

# Founder Focus: FAQs for Start-Up Success

## What do I do if I face litigation?

Litigation can be a stressful and expensive process, especially for a start-up. This note sets out how to best avoid litigation, how to manage a dispute once it arises and what alternatives there are to litigation.

Please note that this note only applies to proceedings in Scotland. While the broad principles also apply to English disputes, the procedure is different. Our dispute resolution team is able and happy to assist you with both Scottish and English disputes.

### 1. Avoid it

Where possible avoid litigation. It is a time and resource intensive process. In addition to incurring legal fees, litigation may sour relationships with key suppliers or customers and can expose your organisation to reputational damage. It will also use up valuable time of your employees.

By engaging with the other side early in the dispute and trying to understand their concerns it may be possible to avoid litigation. A small concession or settlement is often cheaper and more efficient than litigation.

### 2. Get legal advice early

If a dispute does arise, seek legal advice early on. Involving a lawyer from the outset to advise on options and to develop a strategy specific to the nature of the dispute and the outcome you are hoping to achieve ensures that you understand the legal position you are in.



The initial advice will also seek to ensure your position is protected, particularly in trying to avoid any accidental concessions or an acceptance of liability, in pre-litigation correspondence or discussions, which could have a bearing on any subsequent litigation.



You also give yourself the best chance to decide at an early stage whether it is in your company's best interest to try to settle or fight the dispute.

### 3. Preserve evidence

Disputes can turn on documentary and other forms of evidence. It is important for any company to have a good document preservation policy. Ensure that you have copies of all key contracts and that your employees are reminded to file their emails. The scope of evidence is wide and can extend to text and WhatsApp messages, as well as videos and photos, all of which should be preserved.



The destruction of evidence has significant consequences and should not be undertaken in any circumstances.



If a contentious point requires to be supported by witness testimony, then recollections should be accurately recorded for future reference.

### 4. What to do if you are pursuing a claim in court?

The initial advice on strategy will inform the decision about whether to litigate and in which court. If Scotland is the correct jurisdiction, then small claims (up to £5,000) can be raised using the "Simple Procedure", which requires minimal legal guidance. Proceedings for disputes up to a value of £100,000 can be raised in a local Sheriff Court. Disputes of six figure value and higher are pursued in the Court of Session in Edinburgh.

In addition to monetary claims, there may also be a requirement to seek other orders from the court, for example to prohibit someone from doing something; to force adherence to an obligation; or to seek the liquidation of a company. The courts in Scotland may also be required to recognise the judgments from courts in other jurisdictions, including England, for enforcement. Some types of applications can also be made urgently to court or pursued as a result of statute.

A decision to litigate should include being clear about how to fund any proceedings. Consider whether insurance or third party funding is available for your claim.

## 5. What to do if you are defending?

If court proceedings have been served on you, you should contact your lawyer as soon as possible. You only have a limited time to formally acknowledge the claim and file a defence. Failing to do so may result in default judgment being entered against you.

There can be cost advantages to resolving court proceedings in the short window before defences are lodged, which a lawyer would advise on if you act quickly. Ignoring a court Writ or Summons will not make a case go away!

## 6. What happens during the court proceedings?

Once the proceedings are in court, progress is determined by formal court rules. Depending on which court the claim is in, the steps and timing can vary. You can anticipate having procedural hearings as well as substantive hearings to determine the merits of a case. Procedural steps can also include the recovery of documents; revising of written court pleadings; preparation of witness statements; and the preparation of third party expert reports.

You should get ongoing advice from your legal team as to the relevant procedural steps for your specific case and the deadlines you will have to meet.

Court deadlines are generally fixed and there is no guarantee that a deadline can be extended. Failing to comply with a court deadline can attract sanction from the court.

## 7. ADR

It is important to note that not all disputes have to go to court. There is also Alternative Dispute Resolution (“**ADR**”) which may be the better option in many circumstances. This includes mediation, arbitration or expert determination.

In a mediation, parties can discuss their positions with an independent mediator, in a confidential environment, to explore whether a settlement can be reached. Arbitration allows parties to have their claim determined confidentially and outside the normal court process, which can be cheaper and quicker. An expert determination can be used to achieve resolution of a technical dispute.

### Practical Tips

**Lodge a caveat:** This is an inexpensive document that can be lodged with the court which means that certain applications, such as a petition to wind up your company, cannot be made without you being given advance notice and the opportunity to be heard. We have a note setting out the benefits and process for caveats in more detail [here](#).

It is not uncommon for contracts to set out a dispute resolution mechanism which the parties to that contract would be bound by in advance of, or as an alternative to, litigation. Being aware of any such requirements is important in the initial strategising phase.

### Any questions? Get in touch with our litigation team



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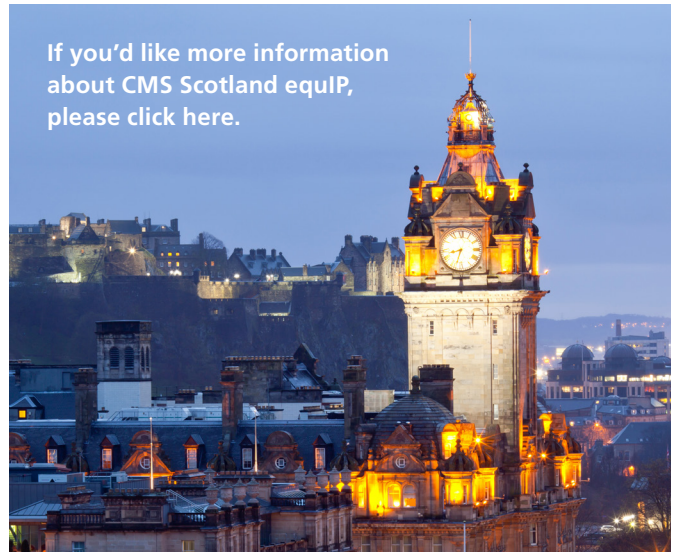
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# Caveats

## Your early warning system for Scottish litigation



### What are caveats?

Caveats enable you to get advance notice of certain urgent applications made against you in Scottish courts.

The most common applications which 'trigger' a caveat are for interim interdict (the Scottish equivalent of interim injunction) and insolvency applications, such as applications for sequestration (i.e. bankruptcy), winding-up or administration. Caveats will also give you notice of applications for orders for permission for group proceedings (class actions) to be brought against you.

The benefit of a caveat is that you, or your solicitor, receive notice of the application before the court can grant the order. You then get the opportunity to oppose the application at a court hearing. Without a caveat, you risk the court granting the order without you being informed of the application and being able to oppose it.

Caveats can be a very useful way to protect against a court granting potentially disruptive or damaging interim orders or permission for group proceedings without your knowledge. It is often more difficult to have an interim order recalled than it is to prevent it being granted in the first place.

### Who should lodge caveats?

We strongly recommend that all businesses and individuals with commercial interests in Scotland should lodge caveats.

We also recommend that caveats should be lodged not only when there is a known risk of litigation, but also as a general protective measure even when litigation is not expected. Caveats should be lodged in the Court of Session (the highest civil court in Scotland) and the sheriff court(s) local to a company's registered office and/or place(s) of business.

### Duration of caveats

A caveat lasts for one year, after which it needs to be renewed to remain valid.

If we lodge caveats on your behalf, we will contact you before expiry of the caveat to check whether you wish it to be renewed for a further year, ensuring uninterrupted protection.

### Further information

If you wish to know more about caveats, or if you wish us to lodge them for your business, please contact:



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