

# National Construction Contracts and Law Survey 2012

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# UK construction adjudication: current trends and practical tips

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and  
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Matthew Molloy

Matthew has worked in the construction industry since 1987. He qualified as a Chartered Quantity Surveyor in 1993, having completed his studies on a part-time basis at the University of Greenwich whilst working for a national contractor. Once qualified he joined a regional contractor, and progressed to Contracts Management after undertaking an MSc in Construction Management by distance learning at the University of Bath and qualifying as a Chartered Builder. Since forming MCMS, Matthew has specialised in providing quantity surveying services, contract advice and dispute resolution services to a wide variety of clients. He has been admitted as a Fellow of the Chartered Institute of Arbitrators, is a Chartered Arbitrator and is a Practising Member of the Academy of Experts. He is a CEDR trained Mediator and has been called to the Bar. He is regularly appointed or agreed as Adjudicator, and is on the RICS, RIBA, TeCSA, CIArb, and CEDR panels of Adjudicators. Matthew also acts as Expert Determiner, Mediator and Arbitrator, and has been appointed as Arbitrator by the ICC.

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.

Jonathan Cope

Jonathan has over 20 years' experience in the construction industry in both contracting and professional services. He is a fellow of RICS, CIOB and CIArb, and has also been called to the Bar. Jonathan regularly acts as adjudicator, and is on the CIArb, CIC, RIBA and RICS panels. He has also been appointed to act as arbitrator and expert determiner. Jonathan has undertaken expert witness work in adjudication, arbitration and litigation proceedings, including the provision of oral evidence both in court and arbitration.

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 Carillon 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.

### Relevant survey statistics →

The number of people having at least one contract in dispute is high; nearly a quarter of respondents have been involved in one or more contract that went into dispute in 2011. Although it's fewer than those who say the number of disputes is increasing, it's a significant proportion. Just over 6 per cent, around one in 17 respondents, have been involved in three or more disputes.

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: try and 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?

#### The responding party

##### 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. ●