

A guide to litigation for construction disputes

This guide is current as at March 2025

This guide is about claims made in the Technology and Construction Court (**TCC**) and the process of obtaining a court judgment.

What is litigation?

Litigation is the process of bringing or defending a disputed civil claim in court. The civil courts have the power to make decisions about rights and obligations and can order remedies, such as damages. Once given, the order of the court can be enforced.

What you need to consider

Who can litigate?

The civil courts in England and Wales are available to anyone who has a recognised right or claim. Claims dealt with in the civil courts include breach of contract, negligence as well as breach of other recognised personal or property rights.

In some cases, the right to go to court may be restricted or barred. Some contracts for example contain an agreement that the parties must take steps to resolve their dispute themselves, before they can apply to the court. Or they may agree that their dispute will be decided not by the court, but privately, by way of arbitration.

For certain types of construction contract, there are rules which allow one party to a contract to take their dispute to adjudication, in addition to the right to go to court. If the dispute is about a contract, it must be checked to see if there are restrictions or bars on the right to go to court.

What cases can be brought to the court?

Most construction, engineering or technology disputes arise out of, or in connection with, contracts. The TCC is a specialist court that deals with these types of disputes. The judges who sit in TCC are experienced in this area of law. There are TCC courts in London and in some of the regions in England.

Before starting a claim in the TCC

A person who has started a claim in the civil courts including the TCC is known as the **claimant**.

Before a claim is made it's important to see what the contract says about dispute resolution. If a claim is started in the TCC but the contract says that disputes are to be decided by arbitration, the TCC can refuse to allow the claim to continue.

Similarly, the contract should be checked for any other pre-conditions or contractual steps that have to be followed before starting litigation.

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Timescales

Litigation is a lengthy process. A claim can take months or even years, depending on the issues involved, the number of parties and whether there are applications made to the court during the period between starting the claim and trial.

Benefits & risks

The benefit of litigation is that the order of the court is, subject to any order of the appeal court, final and binding, and can be enforced. The dispute is reviewed with rigour and by an independent judge. There is also the possibility of recovering at least some of the costs incurred in the litigation process.

The disadvantage is the time taken to get the court order, the heavy involvement required of the client which may interrupt its business activities, and the fact the order may be made public.

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Litigation costs

Litigation costs include court fees, solicitors' costs, expert and barrister fees and other types of disbursements.

Parties involved in litigation should note that the cost of representation can be high but will be an essential investment in the success of complicated proceedings.

Insurance, funding, and no win, no fee

Sometimes the events giving rise to a claim may be covered by an existing insurance policy, e.g. professional indemnity insurance. Litigation (after the event) insurance or third party funding which covers litigation costs may be available in certain circumstances.

Some solicitors and barristers offer conditional fee agreements, also known as no win, no fee agreements, or damages-based agreements.

Advice should be sought on the availability of all of these options at an early stage of the litigation.

Starting the litigation process

First steps: the pre-action protocol

Anyone wanting to start a claim in the TCC will normally have to follow the pre-action protocol, which sets out the steps the parties must take before the claim form can be issued. The protocol, called the 'Pre-Action Protocol for Construction and Engineering Disputes' (2nd edition), sets out requirements for the exchange of information about the claim and any defence, and requires the parties to meet. The purpose is to give the parties the chance to settle their dispute without going to court, or at least to reduce the scope of the dispute.

In some exceptional circumstances the parties are not required to follow the protocol. Examples of the exceptions are if the claim covers the same or similar issues that were recently the subject of an adjudication, which is a separate form of dispute resolution, or if the matter is urgent, such as seeking an injunction.

If, after all of the steps required by the protocol have been completed, the dispute isn't settled, then the next step will be to consider whether to start a claim in the TCC.

Barristers and experts

Cases involving disputes about construction, engineering and technology matters can involve complex issues of law and fact. Sometimes these issues will require a specialist barrister, sometimes referred to as 'counsel'. Barristers can provide advice on the law, identifying the facts that are required for the claim and strategy,

as well as advocacy in court. If the dispute involves complex issues about financial matters or highly technical issues, then it may be necessary to appoint an expert in the relevant field.

Starting the claim

The claim is started when a claim form is issued. The claim form sets out the name of the person making the claim (the claimant), the name of the person against whom the claim is made (the defendant), the nature of the claim made and the remedy sought. The claimant has to pay a court fee to issue the claim form.

The claim form is either accompanied or followed by a document that sets out the details of the claim, known as particulars of claim. The claim form and the particulars of claim are referred to as 'pleadings', and copies are filed at court and served on the defendant. Barristers are usually instructed to prepare the pleadings.

There are court rules about how the claim form is served on the defendant. Once the claim form and particulars of claim have been served, the defendant must file and serve an acknowledgment of service and, if they intend to contest the claim, a defence. If the defendant has its own claim against the claimant, known as a cross claim, then the defence must include a counterclaim. The defendant can also bring in an additional third party to the claim at this stage.

The claimant may want to serve a reply to the defence and must serve a defence to any counterclaim is made.

The first case management conference (CMC)

If the claimant wants the claim to be heard in the TCC, then the claim form must state that it's a TCC claim. The claim will continue in the TCC list if the judge accepts it is TCC business. If the claim value is below £500,000 it will usually be transferred to the TCC in the County Courts. All claims allocated to the TCC are assigned to the multi-track. The multi-track is a procedural allocation which determines, in part, the procedure and what court rules apply.

The TCC judge will give an order early on to direct the steps that have to be taken by the parties as the claim progresses to trial. This is normally done at a case management conference.

A CMC is a hearing in court, either in the court room or held remotely, before the judge who will usually have control of the claim from this stage onwards, including trial. The parties may decide to brief their own barrister to attend court for this hearing.

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A significant amount of preparation is required in advance of a CMC hearing. This includes dealing with disclosure, and filing a Disclosure Review Document, preparing and filing cost budgets and budget discussion reports, preparing and discussing proposed directions and the preparation of CMC bundle. The parties are encouraged to agree the CMC directions, cost budgets and disclosure issues at an early stage of the proceedings.

Before the CMC the solicitors must prepare a CMC bundle. A copy of this bundle is given to the court and is updated during the period up to trial.

The directions given at the CMC include orders about the timing of further pleadings, amendments to pleadings, the use of experts, a stay of the claim for alternative dispute resolution, the hearing or making of applications about the claim and disclosure (exchange) of documents.

The judge may deal with cost budgeting at the CMC. Cost budgets set out the legal costs incurred by both parties and their expected legal costs to trial, The court will make orders about how much can be recovered at the CMC, or it may order a separate cost management conference. If there are complex issues around disclosure, the court may order a separate hearing for that. At the CMC, the court will usually give a date for the trial, and say how long the trial will last.

The process after the CMC

Significant preparation is required after the CMC and before the trial date to follow the timetable given by the judge and to prepare the case for the trial. Following the trial itself, further steps may yet be required. Click on the icons below for details of some of the work tasks that are involved:

Key contacts



Stephen Homer FCI Arb
Partner
Construction
s.homer@ashfords.co.uk
07968 447596



Lianne Edwards
Partner
Construction
li.edwards@ashfords.co.uk
07702 565025



Mark Manning
Partner
Construction
m.manning@ashfords.co.uk
07515 577067



Patrick Blake
Partner
Construction
p.blake@ashfords.co.uk
07968 728868

ashfords

Exeter

Ashford House,
Grenadier Road,
Exeter EX1 3LH
T: +44 (0)1392 337000

London

1 New Fetter Lane
London EC4A 1AN
T: +44 (0)20 7544 2424

Bristol

Tower Wharf,
Cheese Lane,
Bristol BS2 0JJ
T: +44 (0)117 321 8000

Plymouth

Princess Court,
23 Princess Street,
Plymouth PL1 2EX
T: +44 (0)1752 526000

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