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"Don't wait for a light to appear at the end of the tunnel, stride down there … and light the bloody thing yourself"

This article is written from the perspective of a party who has undertaken work and is not getting paid on time (either in whole or in part). The issues becomes what can the unpaid party do. I must immediately confess that I am not aware of any new magic elixir to resolve this situation. Rather, this article is simply a reminder of some of the options available, which hopefully you will already know.

The usual situation is the unpaid party is desperate to resolve significant outstanding claims. Those outstanding claims may well have been growing throughout the Project. There is often a history of the paying party finding a multitude of reasons not to pay, often coupled with a dialogue between the parties, which can sometimes result in just enough being paid to keep the unpaid party working on Site. The law operates that if the paying party can utilise Payment Notices/Pay Less Notices correctly, the sums the unpaid party believes is due are treated as being legitimately disputed, and no right to suspend work arises because effectively there is no sum outstanding triggering the right to suspend works.

Hard experience tells me that when the paying party owes £1,000 it is their problem, but when they owe £100,000, it is your problem.

There has been a noticeable increase in claims for money in recent months. Many of those disputes involved the consequence of delay to the works, and who takes the financial risk of such delay. Construction Lawyers are seeing significant increases in the number of adjudications. It is a reflection of the current state of affairs.

The COVID pandemic has raised some further areas of dispute. There is now a seemingly never-ending stream of regulations, advice, and guidance. It is often difficult to steer a clear path through this information to confidently advise on the time and financial implications. All anticipate that we will become more and more involved in disputes involving Covid issues and their consequent time and money effects. Given the current climate, the impact of Covid on current and future construction projects will continue and increase.

In the sphere of Construction Disputes, there is no "*new law*", so if anything the new normal is to pursue rights under the old law. In the current situation, there is a need to act promptly, and to take action in the short term so that the problem doesn't increase. In the context of an Employer and Contractor relationship, the options remain the same.

The simple advice is to act, and act early. There are some inexpensive "*self-help*" steps that the unpaid party can take to try and bring pressure to bear on the paying party to resolve matters.

Statutory Demand

A Statutory Demand is a pro forma document that is completed as the first step in formal insolvency proceedings. They are relevant for debts over £750 against a company. It is simply a standard form document, which you fill in the blanks to complete. The threat behind a Statutory Demand is that if it is not "*compromised*" within 21 days of service, this can be treated as a valid ground establishing insolvency. You can then commence formal winding up proceedings at an insolvency court. A Statutory Demand should only be used if based on an undisputed debt (or an undisputed part of a larger debt). The insolvency court will generally not decide issues in dispute between the parties, and if the debt is genuinely disputed, this insolvency procedure should not be used.

Adjudication

This is currently the most common form of dispute resolution for construction disputes in the United Kingdom. The adjudication process starts with a Notice of Intention to Refer the Dispute to Adjudication (the "Notice"). If you proceed to adjudicate, you must both appoint an Adjudicator and serve the subsequent Referral document within 7 days of the service of the Notice. There is no magic in drafting a Notice. The Notice needs to be drafted sufficiently clearly and widely to encompass the matters that are going to be involved in the dispute. However, in straightforward claims, such words as "please decide if £**X** plus VAT is due and payable, or such other sum as the Adjudicator decides together with applicable interest" or words to that effect may suffice.

You can serve a Notice without subsequently proceeding with an adjudication. Service of a Notice can concentrate the paying parties' mind and lead to fruitful discussions. If matters are not then resolved with, the paying party you can then subsequent re-serve the Notice (or an amended form of Notice) and then proceed with the adjudication.

The Referral is the submission that sets out the unpaid party's case together with all relevant evidence in support. You need to draft the Referral so that the adjudicator (a stranger to the case) can readily understand your position. Don't expect the adjudicator to do that work for you.

If you are going to adjudicate, the Referring Party must be in a position to justify its claim. An important element of that is to keep records of the works, and incidents on Site, partly in anticipation of any subsequent dispute. Such justification can greatly assist in explaining and evidence the situation to the Adjudicator and will go a long way to getting a successful outcome in adjudication. There are proforma e-mails and documents that can be used to keep records of events that arise, and which should allow parties to quickly proceed with adjudication. When a paying party is faced with that sort of evidence, it can have quite a persuasive effect.

Finally, I end on what should have been the beginning of this article. Make sure you read and understand the Contract before you agree to it. Once the Contract is made, make sure that any contractual requirements for such things as the form of and timings of payment application, notices for additional time and expense are complied with.

Author

David Oram
Partner
D: +44 (0)151 600 8801
T: +44 (0)151 600 8000
Hill Dickinson LLP