Risk Management Briefing

Settling disputes with clients

June 2019

Introduction

When a dispute arises between a consultant and their client on a project there is often a period of discussion and negotiation before either party considers instigating formal legal actions. During this period some consultants may wish to agree a quick settlement without recourse to their insurer, however this can lead to adverse consequences.

As a matter of course, any dispute or matter which could give rise to a claim on a Professional Indemnity Insurance (PII) Policy should be notified to the consultant's insurer as soon as possible. The insurer will then advise on the actions needed and will give guidance and confirm acceptance of any settlement - even if the settlement is within the consultant's excess on the policy. It should be expected that the insurer will appoint a lawyer to advise on any such settlement.

This RMB examines two common situations where consultants may wish to make a settlement, and outlines their implications.

A. Situation 1 – Client will not pay the consultant's fees

The first situation is in respect of unpaid fees during the performance of the consultant's services on a project.

In addition to any provisions in the consultant's appointment, the Housing Grants, Construction and Regeneration Act 1996 (as amended) determines the rights and obligations of the consultant and the client in respect of invoicing and payment (except in cases where the client is a 'residential occupier'). A client's failure to pay the legitimate invoices of the

consultant can give the consultant a right of action against the client through adjudication or litigation.

However, many consultants do not wish to go through this process and attempt to negotiate a settlement by reducing the fees owed, rescheduling the payment of fees or off-setting the fees against the consultant's legitimate claim for additional fees.

It should be noted by the consultant that any such agreement with the client will discharge the client's obligations to pay the original fees under the appointment (and the statutory provisions for payment of the original fees). This means that if the client fails to uphold the new agreement on payment of the fees, the consultant cannot then raise an action against the client under the Acts. Any subsequent non-payment by the client can only be enforced through an action for breach of contract (i.e. breach of the new payment agreement).

The advice to any consultant striving to settle a dispute over fee payment is to seek the advice of a lawyer to oversee the new payment agreement to ensure that the consultant does not jeopardise their rights to enforce payment.

It would also be prudent for the consultant to advise the PI insurer of the intention to settle the disputed fees as such discussion or negotiation may prompt the client to formalise a claim against the consultant which would require notification of a claim under the policy. One reason often stated for non-payment of legitimate fees is the client's alleged dissatisfaction with the consultant's performance of their services; in such cases it would be essential to notify the insurer.

Even if there is no expression of dissatisfaction by the client, the consultant should carefully check the wording of their PII policy to ensure that notification of a dispute on outstanding fees is not a requirement of cover under the policy in any case.

B. Client alleges financial losses because of consultant's performance

The second situation is where the client alleges financial losses arising from the consultant's performance of the services and the consultant, feeling there may be some justification to the allegations, wishes to make a financial offer to settle with the client.

The driver for this is often the awareness by the consultant that defending any claim requires significant senior management time, and that any claim may adversely affect the consultant's reputation

However, any settlement is rarely as final as the consultant may hope.

In English law, the principle of joint and several liability applies meaning that a client can pursue their losses against any party or parties who may, along with others, have contributed to their losses. The practical application of this is that after settling with the consultant, the client can still bring a claim for the outstanding amount of their losses against another member of the project team or the contractor. If that other party believes that the consultant contributed to the cause of the alleged losses, it can seek to bring the consultant into their litigation through contribution proceedings under the Civil Liability (Contribution) Act 1978 and Part 20 of the Civil Procedure Rules.

If this does happen then the consultant is still faced with the prospect of committing significant senior management time and to defending the claim. The consultant also has the

additional risk of having to make a financial contribution to any judgment against the other parties as well as being required to make a financial contribution to all parties' legal costs. The consultant's excess on the PII policy may then have to be paid out - in addition to any amount paid to 'settle' the initial claim by the client

It is possible to make a full and final settlement with the client at the outset but this would require very careful drafting of the settlement agreement itself.

The advice to consultants is therefore always to notify the client's initial allegations to their PI insurer as a matter which may give rise to a claim under the policy, to ensure that the interests of both the consultant and their PI insurer are best protected.

This Risk Management Briefing is for general guidance only and legal advice should be sought to cover any particular situation.

This briefing was prepared by the CIC Liability Panel chaired by Professor Sarah Lupton

It is available at www.cic.org.uk