5 KEY QUESTIONS ABOUT LITIGATION

If you need to make a legal claim for your business or yourself, or defend a claim against you, there are many issues to consider. You will need to look at the strength of the evidence, tactics, timescale, whether the case can be settled, and the likely costs. This Guide answers some common questions about the litigation process.

1. DO I NEED A LAWYER TO MAKE OR DEFEND A CLAIM?

Many people are put off making a claim or defending one by the thought of high lawyers' fees. Even if it's pursuing an outstanding debt or making a claim for your business, you might sometimes decide that it's easier to write it off than spend money pursuing it. Even worse, you might settle a claim against you just to avoid the legal costs of dealing with it. If the claim is worth less than £10,000 then the usual rule that 'the loser pays the winner's costs' does not apply, and so even if you win you can end up being put of pocket when you take legal costs into account.

But navigating the court process yourself can be straightforward, especially for simple claims like recovering a debt. Here are some sources of free help and information:

- A website with a useful summary of the small claims court process, which also explains the fees you'll need to pay and how to enforce a judgment (www.gov.uk/make-court-claim-for-money).

- Companies House (www.gov.uk/government/organisations/companies-house). Are you suing a limited company or a sole trader/individual? Is "ABC Plumbing" a trading name for an individual, or a company name? Check on the Companies House website to see if a company exists, and also find out if a company is worth suing, i.e. how strong it is financially.

- Acts of Parliament (www.legislation.gov.uk). The legislation you might need to refer to when bringing a claim, such as the Sale of Goods Act 1979, the Consumer Rights Act 2015 and the Limitation Act 1980.

- Caselaw (www.bailii.org). Link to a database of court judgments, usually in the High Court, Court of Appeal and Supreme Court (or House of Lords).

- Where to start the claim. The court's website for making a claim online, which is cheaper and quicker than on paper/by post (www.gov.uk/make-money-claim).

2. THE LITIGATION PROCESS

This is a summary of the litigation process, both before and after court proceedings are issued. However not every possible stage is included, because each case is different and the particular steps and timetable will vary according to the circumstances.

Pre-action protocols

The courts expect parties to act reasonably in exchanging information and documents relevant to the dispute before court proceedings are even commenced. The intention is to avoid proceedings if possible. If a party fails to follow the relevant pre-action procedure, there can be adverse costs consequences for them. it is always best to seek legal advice to ensure the pre-action protocols are adhered to. There are different protocols for different types of claim (defamation, debt, personal injury, etc.): https://www.justice.gov.uk/courts/procedure-rules/civil/protocol

Statements of case

Each party to court proceedings must prepare documents containing details of their case. These documents (called statements of case, or pleadings) must be filed at court and served on the other party. The main documents are: claim form and particulars of claim, defence, counterclaim and reply to defence.

Statements of case are usually drafted by the parties' lawyers (either solicitors or barristers).

Disclosure of documentary evidence

Disclosure is the process by which the parties make available the documentary evidence in the case (including electronic data). The parties must undertake a reasonable search for such documents, although what is reasonable will depend on the circumstances of the case and the value of the claim.

A party will normally be required to disclose documents that support or undermine the case of any of the parties to the litigation.

Witness evidence

A party's documents may prove the claim or defence, but witness evidence is often also required. Witness statements may also be needed to explain the story behind the dispute or to fill any gaps in the documents. The purpose of the witness statement is to set out, in writing, the factual evidence of a witness. A witness is not allowed to provide opinion evidence. At trial, the witness may be cross-examined by the opposing party.

A solicitor will usually help prepare any witness statements, but it is important that the statement is in the witness' own words. A witness is required to sign a statement of truth confirming the facts and matters contained in the statement are true.

Expert evidence

The court may direct the parties to instruct a expert witnesses (or a single expert between them) or any technical aspects of the claim, e.g. what caused a fire, was a valuation of a property negligent. Expert evidence, unlike witness evidence, will be opinion evidence. An expert will usually provide a written report, and sometimes will also give evidence at trial.

Trial

Parties will usually instruct barristers to present their case to the judge, explaining the law, drawing the court's attention to relevant documents and cross-examining the opposing party's witnesses and expert.

At the trial's conclusion, the judge will make a decision and give judgment. Often, the decision can be delayed to give the judge time to consider all the evidence and write the judgment.

3. CAN I SUE FOR BREACH OF CONTRACT?

A breach of contract occurs when someone fails to do what they have contractually agreed to do. A breach can be difficult to accept with equanimity, even in a business or commercial context. You feel let down and even deceived. You want to get what you agreed in the contract, or even to 'get your own back'. But before deciding whether to take matters further, there are a few matters to consider.

Is there a contract?

For the agreement to be a legally binding contract, there must be an 'offer' by one party which is 'accepted' by the other. For example, Amazon offers to sell you a product by putting it on their website, and you accept the offer by clicking 'buy'.

You and the other party must intend to be legally bound. If a professional kitchen fitter agrees to fit a new kitchen for an agreed price, they clearly intend to form a binding contract. But someone in the pub who drunkenly promises you a million pounds if you score 180 at darts, does not mean to make a legal contract - so you cannot sue them when they refuse to pay up.

If there is offer/acceptance, and the intention to form a legal agreement, then if one party fails to honour an obligation or otherwise breaks the terms of the agreement, there is a breach of contract. Examples of typical breach of contract situations in business are where a customer orders and receives services but fails to pay for them, and where a supplier's goods are below an acceptable standard so a manufacturer cannot use them, or a retailer cannot sell them on to customers.

Proof of the contract

Can you prove that there was a contract? It does not have to be in writing: a verbal agreement is sufficient. But a written contract makes the job of proving it easier. This is why even with simple agreements it is a good idea to have a written trail of evidence, in letters, texts or emails.

Was the contract actually breached?

You must be able to show what the other party's obligations under the agreement were. (Ideally, there will be written Terms & Conditions.) You will have to prove that those obligations were not performed or were not performed to a sufficient standard.

Loss

Have you suffered a loss as a consequence of the breach of contract? Even if there was a breach of contract, it is only worth taking it further if it caused you a loss.

Have you 'mitigated your loss'? You've got an obligation to take reasonable steps to reduce or limit the loss you suffered.

Is it worth it?

If all the boxes are ticked so far, then you may be entitled to compensation, i.e. damages for the breach of contract. The aim of damages is to put you in the position you would have been in if the breach of contract had not occurred. But a final question to ask is whether it is worth bringing a claim or issuing court proceedings.

While many claims are settled out of court, litigation can be expensive and time consuming. It might even cost you more than you lost as a result of the breach of contract. But there are other reasons to bring a claim: as well as wanting to receive compensation, many businesses and individuals pursue a claim on a point of principle, or to put down a marker that they will not accept such a situation. No-one – especially in business – wants a reputation as a soft touch.

4. I'VE GOT A CCJ AGAINST ME! WHAT DO I DO?

Sometimes the first someone knows about a claim against them is when they receive the CCJ. In fact, it is surprising how often this occurs. The obvious question is, "Why did I receive the CCJ but not the court claim form?" Sometimes it's even worse, and you find out that there's a CCJ against you only when you apply for credit or when the bailiff bangs on the door.

A CCJ is usually entered against someone because they do not respond to the court proceedings. Usually this is because the proceedings were sent to the wrong address and so they knew nothing about them.

If you receive a CCJ, the first thing to do is to check whether it has been registered on the official register of judgments (www.trustonline.org.uk/search-yourself). If the CCJ was entered less than 30 days before, it should not yet be registered. If you pay the judgment debt within 30 days it will not be registered at all. The problem with it being registered is that this affects your credit rating.

Next you need to decide if you want to challenge the CCJ. There are two grounds for doing so. Firstly, if you did not receive the court proceedings because they were sent to the wrong address. Secondly, if you have a good defence to the claim, or if it was issued against you by mistake. Regrettably, claims have been issued against people simply because they had similar names to the proper Defendant. The claim is nothing to do with them, and the Claimants have sued the wrong people.

In either case, you need to make an application to the court (called an application to set aside judgment). Some people pay the judgment debt to avoid having it registered, and then decide afterwards whether to apply to have the CCJ set aside.

Finally, you should consider if you need to stop the CCJ being enforced against you. If the bailiff is chasing you for payment, then you can apply to the court for a 'stay of execution' of the CCJ, for instance because you are applying to set aside the judgment.

It is vital to act quickly after becoming aware of the CCJ: if you delay making an application, the court might not be willing to set it aside.

5. WHAT IS MEDIATION?

If you are in the middle of a dispute, it is sometime tempting to rush to issue court proceedings, to try to recoup the money lost or force the other party to do what they agreed to do. But litigation should be seen as a last resort. It can take longer to resolve a dispute through court proceedings than by other routes, and there is no guarantee of recovering all your legal costs, particularly for smaller claims.

An alternative to court proceedings is mediation, a form of Alternative Dispute Resolution (ADR). It is often a quicker and less formal way for parties to try to resolve their differences. It helps to maintain an open dialogue between the parties and makes it easier to preserve or even enhance a future business relationship.

Mediation involves an impartial and unconnected third party – usually a lawyer, surveyor, accountant or engineer (perhaps depending on the nature of the dispute) – meeting the parties to try to bring them to an agreed resolution. The mediator's goal is not to decide who is right and who is wrong. Instead they aim to help find a settlement on terms that both parties can live with.

The parties should enter the process in good faith. Although mediation does not always lead to an agreement, if the parties do reach an agreement at a mediation it is legally binding.

Research by the Centre for Effective Dispute Resolution (a mediation body) shows that 89% of cases entering mediation are resolved during or shortly after the mediation. Even if the parties fail to agree and the case proceeds to a trial, there is still a benefit: they have learned the perspective of the other party. So mediation could be seen as a low-risk method of testing the strengths and weaknesses of a case before incurring the higher cost of issuing proceedings or going to trial.

This Guide is for reference purposes only, and does not provide advice for any particular set of circumstances.

For further information, and to discuss your situation with no obligation, please contact us:

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