



ALTERNATIVES TO COURT

Litigation is expensive and inevitably uncertain in result. One of New Zealand's top Q.C.s says that if you have the strongest possible case then your chances of succeeding are 80%. With anything less than the strongest case, and certainly where one approaches a case equally arguable for each side, one must think long and hard before embarking on this expensive and uncertain process. It has become more expensive particularly in the High Court with greatly increased filing fees and costs awarded.

Alternatives

Alternative Dispute Resolution Processes (arbitration and mediation) are becoming increasingly popular as a means of settling disputes in a timely, cost effective way.

Mediation

Auckland's most prominent mediator claims a settlement rate of well over 90% of all his mediations. The process is at all stages voluntary and either party can walk out should they wish. They seldom do because at the outset a commitment is made by each party that they want this mediation to end in a resolution and that each will give their best efforts to obtain a resolution in good faith. Perhaps this is one of the reasons why mediation nearly always succeeds is this. Inevitably each party believes they have the right position and often do not understand why the opposing party believes that their position should prevail. An essential part of the mediation process is that each party is given an opportunity, without interruption, to present their point of view. Inevitably each gains an insight into the other party's point of view and having a better understanding of that eases the way to some resolution.

Quite apart from having a better understanding of the opposing party's position, a strong motivating factor to a settlement, perhaps by compromise, is the nature of the alternatives to settlement. The mediator invariably obtains an estimate from each party's solicitor as to what are the likely costs of litigating the dispute and by the time two lots of \$50,000.00 are added, there is immediately \$100,000.00 to be saved by settlement. Small wonder perhaps that most mediations end up being resolved.

Arbitration

It is a matter of judgement whether a dispute is better sent to mediation or to arbitration. Sometimes the nature of the dispute or the entrenched positions of the parties make the dispute not suitable for mediation. Once the parties agree to arbitrate, or if the dispute arises under a contract in which there is an agreement to arbitrate, then the matter is put into the hands of an arbitrator who then has control. This process is fundamentally different to that of mediation because the arbitrator has authority to impose his or her decision on the disputants. The arbitrator in effect sits as a judge, hearing evidence and submissions from the parties and then handing down a binding ruling. The arbitration ruling is enforceable through the Courts by a simple process.

Once a decision is made that the dispute is better dealt with by arbitration, (of course even if there is a binding arbitration agreement, there is nothing to stop the parties from mediating) then the first decision is that of choosing the arbitrator. Depending on the nature of the dispute this might best be a quantity surveyor experienced in arbitrations, perhaps it might be an engineer or perhaps a lawyer.

Arbitration can have advantages over litigation in Court. One can choose the arbitrator who has specialist knowledge, an arbitration may well get to a hearing more quickly and there is more flexibility in terms of the procedures that the parties follow to bring the dispute to a hearing. A major consideration may be that an arbitration is confidential whereas it is a fundamental precept of our judicial system that justice must be a public process. A disadvantage of the arbitration process is that one's rights of appeal are severely limited and once the arbitrator of your choice has handed down a ruling you are pretty much stuck with that ruling. The Courts are most reluctant to interfere.

Summary – Avoid Conflicts

Avoid conflicts perhaps by seeing a lawyer before entering into arrangements or contracts. If at all possible, keep lines of communication open with the opposition and try and find a resolution. If necessary enlist the assistance of a mediator. As a last resort, resort to arbitration or litigation. The last resort is expensive. Too often, unfortunately, even if you win... you lose.

For more information, please contact one of our offices.

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