What you need to know about resolving disputes

MOORE BLATCH
solicitors

What you need to know about resolving disputes

If you or your business are considering or encountering a dispute, the process for resolving the dispute either through the Courts or another forum can seem expensive, time-consuming and stressful.

In this guide we will answer some of the most frequently asked questions about dispute resolution so that you have a clearer understanding of what is involved, what the possible risks to you are, and the options available to you.

What is involved in the court process?

Most Court proceedings generally follow the same structure:-

The party who wants to start the Court action (i.e. the Claimant) prepares a Claim Form, which sets out its case. The Court issues the Claim upon payment of a fee. The Claimant then serves the Claim Form on the party he is suing – the Defendant.

The Defendant considers whether to admit or defend the Claim. If he admits the Claim he notifies the Court. If he wants to defend the Claim he prepares a Defence which sets out his case. He serves that Defence (and any Counterclaim he wants to bring) on the Claimant.

If a Counterclaim has been made, the Claimant must either admit or serve a Defence to that Counterclaim. The Claimant also has the option of serving a reply to the Defence.

In most cases the Court sends out Questionnaires to the parties, in order to obtain sufficient information about the case to decide the most appropriate procedure for dealing with the case.

The Court will then generally hold a Case Management Conference, which is a hearing where the timetable is set for taking the steps leading up to trial. The Court might also set costs budgets for the litigation.

The next step is usually disclosure of documents. The Court will decide the scope of disclosure to be given. Each party then searches for documents falling within that scope, and prepares a list of those documents. The list is served on the other party, who can ask to see and/or take copies of certain categories of documents.

After that, both parties will prepare written statements of the evidence they and any other witnesses will give at trial.

If expert evidence is required the Court may order that each party can instruct an expert, or may order that there be a single joint expert that both parties instruct. In either situation the expert's report would be prepared and served before trial.

The Court will usually ask the parties to complete further Questionnaires at this stage, to ensure that the parties are ready for trial. It may also hold a Pre-Trial Review hearing.

Bundles containing the necessary documents are prepared for use at the trial, and the advocate (generally a barrister) will also prepare a Skeleton Argument, which outlines their client's case.

At the trial the advocates make legal submissions and the witnesses and experts give evidence.

The Judge might give his judgment immediately at the end of the trial, or may reserve judgment until later. The Judge will then decide what costs order to make.

How long will it take and how much will it cost?

Court cases generally take months to get as far as a trial (with any subsequent appeal by the unsuccessful party also taking months to be dealt with), although the majority of cases do settle before they reach trial.

In some cases it is possible to ask the Judge to determine the dispute without a full trial. If successful, this can save a great deal of time and costs.

The cost of taking a case to trial will depend upon the size and nature of the dispute.

We can give you a clearer idea of the likely timescale and cost once we know the details of the dispute.

What risks do you face– and how can you minimise them?

Losing the Court action

The main risk is that you lose the Court action. The consequences would be:

- If you were the Claimant you would not receive the damages or whatever other relief you were seeking from the Court (such as an injunction);
- If you were the Defendant you would either be ordered to pay your opponent damages, or you would have to comply with whatever other type of order the Court made; and
- Whether you were the Claimant or the Defendant you would – subject to what we say below - be unlikely to recover any of your costs from your opponent and you would be likely to be ordered to pay at least some (but rarely all) of your opponent's costs.

Losing an application within the Court action

If a party makes an application to the Court during the course of the proceedings the Court will often order the party who has lost the application to pay at least some of the successful party's costs relating to that application.

Failing to comply with Court Orders

It has always been important to comply with Court Orders. However, the Courts now take a much more robust approach to parties who fail to comply with Orders, so a failure to comply may result in your case being struck out.

Unreasonably refusing to settle the litigation

The Court strongly encourages parties to settle their disputes. Indeed, the Court will look at what settlement efforts the parties have made when deciding what costs order to make against a party.

As a result, even if you win the case, if you have failed to do better than an offer previously put to you and/or you have refused to mediate (as to which, see below) the Court may order you to pay some of your opponent's costs. In the case of some offers (known as Part 36 Offers) there are even more stringent penalties for not accepting an offer and then failing to beat it.

Exceeding your costs budget

If the Court sets a costs budget for the litigation you are unlikely to recover more than this figure from your opponent even if you win.

Enforcement

There is almost always a risk that you could win the litigation but be unable to enforce any Order you obtain against your opponent because they do not have sufficient assets.

Minimising your risk

You can minimise your risk by:

- providing us with full information at an early stage;
- keeping the value of the case in mind;
- acting reasonably throughout;
- complying with the Court's timetable;
- making well-timed, well-judged settlement offers;
- giving offers from your opponent due consideration;
- being willing to consider Mediation;
- being realistic about the strength of your case; and
- carrying out due diligence on your opponent's assets.

How can you pay for all this?

The default position

The usual position is that the matter is funded by you as it progresses.

We can discuss with you how this is likely to affect your cash flow, and consider with you whether there is anything that can be done to assist you (such as instalment payments).

Insurance

You may have an existing insurance policy (such as a household insurance policy or a professional indemnity insurance policy) which might offer cover for litigation costs. If you are uncertain about whether a policy provides such cover, we can look at the policy and advise you.

If you do not have existing insurance, there is the possibility of obtaining After The Event ("ATE") insurance to cover your potential liability for your own disbursements and your opponent's costs and disbursements.

If you take out an ATE insurance policy you will have to pay the insurer an insurance premium. This premium will not be recoverable from your opponent, even if you win the case. However, some insurers will offer staged payment of the premium, or even deferral of payment of the premium until the conclusion of the case.

The availability of this type of insurance, the level of cover and the premium payable generally depends upon the type of case and the insurer's assessment of the merits of the case.

Sharing the risk with Moore Blatch

Law firms are permitted to enter into Conditional Fee Agreements ("CFAs") and Contingency Fee Agreements (called Damages Based Agreements or "DBAs") with their clients.

These provide a way for law firms and clients to share the litigation risk. Provided your case is suitable we are prepared to do this.

There are various types of CFA, but broadly they all involve (a) us agreeing that some or all of the fees that we would normally charge will be payable only in specified circumstances (for example if you win the litigation); and (b) you agreeing that in those specified circumstances we can charge a success fee on top of our normal fees. You cannot recover the "success fee" element of your costs from your opponent.

Under a DBA we would be able to take a share of your damages if you are successful. If you are unsuccessful, we will not be paid any of our fees (although the disbursements are still payable).

It is possible to have an ATE insurance policy as well as a CFA or DBA, to provide even greater protection.

Other possible sources of funding

It is possible to get third party funding in appropriate cases. Third party funders are commercial funders who are prepared to pay some or all of your fees and disbursements in return for a fee which is paid out of the damages recovered by you. If the claim is unsuccessful, the funder loses its investment and is not entitled to receive any payment.

Third party funding can work in conjunction with insurance, ATE insurance and CFAs.

If your capital and disposable income are lower than the applicable threshold you may be entitled to public funding in relation to certain limited types of litigation. Moore Blatch does not carry out publicly funded work.

Is litigating through the court the only option?

There are some processes that can be used instead of the litigation process. The most common types are:

Arbitration

The parties have to agree that their dispute will be dealt with by arbitration rather than litigation.

The main advantages are that the parties can choose who the arbitrator is, and the process is confidential. However, the process is not necessarily cheaper or quicker than litigation.

The arbitrator's decision is binding on the parties and can only be appealed to the Court if the arbitrator has made a legal error.

Expert Determination

The parties can appoint an independent expert to look at the case and give his decision. The parties usually agree to be bound by the determination.

The main advantages are that this can be quicker, cheaper and less adversarial than litigation or arbitration. Also, the process is confidential.

Unless the parties agree otherwise, the expert's determination is binding except in limited circumstances.

Adjudication

This is a common way of resolving construction and engineering disputes. The parties appoint an independent third party to decide the outcome.

It is intended to be faster, simpler and cheaper than litigation.

There are also some processes that can be used in conjunction with the litigation process. The main types are:

Negotiation

Either party can make a settlement offer to their opponent – either by letter or email, in a telephone call or at a meeting. The parties can either negotiate direct or through their solicitors. This can produce a very quick and cost- effective resolution to the dispute.

If one or more of the parties have a very entrenched position, negotiation alone is unlikely to work.

Mediation

An independent third party assists at trying to reach a solution to the dispute. If the parties reach agreement it is binding. The process is confidential and "without prejudice" (i.e. nothing said in the mediation is admissible as evidence in the Court proceedings).

Mediation offers a greater opportunity to preserve the family or business relationship being tested by the dispute, and enables the parties to agree to a settlement which goes beyond the scope of litigation.

Mediation can take place before litigation starts, or at any stage during litigation. Judges strongly encourage litigating parties to mediate, and can make costs orders against parties who unreasonably refuse to mediate.

Mediation can be arranged relatively quickly and is far cheaper than litigation. However, if one party is simply "going through the motions" in order to avoid a costs penalty the mediation is likely to be a waste of time and money.

Mediation has a high rate of success; in our experience over 80% of cases settle at or shortly after the mediation.

How can we help you?

We will work with you to achieve the best outcome for you as quickly and as cost-effectively as possible. We will do this by:

- advising you on the strengths and weaknesses of your case – both at the outset and as the case develops;
- clearly setting out the likely costs and timescale;
- looking with you at cash flow and funding options;
- advising you on strategy;
- guiding you through the process and the documentation; and
- helping you to consider ways of resolving the dispute.

Dispute Resolution: Sept 2014

Southampton Lymington Whiteley Richmond London

T: 023 8071 8000 info@mooreblatch.com

www.mooreblatch.com

MOORE BLATCH
solicitors