The court may order for a new party to be substituted for an existing one if; <ul style="list-style-type: none"> ➤ The original parties' interests or liability has <i>passed to that party</i>; and ➤ The substitution is desirable so that the court can resolve matters in dispute. ➤ CPR 19.2(4)
	<p>Consolidating claims</p> <p>Commercial Dispute Resolution 2.7.3</p>	<ul style="list-style-type: none"> ❖ The court may direct two or more actions be consolidated into a single action (CPR 3.1(2)(g)). ❖ Alternatively, the court may leave two actions as separate proceedings but order them to be tried together (CPR 3.1(2)(h)). ❖ Consolidating actions is intended to save time and costs to avoid duplication of work. The order can be made on the court's own initiative, or by an application by the parties. ❖ In deciding whether to consolidate actions, the court will consider (Atos IT Services UK Ltd v Secretary of State for Business, Energy and Industrial Strategy [2022] EWHC 787 (TCC)): <ul style="list-style-type: none"> ➤ How much the facts and legal issues in the separate proceedings overlap. A high degree of overlap suggests that consolidation might streamline the process. ➤ If there's a significant risk that separate proceedings could result in inconsistent or contradictory judgments on similar issues. ➤ The potential to reduce the cost and delay associated with running multiple separate proceedings. ➤ The stage in the proceedings at which consolidation is sought. Early requests are generally viewed more favourably, as they are more likely to reduce costs and prevent delays.

		<ul style="list-style-type: none"> ➤ Whether the benefits of consolidation could be achieved through other means. This includes, but is not limited to, orders for the claims to be tried together without formal consolidation under CPR 3.1(2)(h). ➤ The possibility that claimants in the consolidated claim can be jointly represented by the same legal team. 		
	<p>Multi-Party Actions</p> <p>Commercial Dispute Resolution 2.7.4</p>	<ul style="list-style-type: none"> ❖ There are two categories of multi-party actions identified by CPR Part 19: <ul style="list-style-type: none"> ➤ Proceedings taken or defended by representative parties, and ➤ Group litigation. <table border="1" data-bbox="570 764 1498 1955"> <tr> <td data-bbox="570 764 802 1955"> <p>Claims by Representative Parties</p> <p>Commercial Dispute Resolution 2.7.4.1</p> </td> <td data-bbox="802 764 1498 1955"> <ul style="list-style-type: none"> ❖ A person, with the permission of the court, is able to pursue or defend the claim as a representative on behalf of others where those others have the “same interest” in the claim (CPR 19.8). ❖ “Same interest” is interpreted in light of the overriding objective and the rationale for the representative procedure, which is that claims are capable of being brought by (or against) a number of people which raise a common issue (or issues), and hence there is the potential and motivation for a judgment which binds them all (Lloyd v Google LLC [2021] UKSC 50). ❖ Where the court is satisfied that the representative has the same interest as other parties, the court has discretion as to whether to allow the representative claim, which it must exercise in light of the overriding objective (i.e., an order is likely to be made where appointing a representative will save the parties expense and enable the matter to be dealt with expeditiously). ❖ Unless the court directs otherwise, any judgment or order that is made against the representative party is binding on all the persons represented in the claim. </td> </tr> </table>	<p>Claims by Representative Parties</p> <p>Commercial Dispute Resolution 2.7.4.1</p>	<ul style="list-style-type: none"> ❖ A person, with the permission of the court, is able to pursue or defend the claim as a representative on behalf of others where those others have the “same interest” in the claim (CPR 19.8). ❖ “Same interest” is interpreted in light of the overriding objective and the rationale for the representative procedure, which is that claims are capable of being brought by (or against) a number of people which raise a common issue (or issues), and hence there is the potential and motivation for a judgment which binds them all (Lloyd v Google LLC [2021] UKSC 50). ❖ Where the court is satisfied that the representative has the same interest as other parties, the court has discretion as to whether to allow the representative claim, which it must exercise in light of the overriding objective (i.e., an order is likely to be made where appointing a representative will save the parties expense and enable the matter to be dealt with expeditiously). ❖ Unless the court directs otherwise, any judgment or order that is made against the representative party is binding on all the persons represented in the claim.
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		<p>Group Litigation</p> <p>CPR 19.21-19.26</p> <p>Commercial Dispute Resolution 2.7.4.2</p>	<ul style="list-style-type: none"> ❖ The court’s permission will be required for the judgment to be enforced by or against anyone other than the representative. ❖ Where there are a number of separate claims giving rise to common issues of fact or law, the Court may make a “group litigation order” (GLO). ❖ This is a mechanism by which a court ensures that it is responsible for managing, centrally, a large number of claims brought by multiple parties; for example, where a number of individuals and/or businesses are suing the same company after having been damaged by an environmental disaster caused by that company. ❖ All claims subject to a GLO are allocated to the multi-track and will have a managing judge appointed with overall responsibility for the claim. ❖ Where a GLO is made: <ul style="list-style-type: none"> ➤ A register is established of all the claims that form part of the GLO. ➤ A judgment made in relation to any claim in the register will be binding on all the parties on the register at the time it is made.
	<p>Derivative Claims</p> <p>CPR 19.14</p> <p>Commercial Dispute Resolution 2.8</p>	<ul style="list-style-type: none"> ❖ A Derivative Claim is a claim made by one or more members of an entity, for a remedy to which the entity claims to be entitled. ❖ For instance, the claim might be brought by company shareholders, for a remedy to which the company claims to be entitled ❖ E.g., if minority shareholders want to sue the directors for breach of the duties that they owe to the company, the minority shareholders would issue a derivative claim against the directors. 	
<p>5. Disclosure obligations</p> <p>Commercial Dispute Resolution 2.6</p>	<p>Disclosure Obligations</p>	<ul style="list-style-type: none"> ❖ As with ordinary Civil Litigation, the client should be warned at the outset of their obligations as to the disclosure of documents: ❖ A different disclosure regime to standard disclosure applies to proceedings in the Business & Property Courts. 	

		<ul style="list-style-type: none"> ❖ The provisions are set out in Practice Direction 57AD (Disclosure in the Business and Property Courts). Parties, at the pre-action stage, should be mindful that this obliges them to: <ul style="list-style-type: none"> ➤ PD57AD, para 3.1(1): Take reasonable steps to preserve documents that may be relevant to any issue in the proceedings. ➤ This includes: <ul style="list-style-type: none"> ▪ PD57AD, 4.2(1): Suspending any document deletion or destruction processes. ▪ PD57AD, 4.2(2): Sending written notification to relevant employees and former employees: <ul style="list-style-type: none"> • Identifying the documents / classes of documents to be preserved; and • Notifying them that they should not delete or destroy these. ▪ PD57AD, 4.2(3): take reasonable steps so that agents or third parties who may hold documents on the party’s behalf do not delete or destroy documents.
	<p><u>Norwich Pharmacal Orders</u></p>	<ul style="list-style-type: none"> ❖ A Norwich Pharmacal order is an order which requires a person to disclose documents or information to the applicant. ❖ It can be used to obtain documents from a party who is NOT likely to become a party to the potential proceedings, but who has nevertheless become “involved” in the wrongdoing. ❖ See notes on Norwich Pharmacal Orders.
	<p><u>Pre-Action Disclosure</u></p> <p>Commercial Dispute Resolution 2.6.2</p> <p>Civil Litigation, 3.9</p>	<ul style="list-style-type: none"> ❖ CPR 31.16: the court has the power to make an order for disclosure before proceedings are issued if: <ul style="list-style-type: none"> ➤ The respondent is “likely” to be a party to the subsequent proceedings. ➤ The applicant is “likely” to be a party to the proceedings. ➤ The documents would be disclosable pursuant to a standard disclosure order under CPR 31.6; and ➤ Disclosure is desirable to:

		<ul style="list-style-type: none"> ▪ Dispose fairly of the anticipated proceedings; or ▪ Assist the dispute to be resolved without proceedings, or ▪ Save costs. <p>❖ CPR 31.16 continues to apply for cases subject to PD 57AD "Disclosure in the Business and Property Courts".</p>
<p>6. Jurisdiction issues.</p> <p>Commercial Dispute Resolution, 2.11</p>		<ul style="list-style-type: none"> ❖ Commercial litigation can often involve a foreign element, and therefore it is essential that the chosen forum for the action is appropriate for the client. ❖ E.g., does the client need to issue proceedings in England and Wales before another party issues proceedings elsewhere, or do they need to make a challenge to jurisdiction? ❖ The solicitor should consider the costs, as well as practical issues. This may require consideration of the advice from a lawyer in the overseas jurisdiction. For instance: <ul style="list-style-type: none"> ➤ Is it more convenient for the claimant to commence proceedings in England & Wales? ➤ Is England & Wales' adversarial (as opposed to a more inquisitorial) legal system better suited to the dispute? ➤ How much would it cost to sue in England & Wales vs another jurisdiction? ➤ Do the limitation periods differ? ➤ What are the rules in respect of costs recovery? ❖ Separate notes on Choice of Laws and Choice of Jurisdiction set out the points to be considered in more detail.
<p>7. Other Considerations</p>	<p>Acting for Insurers or Trade Unions</p> <p>Commercial Dispute Resolution, 2.9</p>	<ul style="list-style-type: none"> ❖ The solicitor may need to consider the following: <ul style="list-style-type: none"> ❖ The solicitor must bear in mind, when acting for insurers or trade unions, that such clients have interests other than those of the actual party itself and are generally keen to keep costs to a minimum. ❖ Most insurance policies contain a "control of defence" clause entitling the insurer to bring or defend an action in the name of the insured. ❖ Be mindful of conflicts of interest between insurer clients and the insured (e.g., where you may have to advise an insurer on policy coverage).

	<p>Contractual dispute resolution clauses.</p> <p>Commercial Dispute Resolution, 2.10</p>	<ul style="list-style-type: none"> ❖ Any contract between the claimant and the defendant should be checked to consider whether this requires the parties to engage in a form of alternative dispute resolution either prior to, or instead of litigation. ❖ If proceedings are issued in breach of this clause, the court is likely to stay the proceedings (see, for example Ohpen Operations UK Ltd v Invesco Fund Managers Ltd [2019] BLR 576 (TCC)).
	<p>Case management where a party was previously struck out</p> <p>Commercial Dispute Resolution, 2.12</p>	<ul style="list-style-type: none"> ❖ Under CPR 3.4 the court has the power to order that all or part of a statement of case should be struck out if: <ul style="list-style-type: none"> ➤ It “discloses no reasonable grounds for bringing or defending the claim” or ➤ If “there has been a failure to comply with a rule, practice direction or a court order”. ❖ A struck-out Claimant can be ordered to pay the Defendant’s costs of the original action. ❖ Where this occurs and a party <i>re-commences proceedings</i> during the limitation period, any new action by the claimant can be stayed until the Claimant has paid the costs of the first action.

Limitation Periods

Overview	❖ This document sets out, in overview, the applicable limitation periods that apply to different types of claim.
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Contract	Tort	Latent Damage
❖ 6 years from the date of breach (s5 Limitation Act 1980).	❖ 6 years from the date of the cause of action (the date harm is suffered as a result of the tort) (s2 Limitation Act 1980)	❖ “Latent damage” is where damage is not evident at the date of the cause of action, but arises at a later date. ❖ It applies only to negligence claims in tort. ❖ The limitation period is 3 years from the date of knowledge if this is later than the date of the tort (s14A Limitation Act 1980)
Fraud	Claims under the Consumer Protection Act 1987	Contribution
❖ 6 years from the date of the claimant discovering the fraud (s32 Limitation Act 1980).	❖ Renders a “producer” strictly liable for personal injury, death or damage to a consumer’s property caused by defective products. ❖ 10 years from when the defective product was first supplied by the producer.	❖ Where a claim for contribution is brought by way of separate proceedings under the Civil Liability Contribution Act 1978 the limitation period is two years from the date of judgment. ❖ Contribution is where there are multiple parties at fault but only one party is sued and left “carrying the can”. The Defendant can issue a contribution claim against any of the other parties that contributed to the breach.
Pending Actions	Commercial Contracts	Agreeing to Extend
❖ A party cannot defeat the rules on limitation by adding a claim to existing proceedings when it would be too late to start a separate action (s35 of the Limitation Act 1980 ; CPR 19.6).	❖ Consider whether any commercial contract has altered the statutory limitation period.	❖ The parties can agree to extend limitation periods. ❖ This will often be done where there are multiple potential defendants , and the claimant wishes to sue one of the defendants first but would only need to sue the other defendant in the event that the claim against the first defendant fails.

Foreign Limitation Periods		
❖ Where the English courts apply foreign law (e.g. because there is a contractual choice of law clause) the Foreign Limitation Periods Act 1984 provides that the limitation period will be that as specified by the foreign law.		

