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.

This briefing outlines:

- How to decide whether to sue.
- The key steps involved.
- How to choose a lawyer.
- Alternative dispute resolution.

1 Is it worth it?

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

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

- It may be clear that you have a claim.
- There may be two sides to the story.
- The legal position may be complicated. Unless you are completely sure, take legal advice before starting any legal action.

1.2 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 may depend on how you would have invested in the absence of advice.
  Even if you win, you may not get your legal costs back (see box, page 3).

1.3 You can claim **interest** on most commercial debts at enhanced rates.

- When calculating your claim you should always ensure that you have included your full entitlement to interest.
- Statutory interest, as well as debt recovery compensation, can be claimed on most commercial debts.
  You can recover interest at 8 per cent above the Bank of England base rate, but the calculations can be complicated. You should discuss this with your legal adviser.

1.4 If you won the case, would the defendant be **able to pay**? Credit information and credit reference services can provide you with a credit rating and information about court judgments (against the defendant) that have not been paid.

1.5 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 will count in your favour when costs are awarded.

2.1 With your legal adviser, **plan** your approach to solving the dispute. Your approach will depend completely on the circumstances.

2.2 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 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. For certain types of cases, (eg professional negligence) there is a specific pre-action protocol which you must follow. The court may impose costs sanctions against you for failure to comply with the pre-action protocol.

2.3 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 **5.4**).

2.4 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, or payment of less than the full amount.
- Consider whether any offer exceeds or matches what you can expect to win. Make sure you understand your potential liability for costs if you reject an offer but fail to win more in court.
- Consider whether making your own formal offer to settle (by serving a Part 36 offer) could save time and costs. Take legal advice.
- State that the negotiations are conducted 'without prejudice'.
- Most cases turn on the court's interpretation of disputed facts or points of law, and therefore litigation carries an inherent risk, even if you think that you have a very strong case. You should always factor this risk and the likely irrecoverable costs which will be incurred into the settlement equation.

2.5 Before issuing court proceedings, it is essential to consider if your case might be settled by **mediation** (formal negotiations assisted by a mediator), which may save time and legal costs.

3 Which court track?

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

3.1 **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 (more than £15,000).

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

3.2 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.

➨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.

➨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.

➨Insurance policies are available that pay the legal expenses of businesses that need to bring certain legal actions.

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

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

3.4 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 your costs, even if you win the case.

4 Evidence

Collecting evidence can be difficult, expensive and time consuming.

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. But 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 your 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).

- 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.

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

4.2 Collect evidence **quickly** — witnesses can forget important details or disappear.

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

4.3 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

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

- Your existing commercial or conveyancing solicitor is not necessarily an expert litigator. Find solicitors by personal recommendation or through the Law Society (0870 606 6575).

5.2 **Prepare** for the initial consultation. Your 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 etc.

5.3 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.

5.4 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.
- Hourly rates can be £500 or more for a senior London lawyer in a large commercial firm. Rates for junior London partners are about £200 to £360. Outside London, rates are lower.
- Barristers' costs are extra. Specialist barristers can cost thousands of pounds per

➡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).

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.

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

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

6 Pitfalls

6.1 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.
  Unless you have been given negligent advice, you are unlikely to be able to claim any compensation from them.
- Witnesses may change their stories or refuse to give evidence.

6.2 Litigation is **stressful** and time consuming.

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

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

6.4 You may not be able to **enforce** judgment.

- Enforcement of judgments for £600 or less is carried out by county court bailiffs, who have a relatively low success rate.
  Any judgment of more than £600 you can register in a high court. Enforcement Officers who enforce these judgments are more effective (but potentially more expensive) than bailiffs.

7 DIY litigation

7.1 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 a cheque, cancelled direct debit or unpaid bills is inexpensive and quick.
- Outgoings are limited to court fees, witness fees and expenses, and your time.

7.2 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.

8 Alternative dispute resolution

There are a number of different methods of resolving disputes without resorting to litigation. The advantage of Alternative Dispute Resolution (ADR) is that it is generally regarded as being quicker and cheaper than court proceedings. They are also more likely to preserve any future relationship between you and your customers or suppliers.

8.1 The main attraction of this approach is the **flexibility** it provides.

- You can agree how formal the procedure should be and who should act as the arbitrator or mediator. In this way you can control costs.
- Disputes can be resolved more quickly than in court.
- The process can be less confrontational than going to court.

8.2 One form of dispute resolution, if both parties agree, is **arbitration**. This involves using a professional arbitrator to resolve the dispute. You can make the arbitrator's decision legally binding.

- In commercial disputes, arbitration is rarely used for claims below £20,000, due to the costs involved. The main exception is 'paper arbitrations' (where the arbitrator's decision is based on written evidence that both parties have submitted), which can be used for claims as small as £2,000.
  Contact the Chartered Institute of Arbitrators (020 7421 7444 or www.arbitrators.org).

8.3 An alternative to arbitration is **mediation**, where a professional mediator works with both parties to help them reach an agreement. In many cases, matters are resolved before they reach trial, avoiding the need for court proceedings.

Published by BHP Information Solutions Ltd, Althorp House, 4-6 Althorp Road, London SW17 7ED
Tel: 020 8672 6844, www.bhpinfosolutions.co.uk