

There must be more than one way to crack a nut....
(Or, Dispute Avoidance and Resolution in a Recession)

The messages are rather confusing: some say we are in a recession, some say we have been in one for a while and some say that we will go into recession next year. Whatever the correct economic analysis may be, the fact is that there is definitely a lot less money about. Banks won't lend it, businesses don't have it and we don't want to spend it even if we have it.

The situation presents difficult problems for those who become involved in disputes.

Everyone will be familiar with the concept of using court proceedings to resolve a dispute. There is, however, a nasty surprise lurking in the system. Except in very rare circumstances, for most participants in litigation they will be out of pocket in terms of costs through no fault of their own, and even if they win their case.

Even apparently simple disputes are not cheap to resolve through the courts. Life and the law can be complex, and the costs of litigation can reflect that. The result, in times like these, is that there can be disputes that previously would have been the subject of litigation, but which now are left unresolved because pursuing costs too much.

But isn't that as it has always been? Probably.

What is different is that many of those who in the past might have been able to afford to pursue or oppose a claim cannot now do so, even if one of the increasingly various methods of funding were to be available (and often they are not appropriate).

So what can be done? Answer: All of things that could have been done before, but they are even more relevant now.

Know who you are dealing with

If one is to try to avoid a dispute in the first place there are real benefits in fully understanding who it is one is going to enter into a deal with. An example of where this did not take place is the apparent failure by the banks who engaged in the sub-prime lending business to understand with whom, and with what, they were dealing, so did not assess properly the risks they were taking on. Things will go wrong, but why increase the risk of that and the cost and complexity of sorting out the problems of having done business with someone without considering whom they are and what the situation might be if a dispute arose? In a property context, both sellers and buyers, landlord and tenants, borrowers and lenders could all make a range of enquiries to suit the situation to learn more about the person or entity they might be about to do business with (and their backers or guarantors) and the issues that might be affecting them. Some of them are really easy, for example, a search on Google. Of course, where quite a lot is at stake, more in-depth due diligence, enquiries and research would be appropriate.

Talk...in an appropriate manner

Things do go wrong in business relationships, and sometimes unexpectedly.

When they do, it is very important to recognise that as soon as possible and to try to address the problems. What you do at the beginning can have a significant impact on everything that follows. It can avoid a prolongation of the dispute or it can cause it to go on for years. It can save costs or triple them.

As difficult as it sometimes seems, often the best thing to do is to talk with the person with whom the problem has arisen. Try and find out why it has arisen. Could the cause be something to do with what you have done? Be honest with yourself about that, because to ignore it could result in you having to deal with a counterclaim later on that is more difficult to deal with than your own claims.

Emails can cause particular problems. Firstly, they can be sent almost immediately, but perhaps without the care and thought that goes into a letter, or the tone one can pick up from a telephone conversation. Secondly, their very informality, at times, can lead to

misunderstanding: what might have been meant to be an enthusiastic “No, thank YOU”, can easily become a grumpy “NO, thank you”, causing unintended offence.

Of course, everyone has their own style of communication, but rarely does one style suit every occasion. Tailor your approach to the situation concerned. Is there an on-going and valuable relationship? If so, being strongly confrontational might not be right. Equally, one might not want to appear to be a soft touch or pushover. But being calm, measured, reasonable and professional should not give that perception.

It is important to consider how what you say (or write) will be received. Will it engender a resolution? Will it give a message you want to get across? Will it cause a rapprochement or an entrenchment? If you think that what you say might not be understood in the manner you wish it, consider altering what you say, before you say it.

Test

If the problem, say, is non-payment of rent, try and establish why it is unpaid. What proposals are being made to pay it and when? Are the proposals sustainable and credible? Will what is proposed, although it might involve you accepting something less than normal (whether in terms of the timing of payment or the amount) be acceptable? What if you don't accept what is proposed? Will you cause a greater problem for yourself – an empty property, a liability for outgoings etc?

Consider chatting the problem through with your advisers, perhaps to alert them to the potential need to take early or swift action. There might be a cost associated with that, but it might save you some time and money later.

Trial?

Sometimes there is no option but to escalate the process and instruct lawyers to pursue your claims. But there might be several ways in which that might be done. It does not always have to involve going to court. Sure, if an injunction is needed to stop (or compel) a particular act, then you must seek it. But many disputes can be resolved by other methods. Some of them can, it has to be said, result in a process and costs similar to traditional litigation, e.g. arbitration. But others might not, e.g. mediation or expert determination.

Of course, you should consider trying to keep open the channels of communication. Just because lawyers have become involved does not mean you have to stop trying to resolve the case yourself.

The lawyers should also consider negotiations. There has been much judicial emphasis of the need to engage in Alternative Dispute Resolution (ADR) and mainly the judges have in mind mediation. But that is not the only method of ADR. Any reasonable alternative to court proceedings can be ADR. Many lawyers have become expert at representing clients at mediations. If they can deploy those skills in that context, they can do so without a formal mediation in an advanced form of traditional settlement meeting, perhaps adopting some of the processes of mediation (separate rooms, joint meetings, separate meetings and so on).

You should explore any such option with your lawyers. They will tell you why a court might take a dim view if you do not, but, more practically, unless you have deep pockets and a need to go to court, resolving the dispute early is likely to be preferable.

Learn

Learn from past experience of disputes. Why did they arise and how were they resolved? Was the outcome satisfactory or did it lead to further or different disputes? In either case, how did your behaviour affect the situation? If there were further or different disputes, could they have been avoided? How? If there was a satisfactory outcome, how could you try to influence the future so that the next dispute (and there will be one) might also stand a chance of settlement?

Most important of all, learn what you can do to try to avoid the dispute in the first place and apply it next time. Unless you are very lucky, there will be a next time. In the current economic climate, it could be sooner than you want, and it could be you on the back foot, needing some sympathy or empathy from someone else. Might that influence how you deal with situations now when perhaps you consider yourself to be the aggrieved party?

What one would not want is a situation where the dispute, costs and relationships have got out of hand and you find yourself thinking, "I wish I had done that differently!"

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