

THE ADJUDICATION OPTION



SECURING PAYMENT OF UNPAID FEES MAY BE EASIER THAN YOU THINK VIA THE PROVISIONS OF THE CONSTRUCTION CONTRACTS ACT 2013.

You have completed the work as agreed and submitted your fee invoice. Later you notice that the payment period has passed and your invoice remains outstanding, but you give the benefit of the doubt. An exchange of emails confirms that something is wrong. It becomes apparent that your client has no intention of paying your invoice. While this may be a rare occurrence, that does not make it any easier to know that you now have a problem to deal with. You use diplomacy to try and find out why your client has not paid your outstanding fee invoice. During the following brief, and possibly tense, discussions, you seek to negotiate or even propose a reduction to go some way to acknowledging your client's concerns, justified or otherwise, but to no avail. As may be provided for in your agreement, you suggest the use of mediation or conciliation as a first step to resolve the matter, but you are rebutted. It is now clear that there is a dispute.

FEATURE

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Choosing adjudication

Prior to July 25, 2016, you would have had no choice but to seek redress for breach of contract through the courts, which is a long, expensive and uncertain process. However, since this date you now have an alternative option to resolve the dispute through adjudication under the Construction Contracts Act 2013 (the Act), which is fast, economic and confidential.

The Act is best described by its long title as "An Act to regulate payments under construction contracts and to provide for related matters".¹ The Act is still unknown to some consultants in the building industry, including surveyors. This lack of familiarity is despite the express provision that the Act covers services ancillary to a construction contract, such as surveying work.² The adjudication provisions³ within the Act give you the right to refer a dispute to adjudication⁴ at any time, and the process commences by serving your client with a notice of intention to refer the payment dispute for adjudication.⁵

You will always be understandably reluctant to initiate adjudication for fear of it being perceived as adversarial. Clients are hard won, and there will always be a desire to avoid any adverse impact on a business relationship. Conversely, however, where you have an

entrenched position with a recalcitrant client, you can either accept your loss as a lesson learned, or assess the risks in seeking to recover your loss.

Adjudication offers the opportunity to pursue recovery of fees owed for what can be a modest outlay, where the process is undertaken quickly and in private.

One of the advantages of adjudication is that you are only liable for the cost of the advice that you obtain, which you can seek to manage from the outset, and you have no liability for the cost of advice for your client.⁶ This is unlike litigation through the courts, where costs will generally follow the event, with the loser usually being liable for all the costs incurred by both parties.

How it works

The first action in the adjudication process is to review your records and ensure that they are complete. The records will comprise:

- the agreement, even if this is not in writing, between you and your client for the work undertaken;
- the details of your outstanding fee account;
- any exchanges of correspondence on the matter; and,
- any other relevant details.

Using this information, you can then prepare the notice of intention to refer the dispute to adjudication and a short accompanying statement to support your claim for outstanding fees, usually just a couple of pages. It is not unusual for an account to be settled shortly after the notice and accompanying statement have been served on the client. If by clear articulation in the statement it is evident that the fees are due, a recalcitrant client, on consideration of correct advice, will often see sense in bringing the matter to a close quickly. This will result in the payment of the outstanding fee account, in full or in part, and avoidance of the adjudication. Thus, the dispute may be resolved at this point.

Should the matter continue, you can approach the Society of Chartered Surveyors Ireland (SCSI), which has a panel of experienced adjudicators, and ask to have an adjudicator appointed to decide upon the dispute, by agreement with the client.⁷ Failing agreement, you can have an adjudicator appointed by application to the Construction Contracts Adjudication Service.⁸

From the day that the adjudicator is appointed, you will only have seven days in which to provide your 'Referral' (the particular details of your claim).⁹ A timetable will then be agreed where your client will have approximately 10 days to provide a 'Response', and you will have approximately five more days in which to provide a 'Reply'.

The adjudicator will then reach a decision within 28 days from the date of having received your Referral, unless an extension of the timetable is agreed.¹⁰ It is therefore usual for the dispute to be fully addressed in a period of only five to six weeks – a fraction of the time that it would take if seeking redress through the courts.

The adjudicator's decision, which will be in writing and supported by

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reasons, will be to all intents binding and is only rarely open to challenge.¹¹

Robust mechanism

Adjudication under Section 6 of the Act can be presented as being the 'last alternative', which of course it should be, in the event of your client taking offence. But the threat and use of the Act if necessary does allow you to bring matters to a head quickly in securing payment of outstanding fees, either through service of the notice, or the later issuance of an adjudication decision.

There will always be a natural aversion to being involved in a dispute. However, it is beneficial to know that when you have a difficult client from whom you seek unpaid fees that you believe are due, there is a robust mechanism available to help secure recompense should you need it.

References

1. As set out in the Construction Contracts Act 2013 [CCA 2013].
2. *Ibid.* at Section 1.–(2)(a).
3. *Ibid.* at Section 6.–(1) to (18).
4. *Ibid.* at Section 6.–(1).
5. *Ibid.* at Section 6.–(2), where the notice should be in the prescribed form.
6. *Ibid.* at Section 6.–(15).
7. *Ibid.* at Section 6.–(3).
8. *Ibid.* at Section 6.–(4) and Section 8.–(1) to (6).
9. *Ibid.* at Section 6.–(5)(a).
10. *Ibid.* at Section 6.–(6) and (7).
11. The vast majority of adjudication decisions are adhered to; it is considered that only circa 3% of adjudication decisions are subject to a following challenge by either arbitration or through the courts.