

Capability Statement: Dispute Resolution

Case Study: The 'R' Building

The firm's most successful examples of resolving disputes are probably those that are resolved without recourse to formal proceedings. An example of this is the 'R' building.

Background

A contractor was appointed to construct a building in London. It encountered difficulties progressing the works and then towards the end of its construction activities ceased making effective progress towards completion. This led to its employment under the contract being terminated. Shortly afterwards the contractor went into administration, and then liquidation. The requisite 'Statement of Account' was subsequently issued. This showed that an amount was due to the employer due to costs incurred following termination of the contractor's employment. The Statement was not a final account statement, so not subject to the same 'finality' deadlines.

Approximately two years later the contractor's liquidator submitted a claim to the employer seeking payment of a further c.£2 million. The liquidator's letter was supported by a 230 page claim (together with numerous appendices in a number of lever arch files). The employer wanted a view on the claim's viability that was unencumbered by previous involvement on the project.

Tony Hunter, the partner in the firm who leads on dispute resolution matters, was appointed to review quantum aspects of the claim.

The quantum claim asserting entitlement to the additional c.£2 million payment was based on:

- Valuation of variations
- Adjustment of provisional quantities
- Adjustment of 'undefined' provisional sums
- Design fees for contractor designed work
- Risk for contractor designed work
- Management and attendance on work undertaken by employer directly appointed contractors
- Loss and expense for programme prolongation, increased management resources ('thickening') and disruption

The most effective way to respond to the claim was considered in consultation with the employer and his solicitor. There was naturally sensitivity to the potential for rapidly incurring significant fees if a 'full depth' analysis was undertaken. This resulted in the adoption of a 'top down' approach to initially only review the claim to the extent required to determine

whether the claim had credibility and to what extent; with the ability to develop that review into a full response if the findings or instigation of proceedings required it.

Quantum Analysis

The following was undertaken or considered:

- Comparison and reconciliation exercise between the contractor's claim and the Statement of Account.
- Review of the differences between the statement of account and the claim.
- Consideration of the differences between the contractor's and QS's contemporaneous valuations at the time of termination of the contractor's employment.
- Quantum issues regarding the design element within the contract.
- The effect of value engineering exercises undertaken prior, and subsequent, to contract award.
- Quantum issues relating to 'undefined' provisional sums; noting bespoke amendments made to the contract.
- Provision of notices for loss and expense.
- Requirements for, and ascertainment of, loss and expense.
- Costs incurred by the employer due to the termination of the contractor's employment.

This review identified numerous and significant flaws in the loss and expense claim; both in the quantum and liability assertions that underpinned it. Regarding the claim in general it concluded that, whereas some relatively minor additional amounts were identified as due and some further sums may become due upon further review, all indications were that the residual figure would still result in an amount due to the employer.

Dispute Resolution

Adjudication was not a viable course of action for the claimant due to difficulties with enforcing any award. This was because the contractor (the party to the contract) was in liquidation. This left litigation as its only recourse. The question that therefore needed to be addressed was 'what was the most effective way to present the review findings to the claimant in order to minimise risk of incurring further expenditure in relation to their claim'. Investigation had determined that the liquidator had no funds and it was considered unlikely that the consultant that had prepared the claim had done so without any payment. It was therefore concluded that someone was funding the claim in return for a 'cut' of any recovery. It was this 'funder' that needed to be convinced of the futility of pursuing the claim further.

It was decided not to issue the quantum report to the claimant, as this could then be used as a critique for revision of its claim and so incur the employer in further expense during subsequent review; following potential resubmission of the claim. Accordingly the claimant's team, including (most importantly) the funder, was invited to attend a presentation of the team's review. This ensured that the funder fully understood the shortcomings in the claim and allowed for dialogue between the parties to reinforce the point.

Mr Hunter gave a PowerPoint presentation of his findings and the claimant's team was provided with a summary. A full and frank exchange on the claim and its shortcomings ensued. The principal message delivered was that the claimant would need to be successful on a significant number of fronts just to offset the current debt to the employer and before starting to generate any recovery; and all indications were that this would not happen. The claimant would also need to incur significant costs to get to that point. Following the presentation there were exchanges of correspondence between the solicitors; following which the claim was not pursued further.

This case study demonstrates the ability to determine and implement an economic but effective response when analysing and responding to a claim.