

dispute resolution

a guide

We understand that litigation can be a potentially expensive and time consuming process. Disputes can be disruptive and even threaten the viability of a business.

Often, disputes are settled early through negotiation, but if they are not, they must be managed within a framework of rules and regulations.

We have put together this guide to provide an upfront look at some of the key factors which can influence the management of a dispute.

Pre-Action Protocols

Certain types of dispute must be managed through a designated Pre-Action Protocol. We will let you know if this applies to your dispute. Even if a Pre-Action Protocol does not apply, adopting its principles is considered to be good practice.

In essence, the purpose of the Pre-Action Protocols is to:

- Encourage the early exchange of full and frank information about the dispute
- Enable the parties to avoid court proceedings by encouraging negotiation and Alternative Dispute Resolution (ADR)
- Assist in the management of court proceedings where they cannot be avoided.

It may also help to salvage important business relationships.

In most cases the Pre-Action Protocols require the exchange of

detailed letters and documents relating to the dispute, and also a requirement for the parties to meet to discuss the issues, negotiate a settlement if possible, or where a settlement cannot be achieved, agree how the dispute should be managed.

Only then may the parties commence court proceedings.

Failing to comply with a relevant Pre-Action Protocol may result in cost orders being made against you, should court proceedings be issued.

Disclosure

In court proceedings, each party is obliged to list and make available to the court and the other party, a list of documents which either support or harm its case. This is called disclosure. The underlying principle is that the court can only deal justly with the dispute if all of the relevant material is out in the open.

As parties are compelled to disclose to each other damaging documents as well as helpful ones, the disclosure process forces parties to be realistic about their chances of success in the litigation, and for that reason, many disputes settle either shortly before or shortly after disclosure.

The duty of disclosure is strict and the courts take it very seriously.

Duty to disclose documents

A party's duty is to disclose documents. The term document has a very wide meaning and includes all media in which information of any

description is recorded. It therefore includes computer records, emails, text messages, as well as paper.

The definition extends to electronic material which is not readily accessible such as electronic documents stored on servers and back-up systems – including those documents which have been deleted.

Duty to disclose documents which are or have been in the party's control

Disclosure extends to all helpful or damaging documents which have been in the party's control. It therefore includes documents which you might not otherwise wish to show to your opponent. The concept of control is not limited to documents which are (or have been) in a party's possession. It includes documents which a party has (or had) the legal right to possess, inspect or copy, for example documents held by a party's accountant.

The reasonable search

There is an obligation on each party to conduct a reasonable search for documents which are or have been in his control. This is a **question of fact and degree**, and generally does not mean having to carry out an exhaustive search for documents, sparing no expense and leaving no stone unturned.

Important points to consider now

The duty of disclosure is an ongoing one and lasts right up to the trial.

Therefore:

- Do not destroy any documents which might be relevant to the dispute
- Do not unnecessarily create new documents which might have to be disclosed
- Do not annotate or amend existing documents which might be relevant to the dispute
- Do not ask any third party to send you documents
- Ensure files, hard disk drives, and servers are preserved safely.

Alternative Dispute Resolution (ADR)

The courts have suggested that the parties to a dispute should always consider ADR to resolve their disputes without resorting to court proceedings. Indeed, the courts actively encourage the parties to consider ADR to help them settle the dispute.

The courts are often willing to put proceedings on hold to allow ADR to take place. This can take the form of informal negotiations or a formal mediation with the appointment of an independent third party to facilitate discussions between the parties in an attempt to help them reach a settlement.

There are other types of ADR, some of them contractual such as Adjudication or Expert Determination. Our Dispute Resolution Team will be able to advise you on these.

Any party who unreasonably refuses to consider ADR will be at risk of having cost orders made against them – even if the refusing party ultimately wins at trial. The courts have also said that a party cannot argue that a mediation is unlikely to be successful as a reasonable ground for refusing ADR.

Costs

Cost is one of the most important considerations before embarking on litigation.

Costs include solicitors' costs, court fees, and often payments to third parties such as barristers and expert witnesses. You will be responsible to pay these costs, though ultimately you may be able to recover a proportion of them from the other party.

If the dispute is settled prior to, or during court proceedings, then it is up to the parties to decide who should pay the costs. If the matter goes all the way to trial, the court has discretion in deciding who should pay.

The general position is that the losing party pays the winning party's costs. However, it is very rare that a party recovers 100% of its costs. As a general rule, the winning party would normally expect to recover 60 – 90% of its costs from the losing party. Therefore, even if you are successful, there is still likely to be a shortfall in amount of costs recovered.

Special costs rules apply, for example, where the dispute is settled following a Part 36 Offer, and we will advise you further if and when appropriate.

The costs of interim applications to the court, such as for the specific disclosure of documents or summary judgment, will normally be decided by the judge at the time of the hearing. Again, the successful party would expect to recover 60 – 90% of its costs.

Other factors which could affect the recoverability of costs are:

- The conduct of the parties both before and during the court proceedings
- Whether a party has complied with a relevant Pre-Action Protocol
- Whether a claim has been exaggerated
- The degree of success of a claim or a defence.

The Court may also take into account the value and complexity of the dispute to ensure that the costs ordered are both reasonable and proportionate.

In Arbitrations, the arbitrator will usually have jurisdiction to award costs in much the same way as a judge in court proceedings. However, in Adjudications or in Small Claims proceedings the general position is that each party bears its own costs.



Key contacts

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