

The Role of the Specialist Consultant In Dispute Resolution

Many construction disputes will, of course, be resolved between the parties themselves, often quite amicably. When this can be achieved it is, without question, the first option that should be pursued. When agreement cannot be reached however, the threat of some kind of 'formal proceedings' is often raised by one or other of the parties. At this stage it is often worth considering the services of a Specialist Consultant. Why? What are the benefits of engaging a specialist Claims Consultant.

Appraisal of your case

All too often, those directly involved in the case can be influenced by emotions, characters and relationships. The Specialist Consultant can review the case and offer an impartial opinion of its strengths and weaknesses in a way that those involved may not be able to. An impartial appraisal at an early stage provides a basis upon which the decision of how best to proceed can be made, allowing 'lost causes' to be dropped before further time and expense is wasted and often preserving relationships. A review of the contract conditions should also be made to identify and fully understand the dispute process defined in the contract and permitted by legislation.

Crystallise and consolidate the case

Before progressing to 'formal proceedings' it is important to review all available documentation, evidence and earlier exchanges. One final attempt at putting the case to the other party is usually wise, clearly stating the facts of the case and the grounds for the position being taken. When this is done in a structured and formal way, it often has the benefit of encouraging the other party to reconsider its position and may afford one last opportunity at reaching an amicable solution. That notwithstanding, it is normally a pre-requisite that a dispute has to have been 'crystallised' before entering into formal proceedings. Previous exchanges between the parties often fail to fully satisfy this requirement. A Specialist Consultant brings an objective eye to the table at this critical stage, laying the foundation for future proceedings.

Mediation

Mediation is a relatively informal procedure which, unless the parties agree otherwise, is non-binding. There is however increasing pressure from the courts (especially in England) for the parties to have at least attempted mediation before proceeding to litigation. Pre-requisites for mediation to have any meaning are a) a willingness of the parties to seek a settlement, and b) the authority of the parties to settle. The process is very quick and relatively inexpensive, however, in this environment where the goal is to reach a settlement in a couple of days or even a few hours, it pays to have someone on board to provide support and advice.

Adjudication

This process is governed by strict procedural rules derived from both legislation and contract conditions. Although it is possible for either party to enter into this process without specialist assistance, the need to fully understand the process and adhere to strict rules and timetables makes the engagement of a Specialist Consultant a wise course of action. In this context the Specialist Consultant acts as his client's representative and owes his allegiance and responsibility solely to the client.

Ensuring that the Notice of Adjudication, the Referral and the Responses etc are properly prepared, presented and supported, all within the set timetable, is key to properly managing a party's case during this process. Many perfectly good cases have failed at adjudication simply because procedure was not understood or followed.

Arbitration and Litigation—expert functions

Within the environment of arbitration or litigation in respect of construction disputes, the Specialist Consultant may be called upon to function in any or all of three roles:

- as Consultant in an advisory role
- As Expert Advisor to investigate and problem or provide specialist advice
- As Expert Witness in proceedings

Consultant: appointed by the client to review and evaluate a problem and advise as necessary on technical and contractual features, strategies and of the need for any Expert Advisors. He would probably attend hearings to give professional or technical support. Such services are most likely to be required on large, complex, multi-disciplinary proceedings.

Expert Advisor: In the majority of cases (less complex cases), Expert Advisors will usually be retained by each party to investigate the problem concerned, co-ordinate the work of other experts and prepare evidence.

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The Role of the Specialist Consultant In Dispute Resolution (contd)

Expert Witness: An Expert Witness is an Expert retained by either party to provide (either in support of or in response to the relevant allegations) an Evidential Report which is subject to examination. It is of paramount importance that the evidence which an Expert Witness presents is independent and impartial; his allegiance being to the Court, Inquiry or Tribunal. The report prepared by an Expert Witness need not be limited to fact and may include opinion on matters within his/her sphere of expertise, if requested.

Differences between parties will arise on many contracts and the parties should always attempt to resolve these between themselves. In reality this is not always possible and engaging a Specialist Consultant when negotiations are floundering is often the best way to re-focus the dispute. Ultimately, should formal proceedings prove necessary, the path can prove long, complex and full of pitfalls. The engagement of a Specialist Consultant at an early stage can prove invaluable.

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