SQUIRE PATTON BOGGS

Key Considerations for Insolvency Practitioners Ahead of Litigation

UK – 2026

In this quick guide, we take a look at the key considerations to take into account before commencing litigation in respect of a potential claim.

Why Investigate/Litigate?

The first point to make is that officeholders (whether acting as administrators or liquidators of an insolvent company) are under a duty to investigate what assets there are (including potential claims against third parties, stakeholders and directors), and whether such assets may lead to recoveries for creditors. As a result of this duty, officeholders need to undertake suitable investigations to understand the existence and extent of any such claims. Potential claims include those set out in this quick guide giving an overview of insolvency claims, including claims for misfeasance or breach of duty by directors, wrongful trading, preferences and transactions at an undervalue.

A shortage of funds does not, in itself, relieve the officeholder of the need to consider the information they have acquired in the course of realising the business and assets of the company, including information received from creditors and other sources. If there are insufficient funds to carry out a detailed investigation, the officeholder should consider whether it is appropriate to seek funding from creditors or other sources. In all cases, the officeholder's investigations should be proportionate.

Merits of the Claim

Perhaps the single most important consideration of an officeholder (or, indeed, any) proposed claim is the merit of that claim. In particular, and consistent with the burden of proof in all civil claims, is the claim more likely than not to succeed (i.e. are the prospects of a successful claim 50% or more)? In evaluating the prospects of success, the officeholder will need to assess the availability and strength of the available evidence. Here, the officeholder will likely be at a disadvantage compared to their proposed opponent because the officeholder will have no direct first-hand knowledge of the claim they intend to bring because they were not in office at the time the claim arose. The officeholder will, therefore, be heavily reliant on what the documents tell them and what evidence they can obtain from third parties.

To level the playing field, the officeholder is given wide powers to compel the cooperation of various parties involved in, or who had dealings with, the company prior to its insolvency. These powers form the subject matter of a future quick guide so are not explored further here, save to say that such powers, although wide ranging, must be used judiciously and not as a fishing expedition or to gain an unfair advantage in subsequent litigation.

Prospect of Recovery

If the merits of the claim are good, attention must then focus on whether the officeholder will be able to enforce any judgment awarded or settlement reached. The time to think about this is not after you have secured a favourable result, or even after you have commenced proceedings, but before you issue any proceedings and start incurring significant costs. There is little point in pursuing any claim unless there is a reasonable prospect of securing a recovery of funds/assets from which to pay the costs of the proceedings (including court fees and experts' costs where incurred) and make a meaningful return to creditors.

Unless they have the capability to do something similar in-house, officeholders should consider obtaining a "fit to sue" report, which aims to pull together information from publicly available sources to help the officeholder decide whether it is worth pursuing a particular target. Sophisticated wrongdoers will often have taken steps to ensure that the fruits of their wrongdoing are well hidden or at least not easily recoverable. Assets may be held in trust or overseas, or by third parties with no obvious connection to the wrongdoer. If they decide to pursue a claim, officeholders will need to assess, as early as possible, whether they have the time/inclination/funding to enforce a judgment or settlement if the claim is successful. We take a more detailed look at recovery and enforcement in our next quick guide.

Views of Creditors

Given that the court generally has a wide discretionary power to make any order it sees fit, officeholders will also need to consider who are the likely beneficiaries of any judgment or settlement. We mentioned some of these potential court orders in this quick guide, which gave an overview of insolvency litigation generally. The identity of the claimant (e.g. the officeholder personally or the company in administration/liquidation acting by the officeholder), the nature of the claim and the remedy ordered can all have a bearing on who will ultimately benefit from the claim.

Sometimes, there can be significant overlap between claims and if the claims are successful, the officeholder may need to allocate recoveries to different heads of claim. This allocation could have an impact on whether a particular category of creditor benefits from a recovery or not. For instance, if a sum recovered could be categorised as a book debt, the officeholder will need to consider whether it is captured by a secured creditor's security such that it is not available to the general body of creditors.

For these reasons, the officeholder will need to evaluate the degree of interaction required with creditors. For instance, a creditor who is unlikely to benefit from any recovery made is unlikely to want to risk the existing assets of the company being diluted by costs incurred pursuing litigation. Notwithstanding this, if there is clear evidence of wrongdoing, the officeholder will feel compelled at least to investigate a claim. In such circumstances, it is often helpful for there to be a creditors committee containing a cross-section of differently affected creditors so that the officeholder can make an informed decision on how to proceed.

Whatever the views of creditors and the categorisation/allocation of any recoveries, officeholders will need to ensure that they have a robust paper trail setting out the reasons and thought process for their decisions.

Costs of Claims and Funding

Whether the claims are officeholder claims or company claims brought by the officeholder, insolvency claims are rarely straightforward and are, therefore, often time consuming and expensive. Before embarking on any litigation, the officeholder should have as clear an idea as possible about its likely cost and how this might be funded. This is always difficult in litigation because it is virtually impossible, at such an early stage, to predict what may happen in the future. Is a potential target going to "roll over" and offer a settlement upon receipt of the first letter of demand from the officeholder? Or is the target going to wait until you issue proceedings before discussing a settlement, or are they going to defend the claim all the way to trial?

The estate might have insufficient funds to cover all or any of the litigation costs, and officeholders need to be mindful that they could face an order for security for costs unless they can show that they would be in position to pay costs if the claim were not successful. If there are sufficient assets already in the estate to fund the litigation and there is creditor support, then all well and good. If not, then the officeholder should consider whether to try to obtain adverse costs insurance in the event the claim (or part of it) is unsuccessful, or litigation funding to pursue the claim, or to assign the claim to a third party that has funding to pursue the claim. Even if the claim is successful, it is also extremely unlikely that all litigation costs will be recovered.

The ability to fund litigation costs, and the ability to pay adverse costs if the claim is unsuccessful are one of the key considerations ahead of commencing litigation. There are a number of options that an officeholder can consider, such as funding arrangements, insurance and/or assignment that will be covered in a future guide, but suffice to say that there are many factors to consider when contemplating litigation and care should be taken to ensure that whichever route is taken, it optimises the potential return to creditors while minimising the risk to the estate and the officeholder. It often comes as a surprise to officeholders that in some cases (depending on the type of claim brought) they can be personally liable for the costs.

Likely Timescale

A final consideration to take into account before embarking on the pursuit of a claim is the likely timescale to resolution. Again, at such an early stage, it is impossible to estimate the length of time it will take to conclude because this is dependent on several matters beyond the officeholder's control, such as the availability of evidence (both documents and witnesses); the possible need to seek the court's assistance to ensure the assistance of third parties while investigating the merits of the claim; the attitude of the target in terms of settlement or defending the claim; and the availability of stakeholders (witnesses, experts, counsel and judges) at key times.

It is particularly important to bear in mind that unless a settlement is reached it is likely to take years to bring a claim to trial. It can often take several months to find time in the court diary to list the most straightforward of applications, and therefore progress can be very slow.

All of these factors will affect the timescale of any potential litigation and, therefore, its cost. As well as the direct costs attributable to the claim itself, there will be the indirect costs of having to keep the insolvency open and the costs associated with a live assignment (including ongoing statutory, insurance and monitoring costs, costs of progress reports to creditors and potentially the costs of applying to creditors or the court for an extension).

Given that the officeholder will be "late to the party" in terms of their involvement and knowledge of the case, a careful eye should also be kept on the expiry of limitation periods, which usually run from the date of the officeholder's appointment for officeholder claims but can vary for company claims. Limitation periods also form the subject matter of a future quick guide.

As can be seen from the above, there are multiple factors to consider before a claim is pursued. This quick guide gives no more than a flavour of these factors, but each case will be different and there may be other considerations in play for any particular assignment. It is, therefore, important to give careful consideration to all of these matters and, where necessary, seek assistance from lawyers and other professionals before deciding on a course of action.

Contacts

John Alderton
Partner, Leeds
M +44 788 505 8896
E john.alderton@squirepb.com

Deborah Brown
Partner, Birmingham
M +44 754 511 0790
E deborah.brown@squirepb.com

Monika Lorenzo-Perez
Partner, London
M +44 778 572 0439
E monika.lorenzo-perez@squirepb.com

Charlotte Møller
Partner, London
M +44 788 180 4970
E charlotte.moller@squirepb.com

Chris Roberts
Partner, Manchester
T+44 773 647 9569
E chris.roberts@squirepb.com

Devinder Singh
Partner, Birmingham
M +44 772 139 9625
E devinder.singh@squirepb.com

Rachael Markham
Professional Support Lawyer, Leeds
M +44 754 511 0781
E rachael.markham@squirepb.com