Chapter 2: Preliminary Considerations

Aims of this Chapter
This chapter will enable you to achieve the following learning outcomes from the CILEx syllabus:

2 Understand how civil actions are funded
3 Understand how to commence and defend actions in civil proceedings

2.1 Introduction
Although the public perception is that most cases proceed to a trial, this is far from the reality and many cases fall at the first hurdle. Indeed, if a case has no real prospect of succeeding, a client will not thank his solicitor for pursuing it. Lawyers too must be aware of commercial considerations to ensure the future of their own business. Thus, before commencing an action, certain questions must be answered.

• Can the claim be brought at all?
• Who are the parties and is the defendant worth suing?
• How will the case be funded?

In this chapter, these issues are discussed in turn.

2.2 Limitation
Before commencing action, the lawyer must check that the case is not “time-barred”. In other words, the client has left it too late to bring a claim – a concept known as limitation.

The Limitation Act 1980 (LA 1980) sets down strict time limits relating to the time between the cause of action (e.g. the date the faulty goods were sold in a contract claim) and the commencement of the litigation relating to that event. This is known as the limitation period. It prevents a potential defendant from remaining under a constant threat of litigation for events that happened years ago and recognises the difficulties each party may have in bringing or defending a claim once memories of witnesses have faded.
Limitation made headline news as a result of *A v Hoare [2008]*. One of the victims of lottery-winning convicted rapist Iorworth Hoare wished to claim for the injuries (including psychiatric injury) she suffered as a result of his attack on her. Unusually, she was allowed to bring her claim many years after the expiry of the limitation period.

**The general rule**

Limitation periods operate to provide a defendant with a *technical defence* to a claim that is issued a long time after the events in question took place. The general rule is that actions commenced outside the limitation period will not be allowed to proceed, although extensions may be available in exceptional circumstances.

Allowing a case to be lost on limitation grounds could lead to a professional negligence claim and so it is vital that the solicitor operates an efficient diary system.

**2.3 Calculating limitation periods**

The main limitation periods are as follows.

<table>
<thead>
<tr>
<th>Type of Claim</th>
<th>Limitation Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal injury claims</td>
<td>3 years</td>
</tr>
<tr>
<td>Most other tort claims</td>
<td>6 years</td>
</tr>
<tr>
<td>Contract claims</td>
<td>6 years</td>
</tr>
</tbody>
</table>

Time starts to run for limitation purposes when the cause of action occurs, that is, the date on which the claim could have been brought. This is usually:

- in negligence cases, when the claimant suffers damage as a result of the alleged negligent conduct, for example, the date of the road traffic accident;
- for children who suffer personal injuries the time limit does not start to run until they reach their 18th birthday;
- in contract claims, when the contract was breached. Thus, in a claim for damages for late delivery it will be when the goods should have been delivered under the terms of the contract.
A road traffic accident occurred on 6 October and the claimant wishes to sue for personal injuries suffered as a result. The limitation period would start running on 7 October, with the last day for issuing being on 6 October three years later.

2.3.1 Extending limitation

For most types of claim the limitation periods laid down by LA 1980 are final. In some cases, however, this is not the case.

Personal injury claims

In personal injury claims, the client has three years from the date of the cause of action to bring his claim. However, not everyone will know, at the date of the cause of action, that they even have a claim. Therefore, time may not start running in personal injury cases until a later date known as the “date of knowledge”, that is, when the claimant first became aware that his injury was linked to the original accident – perhaps as a result of seeking medical advice. This is particularly relevant in personal injury cases involving exposure to asbestos, where it may be many years later that the claimant discovers he has contracted an asbestos-related disease.

Discretion to extend limitation

If the claimant has failed to meet the limitation date, the court has discretion to extend it, but will rarely do so.

In Collins v Secretary of State for Business, Innovation and Skills [2014] the claimant was diagnosed with lung cancer in 2002 and successfully treated. He attributed the illness to exposure to asbestos between 1947 and 1967 but only instructed solicitors to pursue a claim in 2012, aged 90, after seeing a newspaper advertisement.

The court considered that a reasonable person would have enquired about the possible causes of the cancer by mid-2003. This meant that limitation had expired in 2006, three years later. The proceedings issued in 2012 were six years out of time.

In this instance, the court refused to exercise its discretion to extend the primary limitation period as the claim had low value and the litigation costs would be disproportionately high.
2.3.2 Summary of limitation

| What is limitation? | The strict time limit imposed on when a claimant can issue proceedings against a defendant in relation to a cause of action, for example:  
|                    | • the date of the accident in a personal injury claim; and  
|                    | • the date the invoice was due for payment in a debt case. |
| What is the effect? | Limitation periods provide defendants with a technical defence to a claim where the claimant has issued proceedings after the expiry of the limitation period. |
| General rule       | The court will not allow actions commenced outside the limitation period to proceed. |
| Reasons?           | (1) Protects a potential defendant from an indefinite threat of litigation arising from events which occurred years ago.  
|                    | (2) Recognises the evidential difficulties of bringing a claim when witnesses’ memories may have faded. |
| Limitation periods | • Personal injury claims – three years.  
|                    | • Other tort and contract claims – six years. |
| Limitation period for children | The time limit is three years, but this does not start until the child reaches the age of 18. |
| Extending limitation | • Limitation periods are usually final.  
|                    | • The court has discretion to extend the deadline but will rarely do so.  
|                    | • May be extended so that it expires three years after the date of knowledge.  
|                    | • Actual knowledge arises when the claimant knew the injury was caused by the defendant’s default.  
|                    | • Constructive knowledge is the date when the claimant ought to have realised he had a claim from facts available to him, for example, from a medical report. |

2.4 Viability

Before launching into litigation, it is important to check whether it is worth doing so. In particular:

- **Who is the defendant?** In addition to identifying the correct defendant, you must ensure that he is sued in the correct capacity, whether it be as an individual, a partnership or a limited company. We shall be considering this in more detail in **Chapter 5**.