

Capability Statement: Dispute Resolution

Case Study: Walter Lilly -v- Giles Mackay [2012] EWHC 1773 (TCC)

Probably the most high profile dispute the firm has been involved in is the widely reported case of Walter Lilly -v- DMW & Giles Mackay. This case was heard before the judge in charge of the Technology and Construction Court (TCC) in London. Tony Hunter (the partner in the firm who leads on dispute resolution matters) was the quantum expert instructed by Walter Lilly. The judge expressed preference for Mr Hunter's evidence in his judgment as well as noting that the quantum experts had managed to narrow the issues in what was a particularly acrimonious dispute. Extracts from Mr Justice Akenhead's judgment:

(2) *" ... this litigation is very old-fashioned because it has involved a full-blooded conflict between the parties in which there seems to have been little, no or belated room for compromise, although the quantum experts have gone some way to reducing what is in issue."*

(101) *"In relation to the quantum experts, both are experienced quantity surveyors with experience of litigation. I much preferred the approach of Mr Hunter which was pragmatic and down to earth."*

This was a multi-million pound claim. Walter Lilly was successful in the vast majority of the claimed issues in the judgment that was handed down. The unsuccessful defendant subsequently sought, but was refused, permission to appeal. The judgment is on public record.

This judgment brought clarity to several of the practical issues that arise in construction disputes:

- How extensions of time are to be assessed;
- How loss and expense claims should be considered; and
- The correct approach to global claims.

Legal commentary indicates that this decision will prove to be a significant authority on these issues and an essential reference point when making, or reviewing, such claims.

Mr Hunter's instructions from the claimant related to all quantum matters in the claimant's dispute with its client arising from a contract for the construction of a residential building in London. Activities commenced with a review of Walter Lilly's claim prior to issue of the Letter of Claim and issue of Particulars of Claim, through their development of the claim, preparation and issue of statements and expert reports, providing oral evidence during the trial and responding to queries in preparation for the hearing when the defendant sought leave to appeal.

Activities undertaken following instruction:

- Review and comment on Walter Lilly's case as presented;
- Advice on issues that would be required to be addressed in order to pursue the claim;
- Comment and advice on the claimant's claim as it was developed. This was primarily via the instructing solicitor although also with the claimant, leading and junior counsel;
- Meetings with quantum experts appointed by other parties (initially two; only one at time of trial) on numerous occasions to review the respective submissions and evidence; and then attempting to narrow the issues.
- Production of report on quantum matters following review of the evidence together with the finally submitted Particulars of Claim, Defence, Counterclaim and Reply and Defence to Counterclaim (following numerous re-submissions by each of the parties).
- Issued with the other party's appointed quantum expert four joint statements narrowing the issues in dispute. As well as determining narrowed or joint views on matters, the quantum experts were also able to advise where either party had accepted the other's position following comment from the experts.
- Reviewed the other quantum expert's report and issued a supplementary report on matters arising.
- Provided oral evidence, including being cross-examined, on the report during the trial.

Quantum matters addressed included:

- Valuation of building works
- Review of prime cost included in loss and expense submissions
- Cause and effect linkage for loss and expense submissions, including 'global' claim issues
- Review of subcontractors loss and expense claims
- Review of defendant's 'no loss' argument
- Acceptability of subcontractor claim settlements in the contractor's claim
- Applicability and ascertainment of claim for additional overheads and profit
- Calculation of Liquidated and Ascertained Damages (LADs)
- Applying apportionments
- Considering whether certain work had been instructed and, if so, its valuation
- Correct methodology for applying percentage adjustments in valuations
- Applying discounts
- Claim preparation costs
- Finance charge calculations
- Valuation of counterclaim for alleged defective work

Numerous case conferences were attended with the appointed solicitors, junior and leading counsel; as well as responses provided to queries raised by the legal team. Reports and oral evidence was provided in accordance with the requirements of Part 35 of the Civil

Procedure Rules, Practice Direction 35 and RICS Practice Statement for Surveyors Acting as Expert Witnesses.

The dispute involved review of a significant volume of paper files. Indeed 32,000 pages of documentation were submitted to the court and the experts' bundles contained 11,000 pages.

All deadlines were complied with as directed by the court following the various Case Management Conferences (CMCs).

In the initial stages of the dispute a court mandated mediation took place in accordance in standard case management procedures. Both quantum experts also attended a number of 'principal to principal' meetings prior to the trial to explore the possibility of agreeing a settlement.

Reducing financial and legal risk was achieved in this case by:

- Providing strategic claims advice, both orally and in writing, to the claimant as one of the initial exercises upon appointment. The effectiveness of this advice is demonstrated in the final judgment.
- Providing advice on what could, and could not, be supported during development of the claimant's submissions.
- Narrowing the issues in dispute by agreeing and issuing four joint quantum expert statements. This was recognised in the final judgement as noted above.

Value added initiatives related to the advice provided, both strategically and tactically, at the outset and during development of the submissions as noted above. Examples of these are:

- Liability requirements to be demonstrated in order to support a claim for additional overheads and profit.
- Structuring of the loss and expense claim in order to mitigate 'global claim' issues risk.
- Developing effective rebuttal to defendant's 'no loss' argument.
- Identifying how an alternative view on defective works counterclaim work scope could be developed by utilising the technical experts knowledge gained while preparing their main reports in order to develop a counter-view on the defective works counterclaim quantum.

In preparing his report Mr Hunter was assisted by three other quantity surveyors from the firm.