

# The recovery position

Jonathan Cope asks whether adjudication is a viable alternative to traditional methods of recovering professional fees

I suspect the phrase 'recovering professional fees' is what attracted most of you to this article. Many building surveyors still have problems getting paid for their services; some clients can't pay, others won't and others might raise issues of professional negligence. We all want to avoid taking any formal action as the chances of repeat business generally disappears if we do. However, sometimes such action cannot be avoided.

Until May 1998, when Part 2 of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) introduced a statutory right to adjudication, surveyors had two main options for recovering fees:

- issue a statutory demand that could ultimately lead to the compulsory winding up of the client
- litigation.

These options are, of course, still available, however the problem with the first is that, if the client has a valid defence, the claim is likely to be struck out as an abuse of process. Also, if the client is wound up, the surveyor will become a normal creditor with little chance of recovering their full fees. The problem with litigation is the time it may take to obtain a judgment; where fees are over £5,000, periods of over a year are common.

So is adjudication under the HGCRA a viable alternative? It can be, and the speed of the process is an advantage. However, where issues of professional negligence arise, some consider it inappropriate due to the complexity of professional negligence claims.

## When will HGCRA adjudication apply?

Section 108 of the HGCRA provides that parties to construction contracts have a right to refer disputes arising under the contract to adjudication at any time. Most surveyors involved in construction works are aware that this applies to the contract between the client and the contractor, or the contractor and sub-contractors. However, many are unaware that it can also apply to their own contracts. The HGCRA applies to surveying work undertaken in relation to the construction, alteration, repair, maintenance, extension, decoration or demolition of buildings, external works and services forming part of the land (see s105(1) of the HGCRA for more detail on the services included and excluded). For building surveyors, this can include roles such as designer, contract administrator and project manager, but is unlikely to include party walls or dilapidations.

Section 108 provides certain minimum procedural requirements for adjudication. Surveyors can set these out in their own terms of engagement, however even if they don't, the right to adjudicate may still exist and any adjudication would be under the statutory default procedure contained in the Scheme for Construction Contracts.

It is an important point to note that for the HGCRA to apply, the surveyor's terms of engagement (i.e. 'the contract' between the parties) must be in writing (s107). Government is currently considering deleting this provision from the HGCRA, but all RICS members have a duty to set out our terms in writing anyway. The Court of Appeal has stated that *all* agreed contract terms need to be in writing<sup>1</sup>, so I would recommend setting out a detailed schedule of services. Surveyors should also remember that HGCRA requirements regarding payment



© Peter Close

## If the client is wound up, the surveyor will become a normal creditor with little chance of recovering their full fees

also apply; not only should the fee be recorded, but also details of when instalments are due and the final date for their payment.

Contracts with residential occupiers are excluded from the HGCRA, as are PFI contracts. However, if a surveyor has included written adjudication provisions in his terms of engagement then a contractual right to adjudicate might still exist.

## Pre-adjudication actions

Before doing anything else, I would recommend consulting the *Users' Guide to Adjudication*<sup>2</sup> produced by the Construction Umbrella Bodies Adjudication Task Group.

The next consideration is that a dispute must exist between the surveyor and their client. This may sound obvious, but you would be surprised how much case law has been generated arguing over whether a dispute exists and what a dispute actually is. Although it always depends on the facts of the case, the fact that payment of a fee invoice is slightly late is unlikely to constitute a dispute. Also, a dispute does not arise until it is clear that a claim has not been admitted. The circumstances in which a claim may not be admitted can include prevarication by the client or even silence<sup>3</sup>. If in doubt, always allow the client plenty of time to respond – a couple of weeks' delay is better than an invalid adjudicator's decision. It is also sensible for all of the surveyor's intended arguments to be raised prior to starting the adjudication.



» Even if the client hasn't raised professional negligence issues as a reason for not paying, I would still recommend that surveyors consult their professional indemnity insurers before commencing any adjudication. This may even be a condition precedent to the surveyor's cover continuing. If the dispute is complex, the surveyor should consider obtaining professional advice. Although the cost of this professional advice may not be recoverable, the surveyor is also unlikely to be liable for the client's costs either, regardless of the outcome.

If allegations of professional negligence have been made, then the surveyor's professional indemnity insurer is likely to have appointed lawyers in any event, and they should advise the surveyor on the merits of an adjudication. Indeed, in cases of professional negligence, surveyors may find themselves on the receiving end of an adjudication commenced by the client.

### What happens in an adjudication?

Generally speaking, where the surveyor is referring the dispute, the process of an adjudication is:

- the surveyor would serve a Notice of Adjudication on the client
- the surveyor would apply for the appointment of an adjudicator from a nominating body
- the client may challenge the adjudicator's jurisdiction
- the surveyor would serve the Referral Notice on the adjudicator and client within seven days of the Notice of Adjudication
- the client would provide a Response, typically within seven days of the Referral Notice



© Bob Thomas

- a meeting or site visit may be held
- the adjudicator is obliged to reach his decision within 28 days of the Referral Notice, or within 42 days with the permission of the surveyor or longer still with the permission of both parties.

It would take too long to describe the process in detail, however two points are worth mentioning:

1. It is essential that adjudication time limits are complied with
2. I would recommend that surveyors apply to the RICS Dispute Resolution Service for the nomination of an adjudicator<sup>4</sup>. This is the busiest UK nominating body and can nominate an impartial adjudicator with the background to understand the dispute. For example, the surveyor could specify that the adjudicator should be a building surveyor and/or legally qualified if this is what the dispute requires.

The adjudicator's decision will be binding until the matter is finally determined by legal proceedings or arbitration. In practice, the vast majority of parties simply comply with the adjudicator's decision. However, if the client refuses to comply, the surveyor should consider commencing court proceedings to enforce the adjudicator's decision. This would normally be in the Technology and Construction Court (TCC), but surveyors should not be put off by visions of it taking months. The TCC is, on the whole, a supporter of adjudication, and a successful party will normally obtain a judgment within four to five weeks of commencing an action. If successful, the surveyor should be able to recover the majority of their costs for the court proceedings.

In my opinion, in the right circumstances, adjudication is a viable alternative to the traditional methods of recovering professional fees and its biggest advantage is speed. A surveyor should normally be able to obtain an adjudicator's decision within four weeks of the service of the Referral Notice and, even if the client does not comply with the decision, the surveyor should be able to have the decision enforced within another four to five weeks.

### References

- <sup>1</sup> *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] EWCA Civ 270
- <sup>2</sup> The *Users' Guide to Adjudication* is available from the Construction Industry Council, [www.cic.org.uk](http://www.cic.org.uk)
- <sup>3</sup> *Amec Civil Engineering Limited v Secretary of State for Transport* [2005] EWCA Civ 291 contains further guidance on what constitutes a dispute
- <sup>4</sup> Details of the RICS Dispute Resolution Services can be found on [www.rics.org/drs](http://www.rics.org/drs)

The November/December *Construction Journal* focused on dispute management and can be found on [www.rics.org](http://www.rics.org) in the 'Members/Knowledge Zone'

**Jonathan Cope is a Director of MCMS Limited**  
[jonathan.cope@mcms.co.uk](mailto:jonathan.cope@mcms.co.uk)