

## How to help your adjudicator – my Christmas tips!

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*“On the twelfth day of Christmas, my adjudicator gave to me .... their top 12 tips on how parties can help them during an adjudication”.*

Now, admittedly, it’s not as catchy as the original, but it’s a subject very close to my heart, as well as a topic that I’ve been asked to talk about on a couple of occasions this past year.

So, to round off 2024, and as some of you are perhaps starting to think of some New Year’s resolutions for the year ahead, it feels an opportune time to summarise my top tips on how parties and their representatives can help their adjudicator and try to ensure a smoother and more efficient adjudication process.

### **12. Be professional and respectful**

Adjudication is obviously an adversarial process, but try to be courteous in the submissions and don’t attack the credibility of witnesses or experts unless it is necessary to make out your case. I regularly see experts attacked for being partisan, not having the relevant expertise, and so on, but to be honest such arguments very rarely succeed in materially changing the outcome of an adjudication.

Aggressive tactics also rarely work, and, from my perspective as an adjudicator, I struggle to understand what parties think they’re going to achieve by being aggressive.

So, my tip is to try and treat the adjudicator and other party with courtesy and respect, even if there are fundamental disagreements. Professionalism genuinely helps maintain a positive environment for the adjudication process.

### **11. Ask for what you want**

We all know the saying *“If you don’t ask, you don’t get”*. So, if you want more time? Ask for it. If you want a meeting or site inspection? Ask for it. If you want a .... you catch my drift. Adjudicators are not mind readers and so gamesmanship, for example challenging jurisdiction when what you really want is more time, is unlikely to assist you or your client. It’s so much more helpful when parties are clear and candid about what it is they need and so if you have any requests, ask for them promptly.

As an adjudicator, I certainly ask for what I want – if I need more time, for example because my Decision is taking longer than I anticipated, then I will ask for it.

### **10. Get good advice**

I would recommend any party to an adjudication to get good advice from the outset. I recognise that sounds an obvious thing to flag, but I can honestly say that I really appreciate it when good solicitors and/or counsel are involved in adjudications because they know how to deal with complex disputes. So, for anyone who is or might be a party to an adjudication, my tip is don't be afraid to seek reputable legal advice because it can pay dividends.

However, I would equally advise the lawyers not to be afraid of getting good advice on the quantum, delay or technical side of disputes. In especially technical or complex cases, good and experienced expert witnesses really can make a huge difference in assisting the adjudicator comprehend the complex issues. On countless occasions, I have seen cases brilliantly argued on the law, but then fall flat because the case was simply not up to scratch on other aspects such as quantum. To clarify, I'm not saying you need to have multiple experts of every discipline in all adjudications, but just remember that this element of a case is equally important as the law.

## **9. Summarise and explain**

I would highly recommend that you keep your submissions simple and explain *everything* that is relevant, because, while you may have lived the 'ins and outs' from day 1, the adjudicator is likely to be a stranger to the dispute. Presenting information and arguments in a plain and coherent manner, avoiding unnecessary jargon, etc., ensures that the adjudicator can focus on the core issues.

Sometimes I find that parties, and even their representatives and experts, get so engrossed in the matter that they're using acronyms that aren't explained anywhere, they're referring to other areas of the site that are entirely meaningless to me and so on. Your aim should be to assist the adjudicator as much as possible by explaining everything that is relevant.

## **8. Remember: More is not necessarily better**

So, despite what I said in my last point where I emphasised the importance of explaining everything, I do think it's also important to ensure that submissions, the witness evidence and the expert evidence are not longer than they need to be:

1. You can do this by trying to make sure that the submissions are focused on the key issues. For example, if the history of the tender for the project isn't relevant to the dispute, then don't allow the witnesses to give the adjudicator chapter and verse on it in the witness statements. The other thing I see all too often is experts seemingly trying to outdo each other when it comes to the length of their reports, for example where one expert submits a report which is say 250 pages long, and the other delay expert says: "I'll take your 250 pages and raise you by another 250 pages!" Adjudicators have to read everything, but very often I will get to the end of a report and think to myself: "That it could have been about half as long, if that." However, I do acknowledge that some people might say that about the length of my Decisions and Awards!

2. I do also fully appreciate that sometimes having limited time to write a document, as is so often the case when it comes to adjudication, can sometimes cause the document to be longer than we'd like it to be. However, do just bear this in mind when you're reviewing a submission.

## **7. Try to avoid taking bad points**

Now, what I'm *not* talking about here is those points that are arguable either way, or alternative arguments which might be necessary. Rather, I'm talking about the really duff points which you think to yourself "*...we'll never get away with it in a million years but we'll stick it in anyway...*"; in my view there is a risk that it makes a case look rather desperate, and there is a real risk of offending an adjudicator because they may think to themselves "*...do they really think I'm that stupid...??*".

A word to the wise then: submissions that actually reflect your best argument are far more

persuasive.

## **6. The Importance of records**

Where contemporaneous records exist, then include them with the adjudication bundle. I can't stress enough the value of instilling in clients how important proper record keeping is, because the evidence that they will have available to submit in an adjudication will depend on the appropriate record keeping. To illustrate my point, I want to refer you to an extract from the 4<sup>th</sup> edition of *"Engineering Law and the ICE Contracts"* published in 1979 and written by the late Max Abrahamson, who as some of you might know, was an Irish construction lawyer.

I suspect that some of you may also know what I am going to say but I make no apology for that because it's such an important message. Max wrote:

*"A party to a dispute, particularly if there is arbitration, will learn three lessons (often too late): the importance of records, the importance of records and the importance of records. It is impossible to exaggerate the extent to which lawyers can find unexpected grounds, often quite real, on which to cast doubt on evidence if it is not backed by meticulously established records. It must also be remembered that the arbitrator will know nothing about the history of the works, which must be reconstructed for him with all its complexities and nuances, from the records available."*

An important lesson indeed.

## **5. Provide clear and relevant evidence**

Sticking with the theme of evidence, parties should present their evidence in an organised and clear manner, highlighting key documents, facts, and timelines that are central to the dispute. This, together with accurate cross referencing in the submissions, helps the adjudicator to quickly identify important elements without having to sift through unnecessary and irrelevant information and documentation. Don't forget, an adjudicator can only judge what is presented to them, so providing well-organised, complete evidence is crucial.

## **4. Follow the adjudicator's guidance**

Now, of course, I would say this, but cooperating with the adjudicator and overall case management helps to ensure the process is efficient and well-managed. So, if the adjudicator asks questions seeking clarification, then make sure you answer the questions asked. Furthermore, if the adjudicator sets time limits for submissions, or limits on the scope or length of submissions, then parties should do their utmost to comply with the adjudicator's directions.

Even if you might disagree with the adjudicator's approach or procedural decision (and some do!), parties should endeavour to comply with them and trust that the adjudicator is following the procedures fairly.

## **3. Be honest and transparent**

Again, it should go without saying, but transparency builds trust and credibility, so disclosing all relevant facts, documents, and evidence is essential, even those that may not support your case.

Withholding or manipulating information can undermine the fairness of the adjudication process. Parties should therefore ensure their evidence aligns with the facts of the case and avoid exaggeration, omission of information or any misleading statements.

## **2. Properly prepare for meetings and site visits**

As Benjamin Franklin once said: *“By failing to prepare, you are preparing to fail”*, so please keep this in mind and make sure you’re well-prepared for meetings or site visits. This includes understanding all the issues at hand and being ready to discuss them in detail. Ensure all relevant documents and evidence are prepared and presented clearly, and, if witnesses are involved, the parties should ensure that they are adequately prepared to answer the adjudicator’s questions, and to provide clear, relevant, and truthful evidence.

### **1. Be collaborative (where possible)**

Finally, be collaborative! I’ve put the words “where possible” in brackets because I fully appreciate that it’s not always possible to do so, particularly if you have a very aggressive party on the other side, or even have an aggressive client.

However, if the opportunity arises, then these are my tips:

1. If the other party proposes some names for adjudicators, don’t just dismiss them for the sake of it. Instead, I would suggest working with the other side to try and agree who the adjudicator will be;
2. If the adjudicator asks you to try and agree the timetable with the other side then, once again, work with them to try and agree a sensible timetable which is convenient for everyone. I’ve lost count of the number of times Referring Party’s have shouted and screamed about the time the Responding Party wants for the Response, only to come cap in hand later in the adjudication and ask for more time for the Reply. Frankly, it’s not a good look, so try to show willingness to compromise and engage in discussions with the other party from the outset; and
3. Where possible, try and identify factual matters or areas of agreement and avoiding wasting time arguing about matters which aren’t in disputes. This can often streamline the process, reduce the scope of the adjudication and allow the adjudicator to focus on the critical points of the case.

So that’s all from me until 2025, except to share with you the catchier and better-known version from the voice of Christmas himself: <https://www.youtube.com/watch?v=ppOq50Lmk5k>



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