Elements of a Civil Claim

This presentation provides an overview of the elements of a civil claim, with particular reference to construction claims, and looks at each dispute resolution option in the context of the other formal processes available.

In Part A, I set out the basic steps involved in preparing a claim. In Part B, I explain the ways in which that claim can be advanced. In Part C, I anticipate how the claim might be resolved, and give an indication of the costs and risks involved.

A. Preparing a Claim

I start at the end of the process and work backwards. This is because I am assuming that the aim of the process is to recover a sum of money. If another remedy such as an injunction is involved, then the Court will often consider whether money would be an adequate remedy instead. The process itself will involve you in the expenditure of money. It is therefore of fundamental importance to assess at the outset whether the sum that you are aiming to recover is worth the expenditure and the risks involved in seeking to recover it.

1. Quantification of Losses

1.1 There is little point in investing money in a claim, however meritorious it may be on a legal analysis of liability, if you cannot produce compelling evidence of the money that you have lost and want to recover.

1.2 These costs should be capable of being summarised in a schedule that can be appended to a claim document.

1.3 I should add that an inability immediately to quantify your claim is not a bar to initiating any of the dispute resolution processes described below. It does however make any negotiations aimed at an amicable commercial settlement more difficult to conduct, as there is no clear point of reference from which a settlement figure can be derived. Since both the negotiations and the formal process will cost money in legal and consultants' fees and will use up your valuable time, you will not want to initiate them - and in some instances subject yourselves to a rapid timetable for resolution - without clear financial objectives.

2. Categorisation of Losses

2.1 The law will only allow the recovery of losses as damages if they:-

2.1.1 arose naturally, i.e. according to the usual course of things, from an identified breach of contract; or

2.1.2 are such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it; or

2.1.3 are demonstrably losses which were in the actual contemplation of both parties at the time the contract was made as the probable result of a breach of it.

2.2 The costs of unsuccessfully contesting claims brought under a different contract will not normally fall within either of the first two categories.

2.3 If the risk of such losses was specifically brought to the attention of the party or parties from whom recovery of the loss is sought at the time a contract was entered into with them, however, then such losses may fall within the third category.

2.4 Losses consequent upon negotiated compromises of claims under a different contract may not fit within any of the three categories, particularly if the compromises can be shown to be unreasonable.

2.5 For these reasons, it is especially important for a defendant such as a party in the middle of a contractual chain to consider consolidating an action against it with any claim it could bring under a different contract based upon the same facts.

2.6 This will then influence the type of proceedings which are most desirable for the defendant for the purposes of minimising its risk.

2.7 Clauses are typically inserted into commercial contracts which require disputes or differences to be notified at an early stage to parties higher up a chain of contracts, and there may be a requirement that the claims under two or more contracts in the chain are dealt with together in any of the formal processes discussed below.

3. Causation of Losses

3.1 This is frequently a difficult and expensive matter to establish in construction disputes, because of the number of different parties involved in a project.

3.2 Take as an example a claim by an employer against a contractor. If you as employer are able to prove that the contractor did not build the works to specification, he may still escape liability on the grounds that even if he had built the works to specification, the design was inherently defective and therefore his breach made no difference to the final outcome. If you are able to show that he is late in completing the works, he may escape liability because your architect failed to provide him with essential design information at the appropriate time, and may even have a substantial claim for delay himself against you.

3.3 If on the other hand you bring a claim against your architect, he may dispute that the specification was defective, and blame the problems on the contractor's poor workmanship. Even if he concedes that there was something wrong with the specification, he may still argue that it would have been adequate for its purpose if the contractor had built it properly. If he is held responsible for delay in supplying design information or giving necessary instructions, he may try to lay the blame on the contractor's poor management. All this will have to be considered by independent experts who will charge further fees for producing reports and attending meetings and hearings.

3.4 The courts have preferred to keep the latitude to apply common sense to the facts of each and every case in determining causation. There are thus no hard and fast rules by which one can confidently predict which way a judge will come down. All that can be said with any certainty is that an extensive, and expensive, factual investigation will normally need to be conducted prior to the trial of an action, in order that the judge has as many of the relevant facts as possible to which he can apply his common sense. It is most important, therefore, for those people who have the relevant facts in their heads and in their files to make a common sense assessment of their own as to what caused the losses claimed in each case. Statements should be taken from the key managers involved in the project as early as possible whilst their memories are fresh.

4. Breach of Contract or Duty of Care

4.1 It is necessary to identify the term or terms of a contract, or a duty of care owed in tort or under statute, which has been breached by the party or parties from whom damages are sought.

4.2 If there is no executed contract in place with a potential defendant, evidence will be required of a contract concluded by conduct. The acceptance of payment for specific works is usually sufficient.

4.3 Thought should be given to any implied terms which may have been breached. The Supply of Goods and Services Act 1982 implies that works will be done to a reasonable standard in a reasonable time and for a reasonable price where nothing specific has been agreed in these key areas. These are questions of fact which a Judge can decide based upon the factual evidence before him.

4.4 Claims against professionals are typically based upon an allegation that they failed to use reasonable skill and care in the performance of their duties. The evidence of a senior member of the defendant's profession is normally required to establish this. This evidence is costly to obtain, and there is a risk that the expert appointed - and indeed the Judge - will ultimately take the view that the defendant did use reasonable skill and care, and therefore was not in breach of duty.

4.5 Claims in tort are often problematic. This is because there is no duty in law not to cause pure economic loss. The duty not to cause damage is also normally limited to property other than the building to which work is being done. Duties of care thus usually have to be framed by reference to contractually agreed conditions, which makes them largely superfluous, save in certain cases (usually involving latent defects) where a contract claim is statute-barred but the claim in tort is not.

B. Advancing a Claim

1. A claim should be advanced by setting out the information described in Section A of this Schedule - or as much of it as is available - in a letter of claim addressed to each or every potential defendant.

2. In order to maintain the flexibility to choose any of the dispute resolution options described in Section C below, this letter should ideally be in the form required by the Pre-action Protocol for Construction & Engineering Disputes issued under the Civil Procedure Rules.

3. In addition to the substance of the claim that you are advancing, the Protocol letter must deal with a number of administrative matters, such as the addresses of the parties and of any experts who have been instructed.

4. A copy of the Pre-action Protocols can be found on the Ministry of Justice's website at **http://www.justice.gov.uk/civil/procrules_fin/menus/protocol.htm**.

C. Resolving a Claim

1. The Pre-action Protocol letter is a first step towards issuing court proceedings. Before these are issued, however, the Protocol provides for the potential defendant to make a response within 28 days of receipt of the letter, and for a without prejudice meeting to be held between the parties as soon as possible after this letter is received. The aims of this meeting are described in detail in Section 5 of the Protocol, but in brief they are to see whether the claim can be resolved by negotiation, and if it cannot, to agree a sensible way to manage the resolution of the claim.

2. There are four main options for resolving the claim where negotiations fail, which are as follows.

2.1 Adjudication

2.1.1 The right to refer a dispute to adjudication at any time is implied into all "construction contracts" (as defined) by the Housing Grants Construction and Regeneration Act 1996 as amended ("the Act").

2.1.2 The Act also lays down the timetable for resolution of the dispute referred to adjudication: just 28 days, unless the parties agree to a longer period.

2.1.3 Adjudication thus promises a swift return for a properly prepared and advanced claim. It should be noted that although the right is available "at any time", the courts have held that a claim is not a "dispute" until it has been put to the potential defendant in a form in which he can decide whether to accept or reject it. Hence the importance of preparing the claim properly and advancing it in a letter of claim.

2.1.4 There are some drawbacks to the adjudication process however: -

2.1.4.1 the adjudicator's decision is not final and can be reviewed in arbitration or litigation (although the courts will usually grant summary judgment on a breach of contract claim very quickly if a sum awarded by an adjudicator is not paid in the interim and in practice most adjudicators' decisions are the final word on the matters referred to the adjudicator);

2.1.4.2 the adjudicator has no power to order the unsuccessful party to pay the successful party's costs, unless both parties agree to give him that power;

2.1.4.3 the speed of the process may make the adjudicator reluctant to make a finding on the balance of probabilities (the civil burden of proof) that a professional person has been negligent;

2.1.4.4 the rough and ready nature of the procedure makes the likelihood of error greater.

2.1.5 The costs of preparing and advancing a claim in adjudication proceedings will most likely run into five figures, given the level of preparation required, and the need to advance the claim formally before it is referred to an adjudicator.

2.2 Mediation

2.2.1 This is a form of facilitated negotiation, whereby a neutral third party chairs a meeting of the parties and then generally moves them into separate rooms and shuttles between them in an effort to broker a settlement.

2.2.2 The process has a good track record of settling disputes - an overall success rate of 60-70% for construction disputes - even where negotiations have reached an impasse.

2.2.3 There are nevertheless some pre-requisites, in the absence of which the process is likely to fail:-

2.2.3.1 those attending the mediation on all sides must have the authority to conclude a commercial settlement without reference back to a board, insurers etc;

2.2.3.2 the participants must be willing to be pragmatic and prepared to walk away with an outcome that they can live with, rather than their ideal outcome;

2.2.3.3 the parties should be prepared to think laterally, and in particular to go outside the ambit of legal rights and remedies in the search for a mutually acceptable solution to the problem which has given rise to the claim.

2.2.4 Any agreement reached at mediation will normally be recorded in writing and signed by the parties, thus giving rise to a new set of legal obligations between them. If court proceedings have been commenced, this agreement can be incorporated as a schedule in a so-called Tomlin Order which will be sealed by the court.

2.2.5 If however no agreement is reached, the mediator will not make a decision in favour of one or other party - the dispute will have to be resolved by some other means.

2.2.6 A one-day mediation will typically cost around £2,000 in mediator's fees (normally shared by the parties), with a similar figure for preparation costs (which one party may agree to pay if it admits liability).

2.3 Arbitration

2.3.1 Many standard form construction contracts and professional appointments contain clauses which provide for disputes to be decided finally by an arbitrator, rather than by the courts. Even if the contract does not contain such a clause, the parties could still agree to settle the dispute this way.

2.3.2 Arbitration, like adjudication and mediation, is a private process. Otherwise, however, it resembles court proceedings, in that the arbitrator meets with the parties, sets a timetable for the various procedural steps leading up to a final hearing, and ultimately gives a final and binding decision on the dispute.

2.3.3 The procedural steps of disclosing documents and preparing witness statements and experts reports can prove very costly. The arbitrator normally has the power to order the unsuccessful party to pay some or all of the successful party's costs, although the successful party will never recover everything that it has spent in bringing the claim.

2.3.4 Arbitration may be problematic if proceedings involving a number of defendants are possible. As the jurisdiction of the arbitrator derives from the agreement to arbitrate between the parties, it may prove impossible to obtain the agreement of all the defendants to a single consolidated arbitration. The claimant would thus be faced with the prospects of multiple arbitrations. If there are arbitration clauses incorporated into existing agreements, however, this scenario may prove unavoidable.

2.3.5 The costs involved in obtaining an arbitrator's award can very easily run into six figures on large complicated technical disputes.

2.4 Litigation

2.4.1 The appropriate court to proceed in for a claim of any size is the Technology & Construction Court in Fetter Lane, London EC4 - a specialist branch of High Court.

2.4.2 The case - if it proceeds to trial - will be heard in public, and the judge is likely to publish his judgment for dissemination via the law reports. The judgment will contain comments on the competence and credibility of witnesses. The court room - unlike an arbitration room - is provided free of charge, but the judges may soon start charging an hourly rate for their services, which will be added to the fees of solicitors, counsel and experts. These are likely to be considerable, as they would be for arbitration, because of the large number of documents generated in the course of a construction project.

2.4.3 Litigation is not an ideal way of resolving claims of this kind, and should be viewed very much as the last resort. The costs involved in settling a dispute by means of a High Court trial will regularly run into six figures, and at least 30% of these are likely to be irrecoverable even in the event of a successful outcome because of the way costs are assessed by the court. On the other hand, if *a* claim has merit and the defendant refuses to settle on reasonable terms, then the approach of trial can bring the prospect of financial disaster closer to home, and prompt more attractive settlement offers.