Statutory adjudication

A CMS Cameron McKenna guide

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A brief overview of statutory adjudication

What is statutory adjudication?

— Statutory adjudication is adjudication which takes place under Part II of the Housing Grants, Construction and Regeneration Act 1996 (the Act). Adjudication is a form of dispute resolution which is similar to arbitration, i.e. it involves an independent person deciding a dispute. Adjudications are conducted privately, unlike court proceedings.

— The key features of statutory adjudication are:
- the determination of construction disputes on a very tight timetable – usually 28 days
- the decision of an adjudicator is provisionally binding, not binding on a once-and-for-all basis (as is the case with arbitration and litigation).

— It is a rough-and-ready form of interim dispute resolution.

When does it apply?

— The Act applies to any “construction contract” in England, Wales and Scotland (but not Northern Ireland). The Act details which contracts are construction contracts, and which are not. In short, most building and engineering contracts will be covered by the Act. There are, however, some exceptions such as contracts for the extraction of minerals, and oil and gas contracts (among others).

— Importantly, the Act only applies to contracts which are wholly in writing. If any of the terms of a contract are not recorded in writing – even if they are not material terms – the Act does not apply.

— Adjudication is compulsory, in the sense that any party to a construction contract has the right to resort to adjudication at any time. There is no contracting out of the Act. Having said this, if the Act does not otherwise apply (e.g. a contract is one for the extraction of minerals), the parties can agree that the Act is to apply.

— Any type of dispute arising under a construction contract may be referred to adjudication. The dispute may be over money alleged to be owing, or it may be over other matters such as the correct interpretation of the contract.

How is an adjudication commenced?

— The first step is for a person who wishes to commence an adjudication to serve a “notice of adjudication” on the other party to the construction contract. The notice of adjudication must relate to an existing dispute between the parties, and it is required to set out the dispute in sufficient detail.

— The next step involves securing the appointment of an adjudicator, which takes place within seven days of the notice of adjudication being served. The identity of an adjudicator may be agreed in advance, or the parties may agree to an adjudicator being nominated by a body such as the RIBA or the RICS. If there is no agreement on who is to be either the adjudicator or the nominating body, a person who wishes to start an adjudication can simply approach a nominating body (such as the RICS), who will then appoint an adjudicator.

— The referral of a dispute to an adjudicator is usually effected by sending a “referral notice” to the agreed or nominated adjudicator. The content of a referral notice is similar to the content of a notice of adjudication, i.e. it sets out the dispute which the referring party wants decided.

— There are no formal qualifications required for a person to be an adjudicator. In practice, adjudicators come from a variety of backgrounds, including the law, engineering, architecture and quantity surveying.

What happens during an adjudication?

— Adjudicators have a fairly free hand as to how they conduct an adjudication. The procedure is therefore very flexible. The rules which apply to an adjudication may be agreed between the parties (within certain parameters), or if there is no agreement, or the rules agreed do not comply with the Act, a statutory set of rules known as the "Scheme for Construction Contracts" is deemed to apply.

— Usually, what happens is that the adjudicator invites written submissions and evidence from both parties, and there may also be a hearing where further submissions are made, witnesses cross-examined, and the adjudicator may ask questions on matters in issue. An adjudicator may also conduct a site visit, if he thinks it is expedient to do so.

When does an adjudication finish?

— An adjudication finishes when the adjudicator gives his decision. Decisions are usually in writing and required to contain reasons.

— Adjudicators are required to give their decisions within 28 days of the date of the referral. This period may be extended by a further 14 days, if the party who started the adjudication agrees. It may thereafter be extended by such longer period as the parties mutually agree.

How is an adjudicator's decision enforced?

— Parties to a construction contract are required to comply with an adjudicator's decision. What this means is that if an adjudicator decides that party A owes £100,000 to party B, A must pay that money to B.

— If party A refuses to comply with the adjudicator's decision, party B may enforce the adjudicator's decision through the courts. This can usually be done fairly quickly – often within a month or so. When enforced, the adjudicator's decision takes effect as a judgment of the court.

What if the adjudicator gets it wrong?

— Generally speaking, if an adjudicator gets the facts, the law or the procedure wrong, his decision is still enforceable. There is an inherent element of rough justice in adjudications, given the tight timetable involved. This means that even if the adjudicator makes an obvious blunder in rendering his decision, e.g. he makes a simple and obvious arithmetical error, his decision is nevertheless binding and enforceable. The credo of the legislation is "pay now, argue later", meaning that if a party disagrees with an adjudicator's decision, they can always start court proceedings or an arbitration (if agreed to) to have the result overturned.

— It is usually only if the adjudicator has conducted the adjudication unfairly, or if (for some reason) he lacked jurisdiction, that his decision will not be enforced. The way in which an adjudicator's decision is challenged in Scotland is different to how it is done in England and Wales, although the differences are by no means great.

8. Who pays for the adjudication?

— Normally each party is to bear its own costs of the adjudication, win or lose. But the adjudicator may usually make an order that one party or other is to pay his fees and disbursements. If so, the usual position is that the losing party pays the adjudicator's fees and disbursements.

— Having said this, construction contracts sometimes confer upon an adjudicator the power to decide that one party is to pay the other's costs of the adjudication, or that one party is to bear its own costs and the costs of the adjudicator in any event.

What are the "payment provisions" of the legislation?

— The "payment provisions" of the Act confer a right on any person who performs work under a construction contract to obtain a progress payment, unless the period of the contract works is less than 45 days. The payment provisions also state that a person who wishes to withhold payment is not entitled to do so unless he has given an effective "notice of intention to withhold payment" (usually referred to as a "withholding notice").

— A withholding notice is required to be given (i.e. served in accordance with the contract) before the last date for payment of a progress claim, and it is required to set out the reasons for withholding payment. A withholding notice may simply be a regular assessment of a payment claim which includes an itemised deduction, e.g. for liquidated damages. When a deduction is made, the ground for withholding must be specified so that the recipient of the notice understands why there has been a deduction.

— Note also that the Act requires all construction contracts to provide for the giving of a notice, no later than 5 days after payment has become due, setting out the amount which is proposed to be paid, and the basis of calculation. There is, however, no sanction for failing to issue such a notice (unless the contract in question imposes one). A payment notice may also serve as a withholding notice.

— Withholding notices are important in the context of adjudications, because if an adjudication is started over a payment claim, and a valid withholding notice was not issued in respect of the claim, but there are otherwise grounds for withholding money, it is not permissible for those grounds to be used in the adjudication as a defence to the amount claimed. However, those grounds may still be used in later proceedings (e.g. court proceedings) in seeking to redress the financial position resulting from the adjudication.

How can I best prepare for adjudication?

— If you are looking to commence an adjudication, it is important that you are prepared to present your case in a clear and logical manner. This means that all relevant records have been located, ordered and presented in a digestible form. Going back a step, it is important to attempt to keep good records of events during a project, e.g. records of instructions given, time sheets for work performed etc. Good project records of day-to-day matters are the key to success. And where an issue in a project looks as though it is heading towards becoming a dispute, extra care should be taken to ensure that the factual matters surrounding the issue are fully documented.

— Aside from this, it is important to make sure that if a contract sets out the steps for bringing an adjudication, that those steps are followed. One area where some parties have found trouble in adjudications is in commencing an adjudication prematurely. An adjudication may only be commenced when a "dispute" has arisen. There is a great deal of case law about when a dispute has, or has not, arisen.

— Another important matter is to ensure that withholding notices are properly issued under the terms of the relevant contract (see What are the "payment provisions" of the legislation? on page 4).

— Yet another matter is general awareness of adjudication, and how it fits in with building and engineering projects generally. Adjudications are often completed very quickly, so when a notice of adjudication is received a rapid response is required. From a company's point of view, what really needs to be done is to ensure that those who receive notices of adjudication pass them on to the appropriate manager, legal department, or to external lawyers (if needed), as quickly as possible so that resources can be marshalled to deal with the claim. It is important to have effective systems in place to ensure that this is done.

Is adjudication a good thing or a bad thing?

— There are mixed views. On the positive side, adjudication can provide a quick-fire way of resolving disputes, and improving a contractor's cash flow.

— On the downside, there are concerns over the ability of adjudicators to come up with quality decisions, given the tight timetable applicable to adjudications. The courts have become much quicker in recent years in deciding cases, thereby giving the parties a final and binding, high quality decision. This raises the question of whether it is more worthwhile to go to court, rather than start an adjudication.

— On balance, most users of adjudication regard it as a positive change to the way construction disputes are resolved.

Where can I get further information on statutory adjudication?

— You can contact any of the people listed below for further information.

— Other information can be found at our Adjudication Zone sub-site, which is www.law-now.com/construction-adjudicationzone

Contacts

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