National Construction Contracts and Law Survey 2012

Introduction
Richard Waterhouse
CEO, NBS and RIBA Enterprises

Why is collaboration so hard?
Nicholas Deeming
Partner, FaulknerBrowns Architects

National Construction Contracts and Law Survey 2012
Adrian Malleson
Research and Analysis Manager, NBS

A bit of common sense
Ann O’Connell
Partner, bto solicitors

JK construction adjudication: current trends and practical tips
Matthew Molloy and Jonathan Cope
Directors, MCM5

Going back to the basics
Koko Udom and Roland Finch
Contracts and Law team, NBS
UK construction adjudication: current trends and practical tips

Matthew Molloy and Jonathan Cope
Directors, MCMS

There are few who would argue that adjudication under the Housing Grants, Construction and Regeneration Act 1996 has not been a success; indeed, it has undoubtedly become the preferred method of resolving construction disputes in the UK. Figures from some of the nominating bodies suggest that, whilst the number of adjudication appointments has steadily fallen since the current economic crisis began in 2008, they have now levelled off and are not following the continued contraction in construction output. So why could that be? We consider there to be a number of factors:

i) **Margins are extremely tight and some sub-contractors and main contractors are clearly ‘buying’ work.** With such low margins, the smallest variations or events causing delays and disruptions will soon push contractors into a loss-making position, and they therefore have little option other than to make a claim. In healthier times, contractors might have been prepared to absorb such losses in the hope of repeat business, however such repeat business is now scarce.

Don't misunderstand us: we are not critical of the low margins and we appreciate that contractors sometimes have little option if they are to survive. We also appreciate that some of those businesses employing contractors appear to be taking advantage of the current situation, and are driving prices down yet further.

ii) **Whilst there have been no reported cases concerning the payment provisions in the amended Construction Act, it is clear from talking to other dispute resolvers that there are disputes arising concerning the new payment provisions, and how they should be interpreted.** For example, under the original Construction Act, the payer could abate a sum from an amount due to the payee for defective workmanship or the like regardless of the fact that the payer might have failed to serve a withholding notice (SL Timber Systems Ltd v Carillion Construction Ltd [2001]). However, whilst such abatements are arguably not permitted in the absence of a pay-less notice under the amended Construction Act, some main contractors and employers have been slow to realise this.

The amended Construction Act also applies to a larger number of construction contracts than the original Act; the abolition of s.107 means that oral and partly oral construction contracts can also be referred to adjudication.

iii) **With a rise in the number of contractors entering administration, we have seen a rise in the number of adjudications being commenced by administrators attempting to recover sums due.** Such disputes might not have previously been referred to adjudication if the contractors were hopeful of repeat business, or if they lacked the confidence and/or resources to commence adjudication proceedings.
Obviously, most people want to avoid ending up in adjudication. The best way to do that is to
follow the contract to the letter, which is particularly important given that we have seen a rise in the use of condition precedent clauses, i.e. clauses which make a contractor’s entitlement to an extension of time and/or loss and expense and/or damages conditional on the contractor complying with certain notice requirements. Also, maintaining comprehensive records is particularly important if disputes are to be avoided. If you ‘put the contract in the drawer’ on day one and ignore its provisions, our view is that you will greatly increase the chances of a dispute arising, particularly when working under proactive contracts such as NEC3.

However, it is not always possible to avoid adjudication, so what should parties do if they need to commence or defend themselves during adjudication? Here are some practical tips:

The referring party

1. Assess and reassess
   While it may seem obvious, the starting point should be that the referring party actually has a good case. If you do not have the necessary expertise in-house then advice should be sought from a suitably experienced individual or firm as to the chances of succeeding with your claim.

2. Be prepared
   If you have decided to proceed to adjudication then be sure to prepare your claim, referral and notice of adjudication well. Only include relevant material, be clear on the redress you seek and keep it simple. Also adhere to any statutory timescales as the courts have now made it clear that a failure to do so can be fatal.

3. Choose well
   Get the right adjudicator for the dispute and try to agree with a responding party if possible, but if not, then select an Adjudicator Nominating Body (ANB) which has adjudicators with the qualities that you require if the contract allows that flexibility. If using an ANB, inform them of the type of adjudicator that you think would be suitable.

4. Deal with jurisdictional challenges
   When a jurisdictional challenge comes in, first consider whether it actually has ‘legs’, if it does then withdraw before the adjudicator incurs the expense of considering it.

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5. Identify the issues
   Identify the issues for the adjudicator after you get the response, if possible. This will help to point the adjudicator in the right direction and reduce the risk of issues being missed.

6. Try to agree on the timetable
   Be realistic with the timetable and agree on it with the other side if possible. This will make the adjudicator’s job easier. Check with the adjudicator that they have enough time.

7. Try to comply with directions
   Comply with directions, but if you can’t, apologise in advance, giving a realistic indication of when you will be able to comply. The adjudicator may have specified a time for submission for a good reason, if you are going to miss it then say so.

8. Step away from the phone
   Don’t telephone the adjudicator unless it’s essential as this can cause complications in terms of procedural fairness.

9. Behave yourself
   Be polite and don’t bully adjudicators: they are human beings! Put yourself in the shoes of an adjudicator receiving a letter questioning your actions and competence.

10. Don’t waste time
    When drafting correspondence, think before you send it. Is it necessary for the adjudicator to see it? For example, is it really necessary for the adjudicator to be copied in on petty exchanges regarding procedural issues?

11. Consider the cost of taking part
    When you get a notice of adjudication, assess the chances of success and the costs of adjudication. Take advice where necessary and decide whether you want to take part or not. If not, settle and/or attempt to negotiate.

12. Try to agree on the adjudicator
    If you want to take part then attempt to get the right adjudicator for the dispute. Try to agree with the other side, and failing that, make positive representations to the ANB as to the type of adjudicator you think that the dispute requires.

13. Identify the jurisdictional strategy
    If you believe a jurisdictional issue exists, consider how you wish the adjudicator to deal with it. Do you merely want to put a marker down and reserve your position so that you can resist enforcement at a later date, or do you genuinely want the adjudicator to resign?

14. Jurisdiction and the timetable
    If you need more time then ask, rather than using jurisdictional challenges as a delaying tactic. Be realistic as to the amount of time required and seek to agree on a timetable, in advance if possible, with the other side. If you can’t follow a timetable, then say so.

15. Focus the response
    Prepare the response and submissions well, identifying the issues for the adjudicator in advance if possible. Keep them relevant to the issues in front of the adjudicator, as opposed to a rant about everything, relevant or otherwise. A focused response is likely to be more persuasive and will definitely be more helpful for the adjudicator.

So, while it appears that the number of adjudications is likely to continue at a relatively consistent rate in the future, if you do find yourself involved in adjudication then you should be able to increase your chances of success by following these practical tips.