



Dispute Resolution

Taking the plunge into the small claims pool

The prospect of bringing claims on behalf of your business or defending a claim brought against the business is seen as daunting and expensive. An immediate thought is that litigation will inevitably involve hours of downtime away from your business, endless meetings with lawyers and attendances at court.

Access to justice is an important tool, although often one of last resort, for smaller business enterprises. A typical scenario might be discovering that your business has been supplied with defective goods or goods of the wrong description. The company who supplied them may not agree to requests for a refund and worse still your business suffers losses because you are unable to manufacture / deliver goods ordered by your customers since you have not been supplied with the right materials. This is a double blow for your business - you are out of pocket with your supplier and incurring losses and goodwill amongst your customers. Is taking Court action the answer?

Thankfully, the Courts and the lawyers using them have been working hard to implement regimes which add up to much more user friendly and often cost efficient resolutions of legal disputes. This is particularly so for "Small Claims":

A "Small Claim" is any claim with a value of £5,000 or less (excluding interest and legal costs). The procedure is deliberately simple and streamlined. Most towns throughout England and Wales have a Small Claims Court (usually within the County Court



buildings). Defended "Small Claims" cases are generally resolved within 16 weeks of a Defence being lodged. 2 weeks prior to the final hearing the parties are usually required to send to the Court and the other side statements of witnesses on whose accounts of events they rely together with any documents about the case which they wish to refer to. This open approach means that there ought to be no nasty surprises at the final hearing. The hearing itself usually takes place in a Judge's office (called "Chambers") rather than a formal courtroom. This enables the hearing to be in private and much more informal. You do not have to be represented by a lawyer unless you

choose to be.

The general rule in Small Claims cases is that the winner will get their fixed expenses of taking out the case back from the losing party. Essentially this means the fees payable to the Court to start off the case (known as "issue fee") although other expenses may also be payable. If you lose your case you won't have to pay the other side's costs thus making Small Claims a relatively low risk procedure.

If a judgment is made in your favour against the other party then they have 30 days in which to pay before the judgment is recorded in the County



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Court Register of Judgments. This is a powerful point to be made to the losing party because an entry in the County Court Register will seriously hamper their ability to obtain business and / or personal credit terms. Judgments can also be enforced by methods such as Court Bailiffs taking a debtor's goods or, in cases over £750, taking steps to bankrupt the other party (often the threat of the latter stimulates payment!).

For those contemplating litigation of a claim under £5000 or finding themselves being thrust into defending such a claim, the message is that the Small Claims procedure is an open, informal one designed to avoid nasty surprises at the final hearing and, for the winning party, delivering the powerful remedy of a Court Judgment.



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Bouncing cheques

In the UK, 6.5 million cheques are processed each day, of which 32,000 will bounce. For any high value transaction, it clearly makes sense to insist upon payment by automatic transfer of funds to your bank, which can be arranged at relatively little cost.

Often, however, this may not be feasible, especially where the transaction is based upon your business providing credit to your customers. If you bank a cheque you receive from your customer, and place it on special clearance, this will involve cost, but does not guarantee that the cheque will clear. If your customer offers you a cheque which is not met on presentation at the bank, the law, via the Bill of Exchange Act, enhances your rights as a creditor, making it very difficult for your customer to dispute your claim. To take advantage of those statutory rights, it is essential that a notice of dishonour is immediately sent to your customer,

informing them that unless they provide you with guaranteed replacement funds, you will use the cheque against them in evidence.

It is also important to keep the returned cheque safely in your possession. If legal recovery proceedings are issued, it will need to be produced in evidence if a defence to your claim is filed. Subject to a number of very limited circumstances, there is no defence to a claim based upon a dishonoured cheque. There are ways of getting around a debtor's attempts to delay the proceedings with a spurious defence. We can help!



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The importance of the employee contract

In October 2004 the Government introduced penalties for employers who fail to provide "written particulars" to their employees. Despite this it is estimated that almost half of UK employers cannot be certain that all of their employees have in place sufficient employment documentation to meet their legal obligations.

For many years employment legislation has required that employers provide a written document setting out prescribed information regarding their terms and conditions of employment to their employees. This includes information relating to their job title, pay, place of work, pension, holidays and sickness pay entitlement. These written particulars must be supplied to all employees within two months of the commencement of

their employment, provided that they work for one month or more.

A failure to provide written particulars to an employee can result in a penalty of between two and four weeks' pay. But there could be much more detrimental consequences for defaulting employers. The law now prescribes that the employer must provide within a statement of written particulars details of the procedure it will follow when dealing with disciplinary matters, dismissals and grievances. If no statement of written particulars has been provided, and therefore no details of any such procedures are set out in writing, it is highly likely that an employer will fail to follow a correct procedure. The impact of this is that an employment tribunal could increase any award made against an employer by up to 50%. Such an increase

in award could cause significant impact on smaller businesses.

It is advisable for companies of all sizes to ensure that they are meeting these stringent rules in respect of both new and existing employees. They should ensure that the written particulars are provided to employees at the right time and are drafted in such a way that whilst legal compliance is met, the terms provide both flexibility and commercial efficacy.



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Tips for success

How you can work with your franchisor to make the relationship work

Building a successful franchise is not just about money. It's about creating a winning partnership with a franchisor. Here at Smith Partnership we have extensive experience of the various commercial issues encountered by franchisees. What should a franchisee be aware of which will increase the chances of success?

The franchisor will be looking for specific personal attributes that allow them to build a relationship successfully. In order to be successful there are a few key elements to consider:

Enthusiasm for the brand

Firstly and most importantly, applicants will need to be passionate about the company to be successful. Great enthusiasm not only for the concept but also for the future of the company as a whole is essential. Franchisors will expect franchisees to have an understanding of the market, location/territory, competitors and

the history of the company itself.

Expect a realistic turnover

It's important that both parties are fully aware of the cost implications and enter into an agreement with their eyes wide open. This means putting a detailed plan together predicting profit, assessing target turnover figures and of course agreeing the initial input and sourcing financial support where it is required. A realistic turnover, particularly when the company opens, will enable you to manage both your own expectations and those of the franchisor.

Communication is key

The foundation for a great relationship with a franchisor lies in successful communication. It's a good idea to put a plan together to ensure regular meetings and discussions with your franchisor and to formalise the team reporting system.



Don't make the decision lightly

Finally, if all goes well remember that taking on a franchise is a life-changing decision. Meeting the franchisor, seeking out locations for retail business, putting together a communication plan all take time and are just a few of the necessary steps for building the business.

As a franchisee you are not running an entirely independent business. There will be certain boundaries, standards and guidelines that must be adhered to. The right legal advice along with your commitment and dedication will ensure you are a great success.



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Driving Bans on the Up

With the recent proliferation of speed detection devices, it is believed that approximately 1.8 million road users will have penalty points endorsed on their driving licence in the next 12 months. There is no doubt that this is a significant issue for those who employ people in a driving capacity or those who are self employed or employed and need a licence to be able to continue with their employment.

Any driver who accumulates 12 points for offences committed within a three year period is liable to be banned for a minimum of 6 months and for many therefore this is a real occupational hazard as every speeding offence is endorseable with a minimum of 3 points irrespective of the speed rising up to 6 points on a sliding scale. Therefore, it is very easy to see why a significant number

of people will face a potential driving ban and financial difficulty.

Such disqualifications lead to untold cost for all concerned. Franchisors with employees are faced with a decision of either redeploying in a non-driving position or dismissing the employee. In either event it will often involve additional expense in retraining a new employee or hiring temporary staff. For the self employed or employed, it could lead to the loss of job and all the financial considerations that flow from that.

However, there are things that can be done to improve the situation. Each speeding offence attracts 3-6 points on a sliding scale and it is worth putting some effort in at the early stages to ensure that the minimum number of points is endorsed. A fixed penalty will

automatically attract 3 points but Court appearances are not so restricted. Expert help at the Court can prove invaluable.

Similarly, a ban can be avoided when 12 points are accumulated if it can be established that "exceptional hardship" could be caused by the ban. Strictly speaking, the loss of employment or business on its own does not qualify as exceptional hardship but help from an experienced road traffic solicitor would certainly increase the chances of making a successful argument on this ground.



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Check the terms of the lease

A new franchisee business may choose to either purchase the freehold/leasehold of a property, or in the alternate come to a temporary occupation arrangement under the form of a licence to occupy property.

Whether you decide to purchase the freehold or take a lease will of course be determined by availability, costs and your overall business strategy.

Most franchisees tend to take a lease of property. The advantage of the lease is that it is inherently flexible and allows you the means to negotiate its provisions to dovetail the requirements of your business plan, which could be crucial to the success of the business.

It is in the area of the negotiation and advice to the franchisee where the skills of the Solicitor are relied upon. The Solicitor is best positioned to provide you the appropriate advice at the right time. In particular with regard to:

- The length of the term of the lease can have an adverse effect on the payment of stamp duty land tax;
- There will be no scope to legitimately terminate the lease early, unless it is negotiated into the lease;
- The lease may contain a rent review clause which may unfavourably be drafted in favour of the landlords hence producing a high market rent;
- You will not be able to transfer the lease unless such provisions are incorporated;
- Notwithstanding, the lease being completed, if the property does not have an authorised use under planning law, your occupation may be illegal!

The above are a few simple illustrations of potential problems you may face as a franchisee. If these problems are not

addressed at the initial stages they could hit you at the moment you least expect or when the business is going through a quiet period. Ultimately, if these issues are not addressed they could affect the viability/success of the business.

Therefore, the importance of obtaining legal advice can not be over emphasised. It is essential you obtain sound legal advice at the appropriate time, on the lease, and its terms before committing yourself to purchasing the business. We have the specialist skills and knowledge to assist you in dealing with these potential problems and many more.



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