HUGHES ENTERPRISE LAW PRACTICE
GENERAL INFORMATION FOR CLIENTS INVOLVED IN A DISPUTE

Handling your dispute

We are committed to achieving a worthwhile, practical and cost-effective outcome which is satisfactory to you. If we can do this without going to Court, by negotiation, mediation or another form of dispute resolution, we will do so. We set out below the requirements and obligations of litigation so that you can understand what will be expected of you.

Cost benefit analysis and risk assessment

This sounds frightening and it can be! Litigation is often described as "an adversarial process" – two sides are in conflict. It is therefore unpredictable both as to outcome and as to cost. At the beginning and at regular intervals we will consider with you what you can hope to achieve by litigation, what this may cost and what the likely net benefit may be to you. If appropriate, we will also review what the other alternatives may be. In addition, we will inform you of the "downside" risks, including the potential liability to pay the other party's costs. If we doubt that it makes financial sense for you to pursue the case, we will tell you.

It is important to note that the prospects of success, anticipated costs and other risks can change radically during the progress of the case as the evidence unfolds. Sometimes the law can change as well!

Legal charges and expenses

In the first place you are responsible for paying your own legal bills. Even if the Court orders your opponent to pay your costs, you cannot count on being repaid.

The Court may only order part of your costs to be paid. In addition, the Court has powers of summary and detailed assessment which are very likely to result in your opponent being required to pay you considerably less than you have to pay us for the work we do for you.

In particular, your opponent will not be ordered to pay for work you ask us to do for you which is not necessary to progress the case, nor for excessive consultations with us, nor for some aspects of the work which we may charge you for such as reading letters in.

In any event, you have to bear in mind that the opposing party may not have the money to pay, could become insolvent or only have assets which, if traceable at all, can only be pursued by incurring further cost.

If your opponent is legally aided, you may not recover any of your own legal charges and expenses, even if successful.

Most litigation requires a considerable personal time contribution from the client. You are unlikely to be able to recover for the value of the time and expense of working on your own case and instructing your lawyer.

If you are unsuccessful with your case, the probability is that you will be ordered to pay charges and expenses incurred by your opponent, as well as your own.

You should only instruct us to issue and serve proceedings if you are prepared to take the case to a trial and have financial arrangements in place which allow you to afford to do so. If, for any reason, for example a change in the merits of the case or a lack of finance, you cannot, or do not wish to proceed to trial, you may have to "discontinue" the case. If you do this you automatically become liable to pay the other party's reasonable costs and disbursements up to that point in addition to your own.

Use of barristers and other third parties

We may recommend to you that some of the work on your case should be handled by "counsel" (a barrister). If so, we will seek your agreement. Unless counsel is working under a conditional fee arrangement, we will need payment from you before work is done by counsel.

We may also need to have work done by other third parties on your case. These might include expert witnesses to prepare reports and costs draftsmen to prepare costs estimates and the detailed forms of bill required by the court. Normally, we would expect to obtain your agreement to instruct such people but an urgent situation might prevent it.

We have to reserve the right to require that you retain the experts directly and assume responsibility for their fees or to require a payment from you on account of the fees of any third parties before these are incurred.

Information and documents

We will have to ask you for information to help us run your case. Time limits in litigation mean that it is important that you do not delay in supplying that information to us. In addition, it is vital that you tell us if you think that the information is not complete or is inaccurate in any way.

The Court rules which lawyers and their clients have to comply with are strict about anything which might be evidence in the case. All paperwork, records and notes relevant to the case, including all material produced or stored electronically on computer drives, backup tapes and other storage devices, audio tapes, PDAs and mobile phones, however damaging to your own case or commercially sensitive to your business, must be kept preserved safely by you (or by us) and may need to be made available to the other side. The only exception involves the legal advice you receive from us. It is particularly important that this evidence should not be marked, altered or otherwise tampered with in any way. In the case of electronic evidence, this may mean that the information should not be accessed at all without an expert. The rules of "disclosure", as it is called, require you to satisfy the Court and sign a certificate that you have conducted a reasonable and proportionate search to locate all documents which could be relevant. There are penalties and sanctions for a failure to do so.

Although many documents produced in contemplation of litigation may be "privileged" from production to the other party (i.e. copies do not need to be provided), this protection does not necessarily apply to all documents created such as board minutes and other internal management reports. If in doubt, please consult us.

The litigation process

As a result of the radical change in the civil procedure rules which took effect in April 1999, which were intended to change the whole culture and conduct of litigation, we must bring to your attention the following points:

- The issue of Court proceedings is to be seen as the "last resort". Attitudes such as "we will see you in court" or "issue the writ first and talk later" will not be tolerated by the Courts. Deliberate delaying tactics may be penalised.

- The Court will be taking an early view of the strength of your case and will always try to be aware of the proportionality of the legal costs compared to the benefit of the potential outcome.

- Pre-action "protocols" require a "cards on the table" approach with information and evidence being exchanged at an early stage. The use of joint instructions to a single expert will be expected to explore every reasonable approach to negotiation or mediation of the dispute. A failure to do so can be punished by the Court when it comes to Orders for payment of legal costs.

- Settlement offers (known as "Part 36 offers") require careful discussion between lawyer and client and can have considerable financial significance.

- All of these steps can help to avoid a long, drawn out Court case but they do mean that investigation of the facts and evidence and analysis of the law has to be done more fully and earlier than previously and this does "front-load" the legal charges for which you are responsible.

- If Court proceedings have to be issued, the relevant Judge effectively takes control of how the case is to be conducted. Some have more ability in this "case management" process than others. They have wide-ranging powers and their decisions are bound to be unpredictable.

- Where applications have been made to the Court, the Judge will normally assess a figure for costs and order these to be paid by the loser within 14 days. This is a major change from the previous system. However desirable it may seem to be to make applications to the Court, we will carefully consider them with you so that you can decide whether you are prepared to accept the possible risk of such a costs order being made.

- This approach of caution and co-operation may conflict with the wishes of some clients to "bluff and bully". In advising you, we will have to warn you of the results of incurring the Court's displeasure – and perhaps being prevented from continuing from your case as you would wish.

- Business clients need to appreciate that there will be more involvement by them at an earlier stage, for example, in searching for documentation and verifying the truth of documents and of witness statements. You, with us, will have to meet strict timetables or risk your case being struck-out by the Court. You may have more pressing commercial problems to which you feel you should give priority over our need for help from you on litigation involving a dispute from the past. The Courts will not allow us to buy you time. If you get started on the litigation process – as claimant or defendant – you must commit yourself to it.

Do not view all this as "doom and gloom". The current litigation process is designed to offer the prospect of speedy resolution of disputes with tight control of the legal costs involved. although these ideals cannot always be achieved the process does place obligations on both lawyer and client to comply with the rules, even if some of them seem unwelcome at times.

We hope that this note is helpful and we will be happy to explain any aspect more fully to you. In the meantime, we look forward to working with you and towards a satisfactory outcome.