

## Handling A Dispute

This briefing sets out the actions a business should take when a dispute or potential dispute arises.

It applies to any dispute or incident, whether started by the business or brought against it (for example, a dispute with a trading partner or a prosecution by a regulatory body).

## Does the business really want to be involved in legal proceedings?

It is very important to understand what the business is getting involved in. It is almost always better to find a commercial solution to a dispute. Key considerations:

- The value of the claim, the costs involved and the commercial implications of success or failure. Even if the business wins, it will not recover all of the legal costs it has incurred. Especially if the matter falls within the Small Claims Track whereby it is on each party to bear their own costs.
- What is the business is trying to achieve from the litigation process?
- The time, cost and management commitment involved, most of which is incurred early on in the process.
- How it will affect ongoing commercial relationships?
- Whether the mere existence of a dispute will create difficulties in bidding for new business or otherwise adversely affect the business' reputation.
- Whether there is a commercial advantage to the dispute (for example, by showing that the business is serious about trademark infringement).
- What the effect will be for both parties if the dispute is made public?
- Whether the other party will be able to pay up if the business wins? In the event you win your dispute and the Court award you a judgement – what prospects do you even have of enforcing the monies owed to you?
- All litigation is to some extent speculative (for example, how will the witnesses perform in the witness box?).

## Is it possible to negotiate a settlement?

- A business should not consider it a sign of weakness to approach the other side to explore the chances of a settlement. This can be done at any time during the litigation process, even during a trial. Settlement negotiations facilitated by a neutral third party (known as mediation) are increasingly popular. Settlement between two parties is encouraged by the Court in line with Civil Procedure Rules.
- Always take legal advice first to ensure the settlement discussions are conducted on a "*without prejudice basis*". This means that anything said about the dispute during the settlement negotiations or in any written settlement offer cannot be used later at the trial. This protection only applies to statements made purely in an attempt to settle the case.
- Consider who should handle any negotiations. It is generally advisable to appoint one person with overall responsibility.

- If an offer is made, the business should consider its present-day value, bearing in mind how long it will take to get to trial and the potential cost of litigation.

### **Practical steps to take when a dispute or potential claim arises**

- Take legal advice as soon as possible after an incident occurs.
- If the business receives any formal documents requiring a response within a specified time, take legal advice immediately.
- Do not leave everything to the last minute. There are time limits which a business will need to comply with. Ensure the business:
  - knows which time limits apply; and
  - has enough time to comply with them.
- Avoid talking to the other party without having a lawyer present. It is important to avoid saying something that may be used against the business at a later date.
- Do not admit anything or agree to settle without taking legal advice. If the business is forced into a discussion without legal advice, do not admit anything or agree to settle.
- Limit internal discussions to those with a real “need to know”. However, ensure that anyone within the business with day-to-day contact with the other party is aware that there is a potential dispute.
- Do not communicate with any external party (for example, a trade association) without taking legal advice. Do not send documents relevant to the case to external parties or ask them to send them to the business without taking legal advice.

### **Do not destroy, delete or amend any relevant documentation**

- A business should not destroy, delete or amend any documents or media containing information relevant to the case (for example, notes of conversations, diaries, e-mails, photographs or tapes).
- Suspend any routine destruction process that the business may have in place.
- Ensure everyone with access to information relevant to the case is immediately notified not to destroy it and to be careful when creating new documents.

### **Be careful when discussing a potential dispute or preparing a report on an incident.**

Businesses may have to show embarrassing or damaging documents to the other party or the investigating body as part of legal proceedings. Therefore:

- Always consider whether a written document needs to be created.
- Think about what is being recorded and how it would appear if it was read out in court. Take legal advice first if it is likely to contain confidential or sensitive material.
- Never speculate, offer opinions or make critical remarks: simply stick to the facts.
- Remember that e-mails are documents, just like letters.
- Only send the document or e-mail to those who really need to see it.

A business may have to implement improvements or changes in practices following an incident, implicitly showing that previous practice was flawed. Take legal advice to find the best way to do this without prejudicing any possible litigation.

### **Protected communications**

- Communications between a business and its legal advisers do not usually have to be shown to the other side or regulatory body. They are protected by the legal concept of privilege and the Solicitor's general duty of client confidentiality.
- However, some communications are not protected. For example, business advice given by a legal adviser or documents drafted by employees to provide information to the legal advisers so they can give legal advice. Marking a document "privileged" or "confidential" or copying it to a lawyer does not, in itself, make it privileged or confidential.
- Privilege and confidentiality can be lost if the privileged or confidential information is distributed or copied too widely. Only circulate it on a real "need to know" basis and never copy it externally without taking legal advice beforehand.

### **Is the business insured?**

Check the business' insurance policy to see if it is an insured claim. If it may be, notify the insurers immediately and follow their claims procedure, otherwise the insurance claim could be invalidated. The business may need to get the insurance company's consent before taking any action. It is always best to gain the approval of the insurance companies scope of cover before commencing work as you do not want to be left to pay a bill you did not anticipate!

### **Establishing the case**

- Evidence. Locate and preserve any relevant materials as soon as possible.
- Witnesses. Identify anyone who may be relevant to the case and, therefore, may have to give evidence. Are they still employed by the business and, if not, can they be traced? Contact the business' legal advisers immediately if there is any reason why any witnesses might not be able or willing to give a statement (for example, if they were dismissed or are ill). Here at Wilson Browne, we have excellent connections with expert trace agents who can work on a 'no trace, no fee' basis to help track down individuals.
- Other parties. Tell the business' legal advisers if there is any other party who may be liable or should be involved in the case (for example, was the disputed work sub-contracted?).
- Assets. Inform the business' legal advisers if the other party may consider disposing of its assets so that it cannot pay if it loses. A business may be able to obtain a court order to secure its claim. Also consider where the other party's assets are located.
- Management time. Keep a record of management time taken by the case. It may be useful to construct a timeline of events.
- Case review. Review how the case is going on a regular basis. Consult all areas of the business that the dispute is likely to have an impact on.

**For further information or advice please contact our Specialist Team on 0800 088 6004**

Last updated July 2021