

LITIGATING WITH COMPANIES

Basic company searches and alerts are underutilised tools in litigation. They are critical in identifying and monitoring the correct parties in proceedings and avoiding claims.

Naming incorrect or deregistered parties to proceedings can result in delay and unnecessary costs for parties, particularly where the issue is not identified and fixed quickly. While this may seem obvious, it is a common mistake and the consequences can be serious, including professional negligence claims and personal costs orders being sought against practitioners.

Keys, phone, wallet . . . company search

LPLC has seen several claims where firms have inadvertently conducted proceedings on behalf of deregistered companies. Once a company is deregistered, it ceases to exist as a legal entity and cannot be a party to a proceeding. In these circumstances, personal cost orders have typically been sought by their clients or other parties for their wasted costs of the proceeding involving the deregistered party and for the costs of rectifying the mistake.

In one claim example, a firm acting for a company was not aware at the time of commencing proceedings that it was deregistered due to non-payment of fees owing to ASIC. When the error was discovered, the practitioner applied to have the company reinstated, however this did not cure the defect of issuing proceedings in the name of a de-registered company. The client then instructed another firm to commence fresh proceedings and to obtain personal costs orders against the first practitioner for its wasted costs. In another claim, a similar error was discovered at a much later stage after judgment was delivered in the proceeding with unintended and costly consequences for the firm.

Know thy self, know thy enemy

When first receiving instructions to commence or defend a proceeding on behalf of a company, practitioners must carefully consider who are the correct parties and which parties have causes of action against whom. As part of this process, you need to check that the company is registered and can sue or defend litigation in their own name. This should be done by undertaking online company searches on ASIC's Registers to check the status of relevant companies in the proceeding. Check that each company is currently registered and that the directors are in control, rather than an external administrator such as a liquidator. Also, make sure you record the correct Australian company number(s) (ACN) and check them against the searches when preparing pleadings.

Practitioners should actively turn their minds to the status of companies throughout the course of litigation, particularly small proprietary companies, companies incorporated overseas, or where there is uncertainty about their solvency and particularly before key steps such as filing pleadings. Be alive to the possibility, even where there are no obvious red flags such as client instructions or unpaid invoices of your firm.

Some practitioners subscribe to ASIC's "Company Alert" service for the course of a proceeding which is a simple and free way to track any developments or changes to parties which may impact on the matter.

When deregistration occurs

Once you become aware that your client company is deregistered, it is critical to consider the implications and notify other parties immediately to avoid unnecessary costs and claims being incurred.

In a recent claim, a practitioner acted for a developer in defending proceedings brought by a real estate agent claiming unpaid commission. During proceedings, the practitioner was notified of the deregistration of the company and immediately filed a Notice to Cease Acting. However, they failed to inform the plaintiff's lawyers of the deregistration resulting in further costs being incurred, including for an upcoming mediation. The plaintiff's lawyers then made an application against the firm for a personal cost order for wasted fees of their firm and counsel in preparing for the mediation.

Trust, but verify

Another important step to take when acting for companies is don't assume, without checking, that instructions received from an employee, in-house lawyer, manager, director or officer are instructions from the company.

In one matter, a practitioner acted for a company with a husband and wife as directors. The company was a defendant in proceedings and at the time of settlement, the solicitor took instructions from the husband who signed the settlement agreement. The wife later sought to set aside the settlement, relying on the company's constitution which provided that the company did not have authority to settle without her authorisation.

Do basic checks on the authority of your instructors, particularly when acting for new clients or where there has been a change in ownership of an existing client. Company alerts can also be useful in providing updates to the extent there are any changes to directors of a company.

As we have seen, it is important to review and update your firm's processes and checklists to incorporate company searches and alerts as key steps in any litigation you conduct. ■

This column is provided by the **Legal Practitioners' Liability Committee**. For further information ph 9672 3800 or visit www.lplc.com.au.

TIPS

- When first receiving instructions to act on behalf of a company in litigation, check which entity has the cause of action and against whom.
- Do company searches to confirm that the company is currently registered and determine whether directors or external administrators are in control.
- Subscribing to company alerts is a simple and free way of tracking the status of the client company during proceedings.
- When acting for a company always check who has authority to provide instructions.