

For a claimant in Adjudication: 60 point checklist

This checklist refers to the applicable legislation comprising the Construction Contracts Act 2013 and the Code of Practice Governing the Conduct of Adjudications published by the Department of Jobs, Enterprise and Innovation 2016.

First thoughts

1. Has the possibility of a negotiated settlement been exhausted, have you considered the option to formally mediate a settlement.
2. Do you need a fast decision that is temporarily binding, but is usually to all intents binding.
3. If the contract is a 'construction contract' comprising 'construction operations', under the Construction Contracts Act 2013, (the Act) you have the right to invoke adjudication at any time.
4. Have you reviewed the contract, when was it formed and what does it comprise of.
5. You believe you have an entitlement, have you verified that the entitlement is realistic.
6. Be truly objective in assessing that the entitlement exists under the contract.
7. Be aware that the adjudication decision will be determined by the rights and obligations in the contract between you as Claimant as the Referring party, and the other party being the Respondent.
8. Have you previously asserted your entitlement to the Respondent, has it been rejected and have you rejected the rejection.
9. Have you crystallised the dispute, where the point of difference giving rise to the dispute can be clearly identified.
10. Check that the dispute can be defined as a payment dispute under the Act.
11. Check to ensure that the construction contract is not an exception under the Act.

Upon deciding to invoke adjudication

12. Ensure that you identify the correct corporate entity with whom you have contracted as the Respondent to whom the adjudication is invoked.
13. Ensure that you understand the process and then decide what assistance you will need to assist you in advancing the dispute.
14. Do you need the support of a lawyer and/or a contract claims specialist or others.
15. If you do need assistance, ensure you have a clear agreement between you and your advisor/s.
16. Do you have the necessary evidence, in the form of contemporaneous records, to support your claim to entitlement.

17. Have you undertaken an audit to objectively review how strong your claim is through an assessment of facts, issues and legal principles.
18. Beware of accepting the opinions of your advisors at face value; always remember it is your dispute.
19. Evaluate the risk of an unsuccessful decision, no case is ever certain.
20. Consider if invoking adjudication will negatively impact upon a continuing business relationship.
21. Consider if invoking adjudication will provoke a counter-claim from the Respondent.
22. Do not under estimate the resources and time that will need to be directed to the process.
23. Ensure that your costs are managed, remember that with adjudication under the Act you cannot recover your costs, even if you win or lose.
24. Be aware that the adjudication process moves at pace, it is demanding and resource consuming.

Preparing for the adjudication

25. Carefully set out the timetable and activities to prepare the Referral submission, review the evidence and source any missing evidence.
26. Review the evidence objectively in terms of relevance and quality, as any misgivings will be reflected in the adjudicator's decision.
27. Do not issue the 'Notice of intention to refer the payment dispute for adjudication' (the Notice) until the Referral is completed, or nearly completed.
28. Remember that after the issue of the Notice you have to issue the Referral within 7 days, beginning on the day that the adjudicator was appointed.
29. Plan out the adjudication timetable prior to the issue of the Notice and check the availability of those involved in assisting, representing and advancing your case, ensure no one is on holiday.
30. Prepare the Notice and ensure that it includes the necessary information as set out in the Code of Practice Governing the Conduct of Adjudications 2016 (the CoP).
31. It may be easier to complete on-line Form No.4, from the Construction Contracts Adjudication Service (CCAS), being the Notice, to ensure compliance with the CoP, which you then issue to the Respondent.

A quote of 1979 prior to the Construction contracts Act 2013, originally with regard to arbitration, that is equally applicable to adjudication today:

“A party to a dispute.... will learn three lessons (often too late): the importance of records, the importance of records and the importance of records.”¹

1. Max Abrahamson, Engineering Law and the ICE Contracts, 4th Edition 1979, E & FN Spon, p.516, often referred to as Max Abrahamson's mantra.

Preparation of the Referral

- 32. The Referral should set out the facts, then apply the law to the facts with reference to the contract. It should then allocate the liability and clearly identify the quantum and relief you are seeking.
- 33. Always include a copy of the contract documents within the first appendix.
- 34. Always provide documentary proof of expenditure in the form of invoices, time sheets, site diaries and other written records, a spreadsheet of entries alone will rarely be sufficient.
- 35. If you are including witness evidence ensure that preparation is commenced early in the process.
- 36. Ensure that witnesses of fact and expert witnesses are aware of the limitations of their evidence.
- 37. The evidence to support the assertion to entitlement should be clearly referenced.
- 38. The use of tables provides clarity, particularly for calculation of quantum.
- 39. Use diagrams and schematics to fully explain complex concepts.
- 40. Dated and timed photographs will always serve to provide persuasive evidence.
- 41. Do not unnecessarily 'pad out' the Referral with peripheral or irrelevant evidence.
- 42. Order the Referral in numbered paragraphs as introduction and background, substantive case, conclusion and appendices, all of which are clearly referenced in the body of the Referral.
- 43. The Referral should be complete in all aspects of evidence to advance your case, you cannot depend on having a second chance.
- 44. Make it easy for the adjudicator to interpret and understand your evidence.

Commencing the adjudication

- 45. Thoroughly check through the Notice and the supporting documentation before issue.
- 46. Issue the Notice, as required under the Act and the CoP, requesting confirmation of receipt of the Notice from the Respondent.
- 47. There is a period of 5 days, beginning on the date on which the Notice is served, to agree the appointment of an adjudicator with the Respondent.

- 48. Do you know someone, of sufficient experience and with the necessary availability, that you would propose to act as the adjudicator.
- 49. It is in the interests of both parties to agree upon an adjudicator, where both parties can have confidence in the adjudicator's ability to reach a considered and correct decision.
- 50. If you have a preference for a particular adjudicator, propose this person to the Respondent.
- 51. Be prepared for your proposal to be rejected by the Respondent, this is not unusual.
- 52. If there is no agreement to the appointment of an adjudicator, between you and the Respondent, you can apply to the CCAS to have an adjudicator appointed to the dispute.
- 53. An application to the CCAS for the appointment of an adjudicator cannot be made earlier than 5 days from and including the day on which the Notice was served.
- 54. For adjudication under the Act it may be easier to submit on-line Form No.5, being the Application to the CCAS for the appointment of an adjudicator.
- 55. Remember all on-line notices must be separately copied to the Respondent, as the on-line system does not copy them in by default.
- 56. The Chairman of the CCAS will usually appoint an adjudicator to act in the dispute within 7 days of making the application, or shortly thereafter.
- 57. The date of the letter of appointment from the CCAS is deemed to be the date of the appointment of the adjudicator.
- 58. You may receive an approach for settlement following the issue of the Notice, be ready to respond accordingly.
- 59. The adjudicator will set out the timetable and the procedures to be applied for the adjudication in a direction, to which you must adhere.
- 60. Prepare the Referral and ensure that it includes the necessary information as set out in the CoP, and/or the contract provisions.
- 61. Ensure that you issue the Referral, and all supporting documents, to the adjudicator and the Respondent within 7 days, where day 1 is the date upon which the adjudicator was appointed.