



Technical

Adjudication - Part One

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Always check who the parties are in the Contract

1. In a recent adjudication our client served a notice of adjudication to the company it had been dealing with on a day to day basis throughout the contract.
2. It transpired that the contract was actually with a holding company, who chose to completely ignore the notice.
3. Our client had started progressing the adjudication as if the other party was simply refusing to engage in the process.
4. Once we became involved we understood the problem and our client had no option other than to abandon the initial adjudication and re-commence proceedings.
5. This cost our client 3 weeks which had a significant effect on cashflow.

We will look at the importance of ensuring who you refer your dispute to, be that the adjudicating bodies, a named adjudicator or even the other side.

We will consider the different approaches adopted by actual adjudicators on this matter, potential outcomes and some of the tricks utilised by some to delay the adjudication process and deny you of your rights temporarily.

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Dispute - only refer one

6. In a recent appointment our client was faced with a Notice of Adjudication which stated that

“...A dispute has arisen under the Contract... the dispute is regarding the value of the variation account, extension of time properly due and loss and expense on interim valuation 14..”

7. It was successfully argued that this notice had raised a number of separate disputes which was not in accordance with the contract and the Act and the adjudicator decided he had no option than to resign.

We will consider the importance of the wording of your Notice of Adjudication and Referral Notice to ensure you do not fall foul to a challenge which may delay the adjudication process and deny you of your rights temporarily.

Jurisdictional Challenges

8. In 95% of the adjudications we have acted on in the last 10 years a point has been raised on the adjudicator’s jurisdiction, usually that he cannot and should not act. Our experience is that ordinarily adjudicators are unwilling to stand down under such circumstances. Since *RJT Consulting Engineers Limited -v -DM Engineering* a decision of the Court of Appeal in 2002 one of the most common jurisdictional challenges has been the point about whether or not the contract is not wholly in writing. These challenges will be less frequent with the introduction of The Local Democracy Economic Development and Construction Act 2009 but contracts in writing challenges are being replaced to some extent by arguments that there is no contract.

We will summarise some of the most common jurisdictional challenges, using anecdotal evidence we will also look at the varying approaches to these challenges adopted by different adjudicators and advise which have the best chance of success.

Understand your case

9. The aim of this element of the presentation will be to explain the importance of understanding your case and being able to assist others to understand it.

We will consider the importance of being able to simplify your case and look at some of the simple techniques which are key to making sure you present your case clearly and look at some of the common mistakes made.

Dispute - ensure that this is crystallised

10. Anyone entering into an adjudication will have heard the contention *“there is no dispute or difference”* or *“the dispute hasn’t crystallised”*. We have acted on numerous adjudication where this point has been argued at great length (and cost).
11. An example of this is where a submission has been made for an extension of time but only a limited period has then passed before a party commences an adjudication. This presents practical difficulties and arguments about the fairness of the process.

We will consider the importance of ensuring a dispute has “crystallised”, we will look at the current law on this issue and explain how to ensure that a clear dispute exists before entering into an adjudication.

Insolvency

12. In a recent adjudication our client entered into an adjudication against a main contractor. Throughout the process the main contractor attempted to stall the process or stop it entirely by raising some questionable jurisdictional challenges.
13. We had advised our client of our concerns regarding the main contractor’s financial security. Eventually the adjudication was concluded and a decision published which resulted in our client recovering a sum in excess of £250,000; unfortunately on the day the decision was published the main contractor entered into an insolvency procedure and our client is currently pursuing the adjudicator’s decision.

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We will explain how adjudication operates when one of the parties is insolvent, the arguments surrounding such matters and the case law associated with this situation.

We will consider some of the warning signs of a tactical pre-insolvency adjudication and the best ways to protect your business.

[Click here for Adjudication - Part Two](#)

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