What is the best way to resolve a low value building dispute?

Sooner or later every tradesman is going to have a dispute with a client that can't be resolved by negotiation. You can debate the issues until you're blue in the face, but one or both of you is going to remain obstinate or is going to be unable or unwilling to see the other party's point of view. In those situations, people don't act rationally, especially when they are stressed or emotionally charged. They're not about to compromise or meet you in the middle. They feel a deep sense of injustice, regardless of whether they are right or wrong, and all they care about is to inflict more pain on you than the pain they believe you are inflicting on them. So it's pointless continuing the argument, and what you need to do is refer the dispute to an independent third party, as quickly as you possibly can.

A lot of well-intended people will try to dissuade you from doing this. They will encourage you to try things like mediation, which involves sitting around a table while a mediator tries to get the parties to reach agreement between themselves. But there are some major disadvantages to mediation. First, the parties have to pay the mediator's fees and expenses, which can amount to several thousand dollars. Secondly, if one of the parties isn't going to budge, then the end result will be that you have wasted hours and hours of pointless discussion and you are back to square one. Thirdly, a mediation can take up to a month or two to organise and complete, which is precious time you could have used to get the dispute resolved in some other way.

Mediation works in situations where both parties have an equal amount to lose, and an equal incentive to compromise so as to avoid the cost and delay of the dispute dragging on. For that reason, it is very effective in leaky home claims, most of which are settled either in mediation or shortly afterwards. But in normal building disputes, typically one party has no incentive to resolve the dispute at all, because they are already in a winning position. For example, where the property owner has unilaterally withheld payment from the builder as compensation for an alleged failure on the builder's part. Or the builder has been paid in full on completion of the project and refuses to acknowledge or respond to a later claim from the owner about some latent defect that has emerged.

The various options available

In those situations, the faster the aggrieved party can refer the dispute to an independent expert who has power to make a binding ruling, the better. In the construction industry, there are at least five ways of doing that. Three you can do as of right, and the other two you can do if the other party agrees or has already agreed (for example, in the building contract). The three dispute-resolution methods that you can use regardless of whether the other party agrees or not, are the Disputes Tribunals (our small claims courts), adjudication under the Construction Contracts Act, and the Courts. The two that you can use only if the other party has agreed, are arbitration, and referral to an expert or panel of experts (which is an informal process that is not governed by an Act of Parliament and the rules of engagement have to be agreed).

In the large commercial construction projects where the parties have big budgets you typically see much greater use of dispute resolution boards, arbitration, and litigation in the courts. In the smaller construction projects where the disputes are generally low value (for

example, $10,000 - $250,000) and the parties have very modest budgets, you see much greater use of the Disputes Tribunals and adjudication under the Construction Contracts Act, both of which are quicker and more cost-effective.

In the low value disputes the emphasis is on affordability and practicality. The exorbitant cost, complex procedures and inordinate delays that you get in the courts (or for that matter, arbitration) are out of the question. You want “quick and dirty” justice because that is all you can afford. As long as the outcome is reasonably fair, it does not matter whether it is 100% accurate because at least it enables the parties to put the dispute behind them and move on. There are, however, certain important factors that can make all the difference between a reasonably fair outcome and a major miscarriage of justice.

The four important factors

First, it is important that the disputed amount is paid into a trust account or secured in some other way so that both parties are deprived of the use of the money. Only in this way can you make it an even contest, and create an equal incentive for each party to participate in the dispute-resolution process. If one of the parties is holding the money and is free to spend it, then in their minds they have already “won” the dispute, and their incentive is to throw as many obstacles in the way of the dispute-resolution process as they possibly can.

Secondly, you want the dispute resolved by a genuine expert, not someone who has never been exposed to a construction project before or whose career has focused on tenancy disputes or marriage break-ups in the past. That is one of the reasons why the Disputes Tribunals are not ideally suited to handling construction disputes. Apart from the fact that their jurisdiction is limited to claims of up to $15,000, the Referees in the Disputes Tribunals tend to be very easily persuaded by the prevailing public and media mindset that the homeowner is invariably in the right and the tradesman is invariably in the wrong.

Thirdly, the outcome is going to be far more reliable if the independent expert actually gets to meet the parties, and does a site inspection. Any badly-adjusted individual can make themselves out to be a paragon of virtue if they stay hidden in the background and simply file written arguments, especially if written by someone else. Similarly, on the basis that a picture paints a thousand words, a site inspection is invaluable for putting things in context and countering exaggeration.

Finally, you ideally want both parties bound by the rules of engagement and by the outcome, with very little opportunity to appeal the decision or re-litigate the dispute. Only then can you contain the cost, resolve the dispute quickly, and put it behind you and move on.