

Managing commercial disputes

DEALING WITH BUMPS IN THE ROAD

All business, including those in the lighting sector, will at some point experience issues with suppliers, bad debts or stand-offs with other important stakeholders. If you're not careful, such 'bumps in the road' can turn into expensive, full-blown commercial disputes. But ILP members get priority access to a dispute resolution service that can help prevent things spiralling out of control

By Chris Clay

No one ever seeks a commercial dispute, but they are unwanted fact of commercial life, and which collectively cost UK companies billions of pounds each year.

So, what should you do if your find your business is heading towards a showdown, perhaps with a client or a supplier? Here are some tips that can help. But ILP members can also now benefit from priority access to a dispute resolution service called Escalate.

SHOULD YOU PURSUE A DISPUTE?

Commercial disputes are significant issue for UK businesses. Research from the Legal Services Board suggests UK businesses are losing £40bn each year because of legal disputes – and that does not include the £10.5bn of working capital locked in retention payments for contractors in the construction industry and related sectors.

The problem is exacerbated by the fact only one in ten businesses think there is an effective way of resolving disputes. This is because pursuing a commercial dispute has tended to be a costly, lengthy and risky undertaking for most British businesses.

It's not hard to see why. Your lawyers will typically bill you based on the amount of time they spend working for you. Given that the average litigation case is around



Add to that the risk that you could be liable for at least some of the defendant's costs as well as your own if you lose the case.

On top of that, the typical small to medium-sized enterprise does not have the managerial capacity to stay on top of the paperwork and processes associated with a dispute as well as remaining focused on the day-to-day running of the business.

It is hardly surprising, then, that many companies decide against pursuing a claim and reluctantly write-off what they're owed. Indeed, evidence shows that the number of county court judgments against businesses is on a downward trend, leading to suggestions that companies are failing to get adequate 'access to justice'.

No wonder that the Federation of Small Businesses recently stated that 'it is imperative that disputes are prevented where possible and, if not, they must be resolved swiftly, fairly and at the lowest possible cost to those involved.'

As Escalate, we agree. There is little doubt that the current system is stacked against smaller and medium-sized firms, and we think it is time for change.

The good news is that alternative forms of managing commercial disputes are beginning to emerge. The Escalate process, for example, (and see the panel opposite for more detail) removes the barriers that

18 months, it is not uncommon for these bills to spiral to the level of the damages that you're claiming.

Even if you can find a lawyer to act for you on a fixed, capped or 'no win no fee' basis, you'll still have to pay up front for disbursements such as court fees, barristers and expert witness fees within a climate where court fees have increased exponentially and recovery of costs for the winning party has reduced drastically.

currently prevent claimants from pursuing their cases by targeting a negotiated settlement, with fixed fees payable only on a successful outcome and no upfront costs to worry about.

HOW CAN YOU AVOID THE PITFALLS?

So, what can businesses do to minimise the risk of getting involved in a dispute? And how should they manage any disagreements that do arise? I'd argue there are five key things you can do.



1. Agree expectations from the start. Many disputes arise from the fact the parties did not take time to discuss their expectations at the start of the process. Therefore, invest time upfront in clearly defining your objectives, responsibilities, standards and so on to prevent a lack of understanding from flaring up later on.

2. Document as much as possible. Having a paper trail of important decisions can act as a reminder of the agreements made, providing evidence to bring both sides back on track. The longer and more complex the project, the more important it is to have detailed records. Comprehensive paperwork is also likely to help your case, and should help in any court case.

3. Address issues early. The old adage that 'a stitch in time saves nine' applies here. A potentially tricky conversation early on can prevent a problem from growing in a complex legal case that will cost everyone time and money.

4. Be firm but fair. Your business is important to you, so nobody expects you to give in at the first sign of a disagreement. But don't let your emotions cloud your judgements. Don't make things personal. Step back and use an impartial observer.

5. Get an expert involved. If you feel that the other party is unlikely to change its mind, it may be time for expert advice.

Chris Clay is managing director of Escalate

CASE STUDY - 'SIX WEEKS AFTER THE MEDIATION THE CASE WAS SETTLED'

A contracting business entered into a contract with a client and agreed that its fees would be paid in stages over a two-year period.

The final six-figure instalment was, unexpectedly, not received. Approaches were made to the client for an explanation and none was given other than a generic 'breach of contract'.

The contractor engaged legal support to explore the 'breach of contract' and non-payment. Around £20,000 was spent in legal costs trying to understand the problem and recover the money, but no progress was made.

Having failed to make any meaningful headway, the contractor had decided to write off the final payment, and sought advice from its accountant in relation to the tax treatment. The accountant informed the contractor of us at Escalate and the case was engaged.

The case followed the mediation process for the full three-month period before moving to the litigation stage. Aware that there was no legal merit to justify the non-payment, the defendant tried to delay the process by threatening to counter-claim, requesting to

switch the case from a regional court to London, and asking for an extension to the courts for submitting its defence. All these tactics were employed to frustrate the contractor and increase ongoing costs so that it would drop its claim.

As the contractor bore no financial risk through the Escalate process, these attempts to dissuade it from pursuing their case had no impact – in fact, they simply served to increase the defendant's own costs.

This resulted in the defendant's lawyers contacting the Escalate team to inform them that costs had now become prohibitive for the defendant, requesting mediation.

The mediation was held, but without any settlement reached. It became clear in the mediation that there was no defence for withholding payment and the mediation was another attempt to delay or force the case into a low settlement.

This was not achieved and we continued to push for a full settlement. Six weeks after the mediation the case settled, with the contractor awarded a sum in excess of the amount that it was originally owed.



HOW ESCALATE CAN HELP

When or if you reach the final point above – 'get an expert involved' – this is when, as an ILP member, you should consider getting in touch with Escalate.

Escalate is a two-stage process for managing commercial disputes. It removes all financial risk (by ensuring you don't pay unless we reach a successful settlement), gives transparency on pricing from the start (by offering a fixed fee and paying for all upfront costs), and ensures you remain the main beneficiary on settlement.

So, how does it work? In the first stage, Escalate focuses on reaching a negotiated settlement, using corporate recovery specialists to negotiate on your behalf, and encouraging the defendant to settle quickly without the need for litigation.

If the defendant is unwilling to settle, we move on to the second stage, with solicitors acting on a fully conditional basis preparing for litigation. As part of the service, all fees and associated costs are paid on the client's behalf all the way up to a High Court resolution.

Escalate has been designed to help with all kinds of commercial disputes – including bad debts, contractual and negligence. We can also tackle bad debts and disputes of all sizes – from straightforward issues involving a few thousand pounds all the way through to complex multi-million-pound cases.

We are also proud of the fact that we were recently named 'Best Collaboration Initiative' at The Lawyer Awards and 'Innovation of the Year' at the British Accountancy Awards – the first time a service like ours has won awards in both the legal and accountancy sectors.

In the context of the ILP, access to Escalate is available to all ILP members. There are no restrictions on the size or complexity of case and even if the case happened up to three years ago it can still be looked at.

For more information about Escalate go to www.escalatedisputes.co.uk or email chris.clay@escalatedisputes.co.uk