

# The Customer is Always Right?

An overview of alternative forms of dispute resolution by **Paul Greenwood MCIAT**

In the July edition of *Architectural Technology* I referred to the increasing use of adjudication and how it was necessary for professionals to familiarise themselves with the adjudication process in order to be able to discharge their duty to their clients and hopefully avoid being on the receiving end of adjudication. Now that adjudication has taken a firm hold in the construction industry and its use is rapidly increasing, it is perhaps opportune to consider how disputes arise and how best to avoid them. It is also worth being aware of what processes are available to resolve disputes if you cannot avoid becoming embroiled in them.

## How disputes arise

From my own experience as an expert witness there appears to be no limit to the ways to the way in which professionals find themselves in dispute with their client from their very first contact until long after the completion of a project. Architects seem to be on the receiving end of many such actions, however, having also acted expert witness in cases involving technologists and surveyors, architects are by no means the sole target. If clients believe they have suffered a loss, then the professional advising them (whether as contract administrator, project manager or employers agent), is likely to be on the receiving end of an action to recover that loss and the costs incurred in bringing the action. Be warned the smallest of disputes can very quickly run up costs, which are disproportionate to the amount in dispute.

Unfortunately there is no simple solution to avoiding disputes since every dispute is different. I can however offer some tips from my own experiences, which may be of assistance: -

- Make sure that your clients understand what you are going to do for them, how much your services will cost, and when you will perform those services. Above all make sure these things are confirmed in writing and, if there are any changes, confirm the changes
- Keep water out of the building, whether its rainwater, condensation or rising damp. There can be no quicker way to a dispute than to provide the client with a wet building.
- Make sure the details work, and then make sure the contractor builds it in accordance with the details. All too often Contract Administrators do not inspect the works thoroughly enough to ensure it is being built in accordance with the drawings.
- Ensure the building is structurally sound. Know your limitations and seek appropriate advice if necessary. Be careful about employing structural engineers direct (or any other consultant for that matter) since your insurance policy may not cover you for such additional risk. This business is risky enough without taking on board other people's risks!
- Give the client what he/she wants. If you do not give him/her what he/she wants explain the reasons very clearly. If changes have to be made to what has been agreed then keep the client informed.

- Understand the contract. Know what information has to be provided by the Contractor, and when and what you (and others) have to provide to the Contractor. Claims against Contract Administrators for wrongly granting extensions of time are by no means rare. Failure to grant an extension of time is no way out either, since if the client is on the receiving end of a claim from a contractor then the Contract Administrators could very easily be brought into the proceedings as a third party. Rocks and hard places spring to mind! Ensure you issue at the appropriate time any requisite notices such as notice of non-completion and notice to withhold payment.

You probably feel this is all pretty simple stuff but you would be surprised how often people get the basics wrong.

### How to avoid disputes

The most effective way of avoiding disputes is to identify if you have any deficiencies in the above areas. By doing this you will increase your chances of avoiding the very time consuming and costly business of becoming embroiled in disputes which can very often be pretty terminal with regards to receiving future appointments (and recommendations) from the person with whom you are in dispute.

There is usually a point where a disagreement, which is not beyond resolving, crystallises into a dispute and becomes much more difficult to resolve for many different reasons, most of which may be made unknown to the technologist, surveyor or architect.

A common stumbling block is costs. As time passes costs tend to increase and as a consequence the prospect of resolving the dispute diminishes. Don't be fooled into thinking that if you put a problem on the shelf it will go away. Quite often it quietly grows even bigger and becomes harder to resolve. Be bold and get to grips with the problem as soon as possible and don't let go until it is sorted. Don't be afraid to admit failings on your part – sometimes that's all the client may want, but be careful to involve insurers where there may be insurance implications. If the disagreement is left unresolved the client may then want your blood or a pound (at least) of your flesh!

If a problem cannot be amicably resolved there are several ways in dealing with the situation. Melinda Parisotti from Wren Managers, who manages professional indemnity for architects, recently set out very succinctly several of these in an article she wrote for *Building* (22 June, 2001 page 54). She has very kindly allowed me to summarise these as follows:

- Hold fire on the lawyers – by all means seek their advice but think twice before wheeling them out.
- Keep insurers in the shadows – you should always notify and be guided by your insurers but it is often a good idea to keep them out of the limelight.
- Civility pays off – avoid becoming aggressive, dismissive or curt. Keep lines of communication open.
- Play the political game - who is the decision maker?
- Allow for an honourable exit – pride is often the biggest stumbling block

- Don't get hung up on the law – consider a practical compromise rather than the strict legal one
- Explain yourself – if you believe that the fault does not lit with you explain this fully as soon as possible.

If all the above fail you may be unable to avoid being drawn into a dispute. There are, however, various ways in which disputes can be resolved without the need to refer to the courts.

### Alternative forms of Dispute Resolution (ADR)

We all know that disputes can be referred to the courts. There are, however, other ways in which disputes can be resolved sometimes a good deal quicker, more effectively and far more economically than through the courts. These are often referred to as Alternative forms of Dispute Resolution (ADR) i.e. alternative to the courts.

The contract between the parties in dispute may dictate the manner in which a dispute has to be resolved. By way of example JCT forms of contract require disputes to be referred to arbitration. Statue has also recently introduced adjudication whereby any party to a construction contract, with few exceptions, can refer their dispute to adjudication at any time; these provisions are also incorporated into JCT contracts (see *Architectural Technology* May/June, 2001). There are also an almost infinite number of other ways in which disputes can be resolved, a few of which are listed below:

- **Arbitration.** A process by which an impartial third party, knowledgeable in the relevant trade and practice (in this case the construction process), makes a decision as to the parties contractual entitlements in respect of the dispute referred to him/her. The award is binding on the parties.
- **Adjudication.** The process is similar to arbitration but the Decision issued by the Adjudicator is usually issued within 28 days unless this period is extended. Although similar to arbitration the adjudication procedures are considerably abridged in order to comply with the very limited time available. The Decision is binding on the parties until the dispute is referred to arbitration or litigation. Most parties, however, accept the Adjudicator's Decision without the need to refer the dispute to either arbitration or litigation.
- **Mediation.** The parties select an independent third party to assist them in reaching an acceptable solution. His/her role is that of honest broker and not a judge. The parties can agree that the settlement reached by them is binding on them, if not the dispute can be resolved through the courts, arbitration, adjudication or one of the forms of ADR.
- **Expert Evaluation.** As a preliminary step to settlement the parties may agree to engage an expert to investigate and report on the dispute. The parties may, if they so wish, agree to be bound by the opinion of the Expert, if not the dispute can be resolved through the courts, arbitration, adjudication or one of the other forms of ADR.
- **Conciliation.** Usually considered to be an informal procedure, more along the lines of a discussion aimed at trying to get the parties to discuss and settle their

differences. Should there be no settlement the conciliator often produces a recommendation as to how the dispute should be settled.

- **Mini-Trial.** The parties are normally represented by lawyers who make a presentation to a panel. This panel typically consists of a senior manager of each party, who has not previously been involved in the dispute and chaired by an independent neutral person.

All the ADR processes and other variants of them have certain features in common: i) to be successful there has to be someone from each party who has the authority to agree a settlement; ii) there must be acceptance by all parties of the need to reach settlement; iii) each process described above, whilst given a name, is flexible and may be varied to suit any particular problem or circumstance.

Hopefully with an understanding of how disputes arise we will be in a better position to avoid disputes wherever possible. Inevitably some disputes cannot be avoided therefore an awareness of what alternatives are available to assist in resolving them may help in choosing the most appropriate process to ensure that the disputes are resolved as quickly and cost effectively as possible.

It is worth remembering that any dispute, however small, has the potential of becoming serious if not resolved and that disputes are costly in both time and money and have a nasty habit of gaining an unstoppable momentum all too soon. Avoid them wherever you can! If you cannot avoid them, then ensure that you obtain good advice as early as possible it can be money well spent. Whatever you do don't forget to keep your insurers informed.

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*CIAT have a free information sheet available from Central Office, City Road on the various forms of ADR and the Institute has involvement with a mediation and arbitration scheme. Please call Diane Dale on 020 7278 2006 for further information.*