A FAVOURABLE LANDSCAPE FOR DISPUTES?

Alex Bell explores what companies can expect from the world of mediation in 2022

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The North West has long been a hotbed for handling disputes, whether through the courts or by arbitration, mediation, expert determination or negotiation.

Many businesses draw on the depth and breadth of expertise and experience that the region offers, supported by the full muscle of English law. With disputes costing small businesses an uncomfortable £12bn a year in litigation fees, what can companies involved in disputes expect throughout 2022 and beyond?

Surely companies will want to prevent costs spiralling as can so often happen when cases career too far down the road.

Invariably a root cause – usually ending in neither party being satisfied with the outcome – is lack of communication.

But with what many refer to as 'the perfect storm' continuing – Brexit and Covid – conditions remain favourable to disputes. "The challenges of running a business," says CMS partner Geraldine Ryan, "are greater than they've ever been."

"What we continue to see is people being keen to negotiate and to do deals and settle matters. That's positive, as litigation is expensive and time consuming and people want to understandably focus on developing their businesses." Ever since March 2020, Ryan, who leads CMS' commercial litigation team in Manchester, says activity has been busier than normal.

"We're expecting this to continue," she says, "and with many different matters, whether it be shareholder disputes, purchase agreements, warranties and indemnity cases or Covid-related contract disputes".

Ryan is adamant the online shift to civil court hearings remains impressive. "Full trials continue to be conducted online which proves that civil hearings can be done in this way," she adds. "I prefer being in the court physically but it's impressive that so many cases have been dealt with online.

"Some have related specifically to Covid, one we dealt with which centred on face masks and whether they were fit for purpose and could be sold. We've had reputational risk matters around Covid and the way people have behaved in regards to whether or not they have honoured their employment contracts.

"I was involved in a 17-hour straight shareholder dispute mediation which then resumed again for five hours the next day before settlement was reached on the third day. There were people online from Manchester, Monaco and Leeds all speaking from within their own homes."

New legislation

With online potentially quickening the conventional dispute process, where else are the region's top litigators seeing a rise in activity?

Helena Davies' clients include investment landlords, local authorities and private clients, as well as occupiers from the retail, wholesale, telecommunications, and leisure sectors.

Partner, property litigation and head of retail sector with Brabners, Davies has for the first time in an extensive career been following a bill through Parliament.

She expects the Commercial Rent (Coronavirus) Bill to be passed by March 25 this year. "Right now there are billions of pounds of commercial rent arrears going across the country – and it's a massive problem," says Davies.

"The Bill is going to introduce a compulsory arbitration scheme which is very unusual as it means people won't go to court to get their rent arrears.

"The period when businesses were shut down is being ring fenced by the government and the arbitrator will look at a new series of tests in each case and could well write off all rent arrears, which is extraordinary.

"It's both bizarre and interesting as well as retrospective, despite legally binding leases having been in place," explains Davies.

"If you were a tenant that did honourably pay, scraped around to do so, you could end up thinking 'why did we do that?' As an example we act for some charities who will be in this position."

Where the new legislation will differ is how it looks at the solvency of both parties for the first time. But there are numerous questions such as who the arbitrators are, what their powers are, what financial information will be submitted by both the parties and if there will be no disclosure obligations.

It follows the pre-Covid normal of landlords having the power to change the locks and take a commercial property back and the government putting in place the moratorium that instantly stopped some of the rights landlords had in commercial rent arrears matters from March 2020.

One critical element, according to Davies, has been keeping on top of the changing position.

"As property lawyers we still use legislation that is hundreds of years old," says Davies, who represents both landlords and tenants. "Whereas recently laws have been changing every few months.

"At present people are encouraged to try to reach an agreement rather than using dispute resolution because if all the rent arrears went to court the courts couldn't cope.

"There's no doubt that landlords' hands have been tied. And that has led to a whopping problem which is one of the reasons why I've been sufficiently interested in following a Bill's progress through Parliament for the first time in 20 years.

"The Bill is not through yet," adds Davies. "But looking at the whole situation something had to be done and the idea behind it is to preserve solvency and jobs which has got to be a good thing.

"However, it's quite a hotchpotch of different types of dispute mechanism, resolution mechanisms and I don't think it's been entirely thought through."

What are the options?

A developing and increasingly popular form of alternative dispute resolution (ADR) is early neutral evaluation (ENE), according to Steve Morris, commercial litigation partner at JMW Solicitors.

"An independent evaluator," says Morris, "will be jointly engaged providing a usually non-binding assessment of the merits of each party's case. Although the decision is non-binding, the party which has 'lost' should, if it has any sense, take a step back and think long and hard about whether it really wants to push on with litigation".

"Be rigorous with your lawyers and get them to work on a fixed fee-basis rather than hourly rates and scrutinise invoices."

Moya Clifford

Hill Dickinson

Morris says resolving disputes through the court system is often regarded as a last resort due to it typically being a time-consuming and often expensive exercise.

As a result, the use of Alternative Dispute Resolution (ADR) has grown rapidly in the commercial world. "The potential benefits are obvious," Morris says.

ADR, according to Morris, may not be suitable in cases where a precedent or an example needs to be set, or where there is a need for court orders, such as injunctions or disclosure orders. "There are several different forms of ADR," he says, "but by far the most common is mediation, which is where a neutral third party – the mediator – assists the parties to work towards a negotiated settlement of the matter. Usually each party will be located in different rooms, whether in person or virtual, with the mediator shuttling between. This helps to limit the possibility of the negotiation process being derailed by emotional outbursts. In employment cases, judicial mediation is frequently offered."

Practical advice

Morris notes that ADR is not a universal panacea and says: "As with all forms of dispute, the timing of when to enter into ADR is crucial and the preparation for and strategy to be adopted in the chosen ADR process is fundamental to a party's chances of achieving the best result.

"A poorly thought-through attempt at ADR might well set any potential resolution back and conversely make the last resort of court the only option available."

Moya Clifford, legal director, Hill Dickinson Manchester, adds to this. "Without doubt, disputes can be expensive but weighed against that is the cost to businesses of not taking action," she says.

"Take intellectual property assets such as trademarks/copyright. Businesses spend considerable sums on R&D, promoting their brands, investing in copyright and designs and in the same way they would not let someone steal a tangible asset without doing something, these intangible assets are valuable and need protecting, by litigation if necessary."

However, that does not mean that all litigation has to be extortionate, explains Clifford. "Appointing the right advisers for the right job is important as you may have a relatively small dispute that you don't need to instruct a large firm on, therefore a competent smaller firm will suffice," she says. "That said, for a business critical issue it will be worth instructing a specialist firm to maximise your prospects of a successful outcome.

Clifford advises considering making use of Third Party Funding – where a third party funds the legal costs in return for a share of the proceeds of the litigation. "There are other options available apart from the lawyers' standard hourly rate," she says.

"In summary, be rigorous with your lawyers and get them to work on a fixed fee-basis rather than hourly rates and scrutinise invoices." ■