

# The Definitive Guide to Solving Business Disputes

With tips on:

how to save on solicitor fees

preventative action you can take

*plus*

all you need to know to fight it out in court if the worst happens

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## Summary

This paper provides a definitive Guide to business disputes, what causes them, how to avoid them and what you MUST do if you find yourself in a dispute with suppliers, customers or staff.

Written specifically for family owned and owner-managed businesses facing a business conflict or struggling to manage a dispute, the Guide will answer all your questions and concerns about the best way to resolve disputes in your company.

The Guide has been prepared by lawyers who work daily in the arena of dispute management and conflict resolution, and shares years of invaluable experience, short cuts and tips your lawyer wouldn't normally hand out for free.

If you are facing issues not addressed in this guide, do let us know and we'll add your comments on them in the next edition.

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## Conflict in Business

Disputes are a sad and unavoidable fact of business life. From the moment you start your business until you sell up or retire, you face conflict wherever you look, whether it's suppliers not delivering on time or customers arguing over payment terms or the quality of what you've delivered.

And business conflicts cost literally thousands of pounds to resolve if they are not managed properly.

At a macro level, the Centre for Effective Dispute Resolution (CEDR) calculates that conflict costs businesses in the UK £33 billion every year. They say it's how you approach conflict that makes all the difference.

Breaking down the costs of business disputes, the CEDR highlights that the cost of the damage to businesses caused by conflict (£27bn) far outweighs the legal fees (£6bn). This might surprise a few business owners who've seen solicitors' bills run out of control when facing court proceedings. But think about it – the obvious costs are the solicitor's bills but there are also the management cost, lost profit and staffing costs incurred by focusing on the conflict at the expense of the your wider business success. And I haven't even mentioned the potential damage to commercial relationships and reputations which can affect the business in the long term.

If you are facing a business dispute, you are not alone! Daily, business owners are in conflict over such things as:

- late or non payment of invoices - the most common type of dispute
- delay in delivery, or questions over the quality of goods or services
- advice given by professionals such as an accountants or lawyers
- staff behaviour, timeliness or work quality
- the terms of renewal of a tenancy or the level of rent increase
- the use of trademarks or trade names
- trade or product defamation.

The list is endless but what they all have in common is they are a major distraction from business.

Often there is an underlying cause to a dispute, and identifying the cause and doing something about it can mean fewer disputes in the future. Late or non payment of invoices may indicate that the payer is unhappy with the goods or services, or perhaps that they are having severe cash flow difficulties which may end up with insolvency. A payer will look to find any excuse to try to avoid or delay payment, and this means it is very important to find out at an early stage the real cause of the problem.

## **How to Avoid Business Disputes**

Avoiding disputes altogether is maybe not realistic, but you CAN adopt a strategy to minimise the risk of encountering serious business disputes.

### ***6 essential tips to avoid disputes***

#### **Adopt the right management style**

By adopting the right management style, you can make your business less prone to disputes. Listening, having empathy and even conciliation are not weaknesses – they can often give you the upper hand.

Look for early signs of a dispute. Late payment is one sure sign, but keep track on customer satisfaction too. If your customers start to indicate in surveys that they are not happy, act quickly to understand why and put things right. Prevention is far cheaper than cure.

Have a constant dialogue with customers to help you understand their needs and improve your service. On the other side of the coin, make sure that you engage with your suppliers to help them understand your needs and expectations.

Careful preparation of your contract terms and conditions and management clarity on the policy to be followed in completion of the contract paperwork is essential. Setting up a sound performance monitoring process to identify problems before they turn into disputes will also serve you well.

#### **Get it in writing**

Disputes frequently blow up because those involved have different opinions on what was agreed or what they were required to do. And so often there is no paperwork, or the

paperwork does not record what you thought had been agreed, or worse still, you have contracted on their standard terms and conditions that you have never seen.

Many disputes can be avoided by getting the paperwork right in the first place, and making sure that everyone has a common understanding of what is expected of them and what will happen if things go wrong.

So adopt the following approach:

1. Make sure that agreement has been reached on all the important contract clauses;
2. Record all pre-contract negotiations and confirm everything in writing and/or email;
3. Make sure that the contract states exactly what is understood to have been agreed;
4. Negotiate exclusion clauses and make sure that they are fair and enforceable;
5. Agree on any standard terms and conditions to be used and that they comply with the unfair contract terms law;
6. Provide any standard terms and conditions with the contract paperwork, not on the back of invoices;
7. Get advice on your contract documentation and repeat the process regularly to make sure that it has kept up with the law.

Even if you have a contract, you're not out of the woods yet. All too often we see examples of the following, which create their own problems:

- Standard terms and conditions that are on the back of an invoice;
- Exclusion clauses trying to prevent or limit a claim;
- A term falling foul of the law on unfair contract terms

### **Don't delay**

Failing to chase a customer who fails to make a regular payment, ignoring suppliers' broken delivery promises or failing to respond to a customer's complaint about product quality will all potentially escalate before too long into full blown disputes. So whatever you do, don't put off tackling these niggling problems when they first occur.

If, for whatever reason, you find a dispute brewing, *it is best to get early advice on your legal rights*, so that you know where you stand. This should help you negotiate a quick settlement of the dispute. Any problem left to its own devices will only get bigger and more expensive to solve.

## **Be fair**

Exclusion clauses that try to limit or exclude liability for breach of contract pose their own difficulties. Most are subject to laws to ensure that contracts are fair. These are stricter when the contract is with members of the public than with other businesses. You must take care that any clause you include to protect you from claims does exactly that, and that it is fair in the circumstances.

Standard terms and conditions also pose problems. They should not just be on the back of an invoice; otherwise they can only be relied upon if there has been previous trading with the particular customer on those terms. Such standard terms and conditions must be produced to the contracting party before the contract is entered into, not when the goods or services are invoiced.

And it is no good using complex legal jargon and hiding the nasties in some deep, dark corner. With consumers in particular, this will be a waste of time as the courts like to set them aside. The High Court recently decided that parts of an estate agent's standard terms were unfair and completely unenforceable. The agents had not only tried to ensure that they would be entitled to commission where they played no active part in a transaction, but they also buried the term in small print and did not draw it to the attention of the consumer. This fell foul of the law on unfair contract terms.

## **Train your staff**

You can have the best policies, procedures and documentation in the world but, unless you train your staff in how to use them, and constantly carry out audit checks to ensure compliance, it could all go horribly wrong in a dispute when you discover that your procedures had not been followed.

People to focus on include your sales force, who are potentially making or creating contracts on a daily basis; anyone responsible for buying in your business, who need to understand what terms they are committing your business to; and of course anyone responsible for people management or supervision. The law is a minefield for the uninitiated, especially where employees are concerned.

## Vet suppliers and customers

In the rush to secure orders, it is easy to overlook some vital checks which, if done, could help you avoid doing business with a customer or supplier with a bad track record. Carry out credit checks, and repeat them on a regular basis. For each customer, establish a credit policy based on their credit check. Establish sound debt collection procedures. The longer you leave a debt the more difficult it is to recover.

Check references from suppliers. Are they likely to let you down? Do they need close management? Being prepared is after all good management.

### *In summary*

- Adopt a **proactive and conciliatory management style**, avoiding confrontational behaviour. Try to seek solutions through dialogue and agreement rather than warfare. Listen to your customers and suppliers.
- Establish sound policies and procedures for both winning work and for performing the contract. **Get it in writing.**
- **Don't delay.** If there's a problem brewing, don't bury your head in the sand or let it drag on; address it quickly.
- **Be fair** to your customers and suppliers; making exaggerated claims or unreasonable demands will inevitably make conflict more likely.
- **Train staff to** follow set procedures on contract paperwork and dispute handling.
- **Vet both suppliers and customers** before you do business with them. Have a credit control policy, with realistic credit limits and debt collection procedures.

## If conflict is inevitable how should you manage it?

You should have a strategy for dealing with a dispute as quickly as possible before it blows up in your face. Molehills can become mountains if not tackled early.

### *5 steps for effective dispute management*

#### **Step 1 - Identify your position**

The first thing to do is to find out just how strong or weak your case is, as the best way to deal with the dispute will vary depending on the strength (or otherwise) of your position.

- look at exactly what has happened and then examine all the documents between you and the person or organisation you are in dispute with.
- identify your key personnel who would be called upon to give evidence. Get written statements from them as soon as possible. Many a dispute has been lost when key personnel have left employment and refuse to co-operate.
- consider getting early legal advice as this could dictate how you handle the dispute to your best advantage.
- take extra care when writing letters and emails. Write them knowing that they could be examined by a judge, arbitrator, adjudicator or mediator looking at the case.

#### **Step 2 - Consider what result you want**

Once you know just how strong your position is, it's time to consider what your objectives are.

Do you want to win? Of course you do but what does a "win" mean to you in a particular case?

It might be that your position is strong and you want to make an example to stop others from raising such disputes in the future. In such a case, you might be willing to pull out all the stops and fight the case all the way through the courts. However, such an approach may be expensive.

At the other end of the scale, you might want to continue what has generally been a good commercial relationship with your opponent. You want to resolve the dispute as quickly as possible so you can continue to trade.

It might be that you look at the dispute in a commercial way to maximise your recovery or minimise your loss (taking into account risks, time, and costs).

### **Step 3 - Know your opponent**

As well as knowing what you want, it is important to have a good idea of what your opponent wants. Do they want to fight the case? Do they have the money and time to do so?

It might be that you have a 50% chance of success but you know that your opponent could not afford to pay the costs it would take to fight you. If so, this puts you in a strong negotiating position to get a favourable outcome.

Alternatively, it might be that you could spend a lot of money, time, and effort and win your case but your opponent doesn't have the money to pay you and is simply forced into liquidation.

### **Step 4 - Costs and benefits**

You will need to know what the likely outcomes are in your case and how much it is going to cost. What is the likely timescale of various options? Only then, can you really make a decision on strategy.

It is important to undertake a cost/benefit analysis. You might, for example, have a good reason for taking your case to court and recovering £50,000 but, if it's going to cost you £40,000 to get that outcome and you only have, say, a 70% chance of success, you might want to consider other options too.

### **Step 5 - Plan your campaign**

Once you have gathered all the above information and taken legal advice on it, it is now time to plan your campaign. What tactics would be best to achieve the outcome you want? What methods do you want to use?

## How to prepare for court and what to avoid

If you've failed to reach a settlement of your dispute and you find yourself heading for court, there are some things you need to do:

- Get the best representation you can afford;
- Prepare yourself and your witnesses - write down what happened now, when it's still fresh in your memory;
- STOP – consider what you will gain and what you stand to lose, and not just financially, and then reconsider whether you should settle;
- Agree a Case Plan with your lawyer identifying the steps from the investigation stage right through to the trial, the time line, what you will be required to do and when, and the costs involved in each stage;
- Be realistic about your prospects of success and have a strategy for settlement;
- Be prepared to engage in out-of-court methods of dispute resolution (often referred to by lawyers as “ADR”), as the courts will expect this and may suspend any court action to try ADR.

## Out-of-court methods of solving business disputes

Not every dispute has to end up in a courtroom.

The ideal way to resolve a business disagreement is for the two parties to negotiate between themselves and come to a mutual agreement and settlement. Of course this isn't always possible. Sometimes, with the help of your lawyer, you can make a more compelling case and agree a settlement without the case going all the way to court. It's not uncommon for business disputes to be settled at the 11<sup>th</sup> hour, just before the case is due in court.

There are other methods of resolving disputes, and commercial enterprises are beginning to grasp the opportunities of alternative dispute resolution (“ADR”). There are numerous forms of ADR:

1. **Arbitration** is perhaps the oldest form of ADR. It is usually as expensive and inflexible as court proceedings, but with the advantage that the arbitrator who will decide the issues is often an expert in the subject matter of the dispute, and hearings are in private. Many commercial agreements provide for disputes to be determined

by arbitration. Awards made by an arbitrator are binding on the parties. Arbitration is the common form of dispute resolution in international contracts.

2. **Adjudication** is common in the construction industry. It provides for a quick and binding decision and often covers many issues arising in an on-going contract. It can later be varied by a court but the decision can still be enforced before then.
3. **Mediation** in which the process is confidential, 'without prejudice' (i.e. what is said in a mediation cannot be referred to in a court), flexible, and only binding if the parties agree. The mediator is a trained facilitator, skilled in identifying the strengths and weaknesses of each party's case, and in moving the parties towards a settlement.
4. **Expert Determination** is where the parties jointly appoint an expert to decide a question which the parties accept will be binding on them. Usually this is a technical question which may be the deciding factor in a dispute. The expert could for example be a valuer of goods or property, or an engineer.
5. **Neutral Evaluation** where the parties approach a neutral expert in the area of dispute for an indication of the likely outcome of court proceedings. The decision is non-binding but persuasive.

## Tips for saving money on lawyers' fees

Everyone knows that getting a solicitor involved in managing a dispute for you can be a costly business, particularly if the dispute goes all the way to court.

***There are some ways you can SAVE on a lawyer's fees. Here are the top 8:***

- Prepare your case thoroughly, identifying all the facts and key documents.
- Do as much work as you can in setting out your case, as the easier you make it for your lawyer, the less it will cost you. Don't just dump all the files on your lawyer and expect him or her to sort them all out and read your mind.
- Agree the best way of communication. Email is often the most efficient but don't expect an immediate response to non urgent communications. Remember solicitors charge for their time and it's often better that they provide a considered response to all the information about your case than reply instantly before getting all the facts.
- Agree an action plan for the dispute so you both know where you are heading and what you are trying to achieve. This should prevent costly conversations about what stage you are at or why things have taken a particular course.

- Consider alternative dispute resolution (ADR) rather than hotly pursuing court proceedings.
- Listen to your lawyer's advice. They will have seen cases like yours before and have a good feeling for what's worth battling over and likely outcomes.
- Be honest with your lawyer. Recognise that you are in partnership with them. You will both need to pull together to get the best outcome.
- Try to be as objective as possible. It is always important to be honest with yourself and identify both strengths and weaknesses of your case at an early stage.

## Summary

No two disputes are the same. With the range of dispute resolution processes available, the best way to resolve a dispute to your best advantage will largely depend on a careful and early analysis of the situation and planning the right strategy.

There are actions you can take now to minimise the risk of your business becoming embroiled in a costly dispute and, if you can't avoid a battle, then you need to prepare well, get expert advice and follow this tips in this Guide.

## What to do next

Cousins Business Law has developed a *"30-minute business dispute assessment"* which we conduct over the telephone with you and members of your management team. Here's what we accomplish in this straight-talking, action oriented session:

- Getting clarity around your case: Identification of the key points and issue and what steps you absolutely must *not* take if you want to resolve the dispute in your favour.
- Ideas for solving the dispute: How to take the next step to resolve your dispute. You're all too familiar with the paralysis that can be caused by a looming conflict. We'll give you a series of clear and simple options to choose from to move towards a resolution.
- Actions you can take straight-away: Doing nothing certainly isn't an option, but knowing what to do, how and when to do it may not be obvious. We'll show you how to develop of an action plan you can follow immediately to start solving the problems causing disputes to occur.

The *30-minute business dispute assessment* is conducted by Nigel Musgrove, a solicitor with over 30 years' experience of solving disputes for businesses around the UK.

Nigel has acted for PLCs, SMEs, partnerships and individuals on everything from contract disputes to sale of goods, misrepresentation, partnership issues, professional negligence and property related conflicts. Having trained as a mediator with the ADR Group in 1997, Nigel concentrates on practical advice and problem solving but is experienced in court action should that become necessary.

The consultation will normally take place within 1 working day of your contact with Cousins Business Law. To secure your 30-minute business dispute assessment, call Nigel Musgrove on 0845 003 5639 or email [nigel.musgrove@business-lawfirm.co.uk](mailto:nigel.musgrove@business-lawfirm.co.uk).

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