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How to succeed in adjudication

I have been a practising adjudicator for many years and have undertaken several hundred adjudications. In my experience as an adjudicator, I have noted there are a number of recurring issues which often result in parties failing to achieve the outcome to an adjudication they had hoped for. I summarise below three such issues and offer my advice as to how to avoid problems and thereby enhance the prospect of achieving a successful outcome in adjudication.

Getting off to the right start

It is essential that any adjudication gets off to the right start because otherwise it is likely an adjudicator will not have jurisdiction to act. There are three points to consider. Firstly, a dispute must exist before an adjudication can commence – in other words there must be a crystallised dispute. In general terms a dispute is crystallised when a claim is made by one party which is rejected by the other party. The rejection can either be express or implied (eg. if no response to the claim is made within a reasonable time).

Often adjudications relate to claims for payment arising from interim applications and/or final accounts. In relation to such claims, I would suggest the basic requirement is that the interim application and/or final account is submitted and the final date for payment has passed before the dispute is referred to adjudication.

Secondly any party commencing an adjudication must ensure that the adjudicator is appointed in accordance with the requirements of the contract. A party should therefore carefully read any provisions included in the contract which relate to adjudication. Such provisions might require disputes to be referred to a named adjudicator or (more commonly) identify a named adjudicator nominating body ("ANB" - such as the RICS, TeCSA, Chartered Institute of Arbitrators) to appoint an adjudicator. In addition, contractual adjudication provisions may include specific requirements as regards service of the notice of adjudication (eg. where and to whom the notice should be sent and the method of service). Compliance with such provisions is essential.

If a contract does not provide for the referral of disputes to adjudication, then the provisions of the Scheme[1] will be implied (I am of course assuming the contract is a "construction contract" for the purposes of the Construction Act[2]). If the Scheme does apply a party commencing an adjudication needs to be mindful of the fact that the notice of adjudication must be served before any application is made to the ANB for the appointment of an adjudicator.

Thirdly a party commencing an adjudication should be aware of the strict timetable for service of the referral notice. Sec. 108(2)(b) of the Construction Act requires the referral notice to be served upon the adjudicator within 7 days of the notice of adjudication. It is recommended therefore that the referral notice is fully prepared in advance of serving the notice of adjudication.

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[1] The Scheme for Construction Contracts (England and Wales) Regulations 1998 as amended by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 201
[2] The Housing Grants Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009

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Understanding the importance of providing evidence to prove a claim
In the majority of adjudications, I undertake parties are represented by lawyers. It is hardly surprising therefore that parties generally understand the basic principles as to which party bears the burden of proof (ie. the party making the claim) and the standard of proof (ie. the civil standard of the balance of probabilities). In my experience however difficulties arise from parties understanding as to what constitutes proof and the extent of proof required to prove a claim.

An issue which I commonly encounter is a failure of parties to have a clear understanding of the difference between a submission and evidence. A submission is simply a description of the factual and legal basis of the claim advanced by a party - it is not evidence. A party is required to provide evidence to prove the claims which are described in their submissions to the extent that they are disputed by the other side. Evidence can be in the form of factual witness statements, expert opinion evidence, real evidence (eg. objects) and documents.

As regards the extent of proof required it is perhaps best illustrated by way of example. Say a party makes a claim for 100m3 of additional concrete at £150.00/m3 being £15,000.00. Often parties will simply refer to an excel spreadsheet which shows this calculation. The spreadsheet however is not proof of anything as it simply sets out unsubstantiated numbers. Evidence which I might expect to see to properly prove such a claim could include:

- the instruction or revised drawing which required the provision of the additional concrete;
- proof that 100m3 of concrete was supplied. This might be done by (i) production of delivery tickets from a concrete supplier or (ii) the project quantity surveyor might provide a witness statement setting out a calculation of the additional concrete with measurements properly annotated to drawings where applicable;
- proof that the concrete is to be valued at a rate of £150.00/m3. This might be done by (i) reference to a rate included in the contract, (ii) documents which show the rate was agreed between the parties or (iii) the project quantity surveyor might provide a witness statement stating that £150.00/m3 is reasonable rate setting out how the rate has been calculated and attaching supporting documents to support such view.

In order to succeed in adjudication therefore it is crucial parties understand that submissions do not constitute evidence and that disputed claims must be proven.

The quality of submissions
The vast majority of adjudications are conducted on a “documents only” basis. The written submissions are therefore crucial to the outcome of any case. The quality of submissions I receive in adjudication varies tremendously. Some are exceptionally good whilst others are at the other end of the spectrum. My tips for ensuring your submissions fall into the former category are as follows:

- submissions are now generally served electronically only (certainly that is my practise). Parties should therefore ensure they can serve submissions electronically with the minimum of fuss (eg. try to avoid the requirement for the adjudicator or other party to register on new platforms or to create passwords in order to download documents);
- submissions should be set out in numbered paragraphs with sectional headings to aid clarity;

- repetition should be avoided. It is often the practise of parties to repeat large sections of what is stated in an expert report or factual witness statement. This is unnecessary. A brief summary is all that is required as the adjudicator will read in full the relevant report or statement;
- references within submissions to appendices, witness statements, expert reports and case law should be clear and precise with specific paragraph numbers being stated;
- factual witness statements should contain only evidence as to disputed facts and should not include argument or submission. In recent cases I have been involved with I have received so called factual witness statements but which were in fact almost entirely argument/submission;
- when responding to another party's submission I find it more helpful where the responding party identify the important issues and respond under the headings so identified rather than responding on a paragraph-by-paragraph basis. I find that where parties respond on a paragraph-by-paragraph basis this can result in lengthy submissions being made on issues which are not important;
- be concise. On that point I end this article.

If you require any further information, please contact Simon McKenny at simonmckenny@hka.com.