



Talking point

LitCast – litigation and dispute podcasts

Series 1, Episode 1

This series focuses on the pre-action stage i.e. before a claim is formally served. In this first episode we discuss the following:

1) Is there a contract?

- This may be written, oral, or a mixture of the two;
- Which parties' terms and conditions form the basis of the contract;
- Has the contract been varied;
- Has the contract expired?

2) Has that contract been breached?

- Express v implied terms;
- Is the breach continuing or has it been rectified?

3) If so, are there clauses you need to be careful of?

- Is there a dispute resolution clause?
- Is there a jurisdiction clause?
- Is there a notice clause?
- Limitation periods.

4) Establishing what losses you have suffered

- What compensation should be paid to put the business in the position it would have been if the contract had been performed?
- Direct financial loss, loss of profits, loss of goodwill/reputation;
- Recoverable losses v non-recoverable losses;
- Limitations and contractual restrictions on recovery;
- Mitigation of loss;
- Contributory negligence.

5) Document retention

- Duty to retain company and individual employees' records once on notice of a dispute;
- What 'records/documents' encompasses;
- Privilege;
- Be mindful of potential witnesses leaving the company.

6) Commercial/regulatory considerations

- Your relationship with the other party in the wider business context;
- The value of the dispute v the amount of management time required;
- Is it necessary to pursue the claim to establish a precedent for cases that will follow?
- Risk of adverse publicity;
- The financial position of the other party;
- Insurance funding;
- The time frames and requirements of industry specific regulators.

We hope this is a helpful aid to our podcast, and should you require any legal advice in respect of a dispute you are dealing with, or believe will shortly come to light, please do get in touch.

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