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The Cost of Trying To Resolve Disputes

Generally a loser in litigation will be ordered to pay the winner's costs, or the larger part of them. As we highlight in this article, the dilemma is that a party to a dispute might find itself out of pocket not only if it fails to follow the courts' best practice, but, conversely, even if it does comply with the rules. We then offer practical suggestions.

Why You Should Follow the Rules

In December 2008, we wrote about the impact of the recession on disputes, pursuing them or trying to resolve them. We considered in particular the attitude and steps one might adopt to help reach an appropriate conclusion. Click here to view that article.

Since then, in April 2009, some revised guidance was introduced to influence the steps that are taken in disputes before court proceedings start.

We have had that sort of guidance for a decade, but the new version – "the Practice Direction – Pre-Action Conduct" - has renewed the emphasis on taking appropriate steps to try and achieve a resolution before embarking on litigation.

If a dispute has got out of hand and feelings are running high, it is often difficult to understand why the lawyers are suggesting there be a settlement meeting or a mediation. Sometimes, the protagonists are very keen just to issue proceedings.

But to quote from the Practice Direction: "The court will expect the parties to have complied with the Practice Direction or any relevant pre-action protocol. The court may ask the parties to explain what steps were taken to comply prior to the start of the claim. Where there has been a failure of compliance by a party, the court may ask that party to provide an explanation."

If there is inappropriate non-compliance, the court can impose sanctions: it can suspend the proceedings, require the party at fault to pay the costs or some of them, order that costs be assessed on a basis that might be more onerous or order an adjustment to the amount of interest that might otherwise have been awarded.

Complying with the guidance as to pre-litigation conduct generally means, as a minimum, the claimant sending an appropriate letter of claim which includes copies of the supporting documents, and allowing an appropriate time for a response (often not less than 14 days), and the recipient sending an appropriate response, with full reasons if the claim is disputed. If disclosure of documents is appropriate, it should be given. Some of the specific pre-action

protocols (e.g. for personal injury claims) also make provision for serving copies of experts' reports.

These days it is generally recognised that starting proceedings should more or less always be a step of last resort. Although the guidance makes it clear that engaging in some form or other of Alternative Dispute Resolution process (ADR) is not mandatory, there is encouragement to do so as it might help resolve the dispute without the need to start a court claim.

If that were not enough, there is also encouragement to look critically at one's claim and make an offer to settle it for perhaps less than one might otherwise seek. If litigation then takes place, and the outcome is that the court makes an award for a sum greater than that in the offer, the court can be asked to make a costs and/or interest order that is more advantageous to the party that made the offer.

As a result of the sanctions that might be imposed if the court were either to find that there has been an inadequate attempt to resolve a dispute or an offer to settle becomes relevant, those involved in a dispute will, therefore, go to quite some lengths to be seen to try to avoid starting court proceedings and look critically at the merits of the claim or defence of it.

That comes at a price.

With relationships (particularly those made in business) becoming ever more complicated, it can take quite some time, effort and expense to explain a claim, understand it and explain why, if this be the case, it is opposed.

Of course, there will still be more straightforward cases which only require a reasonably simple letter of claim and then, if the claim is not met, proceedings.

How Complying With the Rules Can Leave You Out Of Pocket

The costs that can be incurred in engaging in appropriate pre-action conduct can often be significant. They can sometimes become disproportionate to the value of the issues in dispute. Factor in some of the issues we wrote about in December 2008 (Click here to view that article), and one can see why it is sometimes not worthwhile pursuing, at least using lawyers, what might otherwise be a respectable claim.

But what if one does embark on the process as recommended by the Practice Direction and there is a settlement or there is no longer a need to pursue a claim or the response to a claim is justified and it turns out that there was not a claim to pursue at all? What happens to the costs incurred?

Herein lies a difficult problem. Often those costs will not be recoverable.

That can cause a sense of injustice. A claimant with a legitimate claim incurs costs to pursue his claim, short of litigation, as he is encouraged to do, but then ends up more out of pocket than he was.

The original guidance regarding pre-action conduct came about when the Civil Procedure Rules were introduced in April 1999. They were the consequence of the recommendations of the report by Lord Woolf – Access to Justice.

It was noted by some authors at the time that the effect of the requirement to engage in pre-action conduct in the manner encouraged meant that the report did not mean Access to Justice for all, but only for those who could afford it. That, of course, is pretty much as it has always been.

That pre-action costs incurred when litigation is not then pursued are generally not recoverable has been emphasised in a number of cases, most recently in ***Reeves*** v ***Blake*** {Court of Appeal, 24 June 2009, at paragraph 24). Although the decision mainly concerned the possibility of recovering certain costs in awards made under the Party Wall etc Act 1996, the judgment notes. "Further, in the ordinary way, no costs are recoverable by a party who prepares for litigation which is never instigated." This is not new law, but it is worth being reminded of the principle.

There are some exceptions. For example, some of the pre-action protocols (e.g. that relating to housing disrepair) make provision for some costs recovery. Of course, where there is an agreement between the parties, it might make provision for costs recovery. A classic example is a lease, which often requires the tenant to reimburse the landlord the costs it incurs when the tenant defaults in performance of its obligations. But it would be a rare lease that specifically allowed for the tenant to recover costs from the landlord were it to default.

With these things in mind, it would be prudent to remember when drafting agreements to ensure that the cost of dealing with disputes is an issue the document caters for. Many do, but discuss it with the lawyers.

Of course, as we emphasised in December 2008 (Click here to view that article), one should try and avoid the dispute in the first place, and if one cannot do that, do what reasonably can to avoid it escalating or being repeated.

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