

DIRECTORS' BRIEFING



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Suing

● Part of the skill of running a successful business is creating good relationships with your customers and suppliers, so that agreements are kept and problems can be sorted out amicably.

When things go sour, your priority is still to settle the dispute amicably, but there may be times when you have to resort to using the law.

By being clear and professional in your approach, you can minimise the risk, cost and disruption to your business.

This briefing outlines:

- ◆ How to decide whether to sue.
- ◆ The key steps involved.
- ◆ How to choose a lawyer.

1 Is it worth it?

Going to law is expensive and stressful. Right or wrong, do not litigate on a matter of principle.

A How clear is the **legal position**?

- ◆ It may be clear that you have a claim.
For example, if you deliver fault-free goods, on time and in accordance with the order, but your customer refuses to pay — and you can prove all of this.
See **Debt recovery**, FI 20.
- ◆ There may be two sides to the story.
For example, if the contract was unclear or you were partially at fault (eg you delivered late).
- ◆ The legal position may be complicated.
For example, a claim for negligence against your professional advisers.

Unless you are completely sure, take legal advice before starting any legal action.

B Does it make **financial sense**? In straightforward claims, you may be able to make a rough estimate of how much you will be awarded.

- ◆ If you have rejected goods entirely, you could claim a straight repayment.
- ◆ For breach of trading contracts, damages may cover consequential business losses.
- ◆ Losses arising from an adviser's negligent investment advice are calculated on the difference between the investment's supposed and actual values.

Even if you win, you may not get your legal costs back (see box, page 3).

C If you won the case, would the defendant be **able to pay**? Credit information and credit reference services can provide you

FURTHER HELP

There are other Directors' Briefing titles that can help you. These briefings are referred to in the text by name and by the code given to each briefing. For example, the law briefings have the codes LA 1, LA 2, etc.

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DIRECTORS' BRIEFING

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with a credit rating. They can also provide information about court judgments (against the defendant) that have not been paid.

- D** Will you be able to **prove** your claim? In court, you have to prove your case. The defendant does not have to disprove it. Evidence is vital (see **4**).

2 Initial action

Your first objective is to settle the dispute without going to court. Failing this, your objective is to build up clear evidence that you have given the defendant a reasonable opportunity to settle out of court. This evidence will count in your favour when costs are awarded at the end of a court case.

- A** With your legal adviser, **plan** your approach

Advance precautions

Basic precautions will minimise the risk of problems. They can also put you in a stronger position if you do need to take legal action.

- A** Put the key terms of every contract **in writing**.

Although most oral contracts are as binding as written ones, they are much more difficult to prove.

- ◆ Ensure that your written terms are agreed as part of the contract.

- B** Include clauses to **protect** you in your terms and conditions of sale.

- ◆ State that interest on unpaid bills accrues after, say, 30 days. (See **Interest on late payments**, FI 17.)

- ◆ If appropriate, include a clause stating that the company retains ownership of goods and title to them until paid ('Retention of Title').

You can then reclaim the goods if the customer becomes insolvent.

Your solicitor should draft standard terms and conditions for you.

- C** Consider including an agreement to refer disputes to **arbitration**.

Arbitration can be a flexible and comparatively inexpensive way of settling disputes.

- ◆ Ask your trade association if there is an arbitration scheme for your industry.
- ◆ Contact the Chartered Institute of Arbitrators (020 7421 7444 or www.arbitrators.org).

to solving the dispute. Your approach will depend completely on the circumstances.

- ◆ For example, if an individual customer owes you an acknowledged debt of at least £750, and you have ceased supplying the customer, a statutory demand (formal demand in the case of a company) under the Insolvency Act may be the best option.

The demand forms the basis for a bankruptcy or winding up petition. Your customer may have a choice of making an immediate payment or going out of business.

- B** Send your opponent a **letter** stating the details of your claim. Insist that you require satisfaction or a reasonable offer within a reasonable and specified time.

- ◆ This letter will be a key document in your legal case. Seek advice on what details it should include.

- ◆ Say what you will do otherwise (eg go to your solicitor, or issue a claim). Do not make empty threats. If you give a deadline, stick to it.

- ◆ Be aware that the threat of legal action may provoke a counterclaim against you.

- C** If there is no satisfactory response, instruct a **solicitor** — or abandon the claim.

- ◆ Choose good lawyers (see **5**), though costs can be substantial in anything but the most straightforward cases (see **5D**).

- D** Be prepared to **compromise** both before and during any court case. You can settle either in or out of court, at any time before judgment.

- ◆ Decide whether you are prepared to accept payment by instalments (eg using post-dated cheques), or payment of less than the full amount.
- ◆ Consider whether any offer exceeds or matches what you can expect to win.
- ◆ State that the negotiations are conducted 'without prejudice'.

3 Which court track?

Civil court cases are now quicker and less expensive than they used to be.

- A** **Cases are allocated** to a small claims track (claims of up to £5,000), a fast track (£5,001 to £15,000), or a multi-track (over £15,000).

- ◆ Straightforward claims over £5,000 can be allocated to the small claims track, if the court and both parties agree.

► The law is complex. This briefing reflects our understanding of the basic legal position as known at the last update. Obtain legal advice on your own specific circumstances and check whether any relevant rules have changed.

► For an overview of developments in business law in 1999, 2000, 2001, and 2002, see the law briefings LA 7, LA 9, LA 13, and LA 16.

► Many trade associations and business support organisations provide free legal helplines for their members. These can help you to decide your initial course of action.

"If you can't prove something, then you don't have a case. That's why it's always important to confirm everything in writing."

*Teja Picton Howell,
Picton Howell Solicitors*

► For more information on litigation from your opponent's point of view, and more detail on court procedures, see **Being sued**, LA 2.

Insurance policies are available that pay the legal expenses of businesses that need to bring certain legal actions. See **Litigation and insurance**, IN 4.

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- ◆ Claims for £15,000 and less must be issued in the county court. Claims for more than this can usually be issued in either the county court or the High Court. The main exception is for personal injury claims up to £50,000, which must be issued in the county court.

B The small claims track and fast track both use standard, **simplified procedures**, which are explained in a series of leaflets available from the court. In contrast, the multi-track allows the court flexibility to use a variety of approaches, depending on the complexity of the case.

- ◆ In a small claims hearing (only), you do not have to attend the final hearing, provided you submit written evidence to the court and a notice of non-attendance (stating that you wish the court to deal with the case in your absence) at least seven days beforehand.

C Follow all the **legal formalities** to the letter, including any deadlines you are given.

Who pays?

A As the claimant, you usually pay the court fees and expenses (eg for expert witnesses) **during the court case**.

B If you win a case in the **small claims track**, the defendant may have to repay you for the court expenses, as well as any enforcement costs.

- ◆ You still have to pay most of your legal fees.

C If you win a case in the **fast track** or **multi-track**, the defendant generally repays you for the court fees and expenses, and 'reasonable' costs 'reasonably incurred' (which includes legal fees).

- ◆ The court is unlikely to award you more than 60 to 80 per cent of your legal costs.
- ◆ If you lose, you pay the defendant's reasonable costs.

D If you **refuse an offer** of settlement, and later win an equal or lesser amount, you will have to pay some of the loser's costs (provided that the defendant followed the correct procedures).

- ◆ Conversely, if your offer to settle is refused, the defendant might end up paying a higher award and more costs.

Visit www.hmcourts-service.gov.uk for a guide to court fees.

- ◆ Otherwise, you may provide the defendant with valid grounds for obtaining a judgment in default against you, which means you automatically lose the case.

D If you are suing an individual (eg a sole trader), and the claim is for a specific amount, the case is transferred automatically from your **local court** to the defendant's. Otherwise, the case is heard at your local court.

Whichever track you use, you are unlikely to recoup all of your costs, even if you win the case (see box).

4 Evidence

Collecting evidence can be difficult, expensive and time-consuming.

A Collect **comprehensive** evidence. Whatever the claim, without evidence it is worthless.

- ◆ Take the example of a claim for payment for goods delivered to your customer by a carrier. You would need evidence that the goods left your premises intact and were delivered to your customer on time and undamaged.

B Collect evidence **quickly** — witnesses can forget or disappear.

- ◆ Ensure witnesses give objective, accurate statements. Your solicitor will want to interview witnesses and check their statements.

C Get evidence **in writing**. Written evidence can be used at an early stage and carries more weight in court than an unsupported statement.

- ◆ Witnesses may change their story later, or be unable to get it across in court.

5 Lawyers

A Choose a solicitor with **litigation expertise** and a track record.

- ◆ Your existing commercial law or conveyancing specialist is not necessarily an expert litigator.
- ◆ Your solicitor may also recommend a barrister, but many solicitors deal with the court work themselves.

Find solicitors by personal recommendation or through the Law Society (020 7242 1222 or www.lawsociety.org.uk/choosingandusing/findasolicitor.law).

B **Prepare** for the initial consultation. Your

◆ The Law Society's 'Lawyers For Your Business' initiative can provide you with a free information pack and a free half-hour consultation with a participating firm of solicitors (020 7405 9075).

"All evidence is now backed up by a signed statement of truth. If you sign it and it contains false information given deliberately, the consequences can be severe. You could face imprisonment."

David Greene,
Edwin Coe solicitors

"In litigation for sums over £5,000, the majority of the winner's costs are paid by the loser — and lawyers are now much more flexible about the charges applied."

William Whiteley,
Clarke Willmott solicitors

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solicitor's time is your money.

- ◆ Send a letter of instruction before your initial visit, summarising the claim, the facts and the evidence.
- ◆ Enclose indexed copies of relevant correspondence, notes, photographs, sketch maps, and so on.

C Ask for an indication of **how likely** you are to win a court case, and whether it justifies the expense and risk.

- ◆ A good litigator will be able to provide a clear explanation of the legal position and an indication of the likely expense.

D Ask for an initial estimate of **costs**.

Once a case reaches court, costs can be several thousand pounds, even in relatively straightforward cases.

- ◆ Costs are usually based on an hourly rate. In some cases, it may be possible to agree a fixed fee.

In other cases, your solicitor may agree a success fee — although outside personal injury cases (where the outcome is relatively easy to predict) this is rare.

- ◆ Hourly rates can be £500 or more for a senior London lawyer in a large commercial firm. Recommended rates for junior London partners are about £180 to £250. Outside London, rates are lower.

Some of the work will usually be done by less senior, less expensive, lawyers.

- ◆ Barristers' costs are extra. Specialist barristers can cost thousands of pounds per day. You also pay for their written 'opinion'.
- ◆ Court fees are extra.

To keep costs down, agree as much of the evidence as possible with the defendant beforehand, rather than arguing it all in court.

E Ask for **updates** on progress and costs.

Unless you are warned that costs are escalating, the final bill should not substantially exceed the estimate.

- ◆ You can ask for your final bill to be referred to the court to be approved as reasonable.

6 Pitfalls

A You may **lose**, even if you think you have a watertight case.

- ◆ There are defences to even the most straightforward claims.

- ◆ Your legal advisers may have over-estimated the strength of your case or given you bad legal advice.

You are unlikely to be able to claim any compensation from them. But if you have been given negligent advice, you may be able to claim compensation.

- ◆ Witnesses may change their stories or refuse to give evidence.

B Litigation is **stressful** and time-consuming.

- ◆ Your business may suffer if you focus too much on the legal dispute.

C Even with a good case, your opponent may be able to **delay** judgment by taking advantage of procedural rules.

D You may not be able to **enforce** judgment. (This crucial issue is covered in sections 5, 6 and 7 of **Debt recovery**, FI 20.)

- ◆ Enforcement of judgments for £600 or less is carried out by county court bailiffs, who have a relatively low success rate. But you can register any judgment over £600 in a High Court. Enforcement of these judgments is by sheriffs, who are significantly more effective (but potentially more expensive) than bailiffs.

7 DIY litigation

A Once you know the procedures, it may not be worth using a solicitor for claims in the **small claims track** (ie up to £5,000).

- ◆ Suing on unpaid bills is inexpensive and quick. Suing on a cheque, cancelled direct debit or letter of credit is even simpler.
- ◆ Outgoings are limited to court fees, witness fees and expenses, and your time.

B Always get legal advice for cases involving substantial amounts or where the law or facts are **complicated** or disputed.

- ◆ Property law (eg disputes between landlord and tenant) is complicated. Use a lawyer, even if you handle some of the preliminaries yourself.
- ◆ You may need legal advice if you are at risk of a counterclaim. For example, if you sue a supplier of faulty goods, who may then sue you for non-payment.

EXPERT CONTRIBUTORS

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