ADJUDICATION UNDER THE 'CONSTRUCTION ACT 2009': AN ADJUDICATOR'S PERSPECTIVE

A paper based on a talk given at the Society of Construction Law annual conference in Leeds on 2nd March 2012

Mark Entwistle

April 2012

D133

www.scl.org.uk

ADJUDICATION UNDER THE 'CONSTRUCTION ACT 2009': AN ADJUDICATOR'S PERSPECTIVE

Mark Entwistle

Introduction

Over recent years much has been written, and even more said, about the ability of adjudicators and the quality of performance of at least some of them. Those criticisms are not to be dismissed as merely the disgruntled reactions of disappointed parties or their representatives.

Neither are they ignored, either by individual adjudicators (the vast majority of whom not only take their role extremely seriously but also make strenuous efforts to stay abreast of developments and to improve their performance) or by nominating bodies (the principal amongst which have in place both facilities to assist their panellists in the maintenance and improvement of standards and arrangements to re-assess those panellists' capabilities). By way of example, the Royal Institution of Chartered Surveyors has now embarked upon its latest re-assessment round.

That is not to suggest that all is, or indeed could ever be, perfect in the world of non-court dispute resolution. The very nature of construction adjudication means that an adjudicator's decision could well be found lacking in certain respects by a person determined to find fault. And strive though an adjudicator may to achieve perfection (a taxing and unrewarding goal), the fact that time is limited and that the parties' submissions or evidence may not be presented in the best way often militate against the highest quality decision and even serve to undermine the adjudicator's feeling of satisfaction of a job well done.

The 'Construction Act 2009'

The coming into force of the Local Democracy, Economic Development and Construction Act 2009 (the '2009 Act')[1] would appear to do little to make the adjudicator's job any easier, or to facilitate improvements in performance. Those desirable ends were not, of course, any part of the thinking that went into the amendment to the Housing Grants Construction and Regeneration Act 1996 (the '1996 Act'). It might, therefore be expected that the role of adjudicator and the difficulties adjudicators face will not change much when disputes governed by the new Act start coming on stream.

1 On 1st October 2011 in England and Wales and 1st November 2011 in Scotland.

Where there are likely to be changes, they will probably be in the following specific areas.

Oral contracts

Firstly, the repealing of section 107 of the 1996 Act and the (hoped for) clarity imparted in relation to oral or part oral contracts should mean that jurisdictional challenges as to the applicability of adjudication will be reduced. At least, it is likely that challenges relating to oral contracts will disappear. That said, the imagination applied by some party representatives to arguing jurisdictional matters is otherwise likely to continue unabated.

Costs

Secondly, the attempt to address the difficulties of inter-party costs and the adjudicator's charges (by the attempt to outlaw 'Tolent clauses'[2]) has already been the subject of fierce debate, and there is a strong body of opinion to the effect that the new provisions,[3] far from clearly outlawing such clauses, actually promote them! Given the polarised positions that certain commentators have adopted, it can be anticipated that issues of costs and adjudicator charges will continue to feature in the matters put before adjudicators.

Payment provisions

Thirdly, the new payment arrangements will (initially at least) serve to promote disputes rather than to reduce them. Not only have the parties to construction contracts to familiarise themselves with (and properly operate) the new arrangements, but disputes are likely to arise over the interpretation of parties' in-house contract terms. Nor will it be a surprise if the drafters of such terms apply their imaginations to producing terms that, albeit compliant with the new requirements, nonetheless protect the payer.

No level playing field

Finally, it is disappointing to note that the changes brought about by the 2009 Act have done nothing to level the playing field as between the referring party and the respondent. Whilst it is convenient to an adjudicator that the referring party can unilaterally agree an extension of 14 days to the timetable, no such right is conferred upon the respondent. Not only is this a regrettable inequality of treatment of the parties, it denies the adjudicator a potentially useful management tool applicable to the process itself.

It is to be expected, of course, that both parties and their representatives will do their utmost – both in contract drafting and in the pursuit or defence of claims brought to adjudication – to gain maximum advantage and the 2009 Act can have little effect on those endeavours.

---

2 Tolent clauses, so called after the decision in *Bridgeway Construction Ltd v Tolent Construction Ltd* [2000] CILL 1662 (Liverpool District Registry).

3 Contained in section 108A of the 1996 Act as amended.

The 2009 Act does not (and perhaps never could) address the inadequacies of party representation that many adjudicators find themselves confronted with, and it is probable (without significant improvements in performance in some quarters) that adjudicators will continue to be troubled by poorly drafted submissions.

The parties' inadequacies

Though it is not to be denied that individual adjudicators do vary in their abilities and (given the short time-scale) that there may be internal inconsistency of performance by any adjudicator, it should not be overlooked that the quality of the result may be very significantly affected by the quality of the ingredients an adjudicator has to work with. That said, there are few adjudicators who would not recognise that the quality of representation and submission has improved over the years, as has the performance of adjudicators themselves. However, just as adjudicators should (and do) strive to improve, the same motivation should drive the parties' representatives. Though it is very tempting to lay all the blame for a disappointing result at the door of the adjudicator, the losing (whatever that is interpreted to mean) party's representative should also look at themselves and ask: 'What could I have done better, or differently, to have achieved a more satisfactory result?'

Here are some pointers drawn from the writer's experience as victim of the inadequacies witnessed over the years – even in recent times. The problems seem to stem from several sources.

1. Firstly, of course, the limited time-scale militates against the adjudicator. For every day the parties are given to present their submissions, a day is lost to the adjudicator. There is only so much that can be done to prepare the decision before the last of the submissions is served.
2. Secondly, the submissions themselves often betray a lack of knowledge of the issues and/or a want of ability on the part of the representative.
3. Thirdly, there is a tendency to throw at the adjudicator every single document that is potentially relevant or even in existence, with little thought given to the evidential value of each document or the practical issues of management and time-scale which also load pressure onto the adjudicator.
4. Fourthly, good document management is not always seen on the part of those representing the parties.

It is those issues that cause the adjudicator the greatest difficulty, and of course potentially add to the bill to be paid by the parties.

Timescale

It is to be kept in mind that, for all the adjudicator is generally the master of the process (and that includes deciding how the available time is to be

utilised), the parties themselves can also be instrumental in ensuring that the adjudicator has the time he or she needs to do justice to the parties case and deliver a sound decision.

It should go without saying, of course, that the parties should rigidly adhere to the timetable that is established either by the adjudicator or by their contract. This is not just a matter of professional courtesy and of the efficient use of time, but also reflects the fact that the adjudicator may well have other professional matters to attend to during the currency of the adjudication. Time management by adjudicators is a crucial element of the management of their role and, ideally, they need the parties to be reliable and sensitive to the demands of the adjudicator's task.

To that end, it does not help at all for parties to repeatedly request that they have the last word. Lengthy exchanges of submissions rarely add as much light to the proceedings as they do heat. Where such submissions are uninvited by the adjudicator, he is put under pressure, whether the submission is considered or ignored. Damned if they do; damned if they don't. Even when extensions of time are agreed with the adjudicator, they rarely lessen by much the pressure created by such multiple exchanges. Further, each successive submission can give the impression that the party concerned is either not as well prepared as it might be or that the advisers do not have the fullest confidence in their client's case.

There really should be no need for more than a referral, response and reply, allowing each party to receive what the rules of natural justice attempt to provide them with: the opportunity to present their case and to answer that of the other party.

Naturally, the respondent might well find itself at a distinct disadvantage regarding timescale, for obvious reasons. That is no reason not to make the response as complete, coherent and understandable as it can be. That is best achieved, as with all submissions, by getting it right first time (so that no further submission is necessary) and by including only that which is relevant to the issues to be considered.

Quality of submissions

It is understood that factors beyond the adjudicator's knowledge could impact upon the quality of submissions served. Sometimes it looks as if a submission has been hurriedly put together, presumably either through pressure of time (with a dispute being referred peremptorily for tactical advantage or through commercial necessity), or in an attempt to save the client costs. Neither motivation is likely to achieve the best result for that client.

The less time and effort expended in the preparation and submission of a party's case, the more time an adjudicator will need to understand it. Ultimately, one or both of the parties will pay the cost of that time. It must rankle with adjudicators that complaints are made about the cost of the process

when, in many instances, the cost has been driven up by inadequacies in the parties' submissions.

It can also be tiresome for an adjudicator to have to interpret what exactly a party is asserting or what remedies it seeks and why. Two particular failings can be identified.

Firstly, seeking remedies without explaining the legal basis for the entitlement to the claim. A good example of this is claims for interest. More frequently than not, no attempt is made to set out the entitlement to interest. Similarly, parties seldom set out their arguments regarding the basis on which the adjudicator should determine who should pay his costs.

More important (and more helpful to the adjudicator) is the benefit of the parties themselves – especially the referring party – setting out the issues that the adjudicator needs to address. That is very seldom seen, but is a real assistance to the adjudicator, rendering the decision not only less costly, but also potentially more focussed. Most, but not all adjudicators (I suspect), will conduct that exercise for themselves. As recent decided cases have demonstrated, some even indicate their view of the issues to the parties in advance of the decision. The adjudicator renders himself a hostage to fortune by such a practice, not only in relation to enforcement, but increasing the likelihood of the parties generating further submissions.

Evidence and document management

It is important for parties to keep in mind that it is highly probable (and must be expected) that the adjudicator will actually read everything sent to him. By way of example, if the entirety of the contract clauses are sent to the adjudicator, even though only (say) three clauses are referred to in a submission, presumably the intention is that the adjudicator will read it all. Equally with other contract documents and correspondence by letter or email string. It does not need much imagination to see that a great deal of time and cost can be wasted that way.

It is not for the adjudicator to draw peremptory conclusions about what is relevant and what is not. That is for the parties in the first instance, and it is often forgotten that the first rule of admissibility of evidence is relevance. In adjudications it is rare for the only documents exhibited with a submission to be those expressly referred to. The absolute rule applied by parties should be: if a document is not important enough to be referred to in the narrative of a submission, it is not relevant to be included. How much more straightforward, less time-consuming and thus less costly would the adjudicator's job be if that rule were adhered to?

The ordering of documents in a submission can also be of great assistance to the adjudicator; with evidence being included in an ordered and logical fashion, enabling the adjudicator to easily locate documents germane to each particular issue.

It really ought to go without saying that full pagination and references to document numbers in the narrative should always occur. That is far from always the case. Naturally, these matters of document management will add to the time and cost of preparing the case. However, it can be said with absolute confidence that the cost of a party appointed administrative assistant put to the task will be far less than that of the adjudicator picking the bones out of an ill prepared submission.

Conclusion

In summary, though the 2009 Act has introduced improvements (especially in relation to payment issues and cash flow – possibly the key driver of both statutes), from the point of view of the tribunal, the practice of adjudication is not likely to be rendered any easier or more straight forward. Time will tell.

Mark Entwistle BTech, LLB(Hons), FRICS, FCIOB, FCIArb, Dip ICArb is a non-practising barrister and adjudicator.

'The object of the Society
is to promote the study and understanding of
construction law amongst all those involved
in the construction industry'

MEMBERSHIP/ADMINISTRATION ENQUIRIES

Jill Ward
The Cottage, Bullfurlong Lane
Burbage, Leics LE10 2HQ
tel: 07730 474074
e-mail: admin@scl.org.uk

website: www.scl.org.uk