

## Changes to the Civil Justice System and the Implications for Businesses in the UK

**With the Government looking to create a more transparent, quicker and accessible justice system in England and Wales, Jane Fowler, Managing Director of Aquila Advisory, the boutique forensic accounting company, discusses the proposed changes to the civil justice system and explains how they could have widespread implications for businesses involved in legal disputes.**

Our civil justice system is there to help businesses and individuals claim damages when loss is suffered. So why do so few businesses use it? When we think of the civil justice system we probably think of personal injury claims and claims for unfair dismissal, but do we automatically think about how the justice system can help businesses recover their losses or do we think of it as a costly, time consuming, confusing beast of a system only to be tackled in extreme circumstances?

The last time the civil justice system was reviewed, in 1996, by Lord Woolf, he identified a number of principles that needed to be met. The civil justice system should:

- Be *just* in the results it delivers
- Be *fair* in the way it treats litigants
- Offer *appropriate procedures* at a reasonable cost
- Deal with cases with *reasonable speed*
- Be *understandable* to those who use it
- Be *responsive* to the needs of those who use it
- Provide as much *certainty* as the nature of the particular case allows; and
- Be *effective*: adequately resourced and organised.

As a result of his review changes were made to make the justice system easier and cheaper to access. One of the main changes was to set up a small claims system and a fast track for less complex cases. These changes have been successful in providing resolution in claims of small value. Under the current review these aspects of the justice system are being expanded to enable even greater access to a cost effective method of recovering losses.

### Key measures being implemented

Within the County Court system there are three tracks to which a case can be allocated, based primarily on the financial value of the claim, the Small Claims Track, the Fast Track and the Multi Track.

#### Small Claims Track

The small claims is the normal track for any claims that has a financial value of not more than £5,000. In the current review this is to be raised to £10,000 and possibly eventually raised to £15,000.

Under the new proposals, all small claims will automatically be referred to the Small Claims Mediation Service, though mediation will not be mandatory.

According to the Ministry of Justice, of the 10,000 cases heard by the Small Claims Mediation Service in 2010, the majority of which were dealt with over the phone, 73 per cent were settled. It is hoped that in making referral to the mediation process automatic rather than opt in, that mediation will be used in the majority of the 80,000 disputes that pass through the small claims track each year, freeing up Judges to consider the more complex cases and limiting costs for the parties to the dispute.

Small claims cases going forward are not expected to require comprehensive legal preparation and, as is the case now, don't require either the claimant or the defendant to have legal representation. However, some claims towards the upper threshold limit of £10,000 and certainly £15,000 may benefit from having legal representation, rather than risk losing the opportunity to receive damages through poor preparation of their claim.

The reforms will also allow the judiciary to refer business-to-business disputes and other suitable cases with a dispute value of more than £10,000 to the small claims track, with the option of referring more complex cases under £10,000 to the fast track if that is considered more appropriate. This will lead to cases being placed in the court system in the track most relevant to its needs.

### Fast track

The fast track is the normal track for any claim that has a financial value of more than £5,000 but not more than £25,000 (provided any trial will not take longer than one day with restrictions on expert testimony). For claims, other than personal injury claims, the limits will increase to a minimum of £10,000 and a top limit of £100,000. In addition to this, the limit for equity cases relating to property values will rise from £30,000 to £350,000.

As these cases are also heard in the County Court legal representation is not required, but highly recommended.

### Multi track

Currently the multi track is the normal track for any claim that has a financial value of more than £15,000, suitable for complex cases or case of high value, which are likely to involve the most pre-trial preparation. These claims can and often are referred to the High Court with legal representation a pre-requisite. Other than using judicial discretion, the new reforms will see the minimum claims value allocated to the High Court as being £100,000 (£350,000 in equity cases).

By removing a large proportion of smaller cases to the small and fast track options, those cases allocated to the Multi Track route should reach the trial stage sooner than previously experienced, offering swifter compensation, easing the financial burden on businesses.

So with the proposed changes making access to the legal system more cost effective, how can businesses use the courts to assist them in the recovery of losses?

### Shoplifting and Employee Theft

Shoplifting, or stealing from your employer, is of course theft, and that is a criminal offence. But they are also both a civil wrong, or what is known in civil law as a 'tort'. Under civil law, a party can use the civil courts to try and recover - as damages - any losses arising directly from the commission of a tort.

So, in the case of shoplifting or employee theft, a business could use the civil courts to try and recover both the value of any goods or cash stolen (where not recovered intact), and any 'consequential losses' that can be shown to be directly attributable to that particular incident of shoplifting or employee theft such as cost of investigation, time lost in interviewing other staff members and management time.

## Criminal damage

A relatively small percentage of incidents of criminal damage at business premises result in any criminal prosecution. Even in cases where there is a criminal conviction, invariably, no compensation is ordered. Where compensation is ordered, the maximum is the value of the primary loss - items stolen. It is not the remit of the Criminal Courts to order compensation for other business losses, which arise from the internal costs of investigation and apprehension, and disruption to the business.

Again criminal damage has its civil counterpart and businesses can therefore turn to civil law remedies as a means to reduce criminal activity and as a means to recoup some of their losses. The lack of criminal prosecution is no hindrance to bringing your own claim. With a lower burden of proof in the civil courts to the criminal courts it may even be possible to bring a civil action where there is insufficient evidence for a criminal prosecution.

## Non-performance of contracts

In relation to non-performance of a contract or breach of contract, businesses may want to seek either damages for the non-performance/ breach or force the other party to complete the contract ie apply to the court for an order of "Specific performance". You will not be able to seek both performance and damages.

The aim of an award of damages is to place the wronged party in the same position as they would have been in if the contract had been properly performed. The amount of damages to be paid is the loss that the wronged party could be expected to suffer as a reasonable consequence of the breach. In addition, damages are payable if it can be proved that the party in breach of the contract knew that the other party would suffer a special or unusual loss if the contract was breached.

Specific performance can be awarded when the claimant can prove that to have the contract completed on its original terms is the only way to avoid a situation of loss. This remedy is usually reserved to force the sale of land or other unique chattel.

## Disputes over debts

When looking to recover debt, legal action should be a last resort. But if you are at that stage then you should understand the options and choose the correct legal route. Before going ahead with debt recovery, consider what you will get out of it in the end.

You will obviously lose the customer and you can't be certain of receiving the money owed. Credit reference agencies can give you a credit rating for the defendant and details of any unpaid County Court Judgments. Even if you win judgment, the customer is required to pay. But if they do not pay up, you will then have to take steps to enforce the judgment. However, the current reforms include measures aimed at improving the enforcement of court judgments so that more creditors receive what they are owed.

## Other changes to the Civil Justice system

### Modernising and streamlining the County Court system

A single county court is to be introduced. This will allow claims to be processed electronically and to then be allocated across neighbouring courts according to demand. Restrictions will be lifted on High Court judges sitting in County Courts while waiting to take cases in the High Court. These measures should speed up the court proceedings leading to earlier resolution and restitution.

Extending a web-based scheme which controls legal costs for the majority of personal injury cases

The portal scheme will now apply to employer and public liability personal injury cases and road traffic accident cases worth up to £25,000 - up from the current £10,000 limit.

**Many of the more potentially interesting changes floated in the original consultation paper, such as greater use of telephone hearings and more cases determined on the papers alone, have been left on the back-burner, at least for the time being.**

**When faced with, or considering legal action, taking legal advice at the earliest possible stage is strongly recommended.**

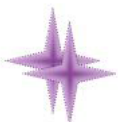
**At Aquila Advisory we can help with conducting the initial investigations, preparation of reports for the court and assistance in negotiations.**

**Asset protection and loss prevention is a growing area of risk management strategy and civil recovery is a key factor in this strategy.**

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