Fenwick Elliott

ALTERNATIVES TO ADJUDICATION

11TH ADJUDICATION UPDATE SEMINAR

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Here I am, at the 11th Fenwick Elliott adjudication seminar, in a room full of people closely involved with adjudication, and I am talking about alternatives to adjudication. I make absolutely no apologies for this. Indeed, if the only message you take away with you today is that there are real alternatives to adjudication then I will be a happy man.

Some of you may have seen my article about Adjudication in Building Magazine a couple of months back. The title of that article, "an expensive way to flip a coin", was somewhat tongue in cheek, but it did, I hope convey a serious message - that adjudication may not be appropriate for every dispute.

Let me be clear - I am not here to knock adjudication. Far from it – Adjudication has been a tremendous success and has transformed construction dispute resolution over the last seven years. Long may it continue.

However, what I would like to do this afternoon is to step back a bit, and look at what we are trying to achieve in the dispute resolution process. More importantly, I want to look at what we are trying to avoid. I will then look at some of the pros and cons of adjudication, finally turning to the various alternatives available, some of which you will be familiar with, others not quite so familiar.

What Are We Trying To Achieve?

Although winning a particular argument or even an entire case may be an important aspect of the process, what we are all striving to do is achieve a deal and move on. It doesn't matter how many mini victories are achieved along the way and how many decisions go in our favour. Until a deal is done it is difficult to call any dispute resolution process a success.

Now, in order to make that deal a good one for both parties, it needs to be a fair reflection of the relative strengths and weaknesses of the parties positions. It needs to be achieved at a minimal cost, and probably as important as any of the above, it needs to be achieved

with as little effort from the parties own management and resources, and with as little disruption to the parties business and profit making capability as possible. The impact on a business and management time is often overlooked in cost benefit analyses when considering whether to commence proceedings.

What Are We Trying To Avoid?

The other side to this coin is what we are trying to avoid in the dispute resolution process. It goes without saying that a long fight is in nobody's interests. One reason the process may be prolonged is because it may be over many rounds, or in dispute resolution terms, over many tiers of tribunal. The inevitable consequence of long battles over many rounds is that the costs commonly overtake the issues and at the end of it all, no matter what the result, both parties regret it. If you approach the question of which dispute resolution process to adopt by analysing what you are both trying to achieve and avoid, it may well be that you come up with an answer that surprises you.

So let us turn to the second aspect of this talk, namely an analysis of how adjudication shapes up against your objectives.

Benefits of Adjudication

There is no doubt that adjudication can be very cost effective – ordinarily the costs involved are a fraction of full scale litigation or arbitration proceedings. Likewise, the 28 day process is undoubtedly fast. In the majority of cases it is also probable that a fair decision can be made by the adjudicator which, even if things are split down the middle, probably isn't that far off what the parties had expected.

If that decision is fair, and is what the parties were expecting then the chances are the parties may well decide not to take things further after the adjudication, and so the adjudicator's decision will be the final word and a deal will be done. Fantastic – so where's the problem?

Problems with Adjudication

Well the first and most obvious point is that in the scenario I just mentioned, why on earth were you adjudicating at all if at the end of the day both parties believe the decision was fair, about right and are happy to stick with it. Surely if common ground such as that can be reached after an adjudication, it ought to have been capable of being settled without recourse to adjudication at all.

Once you are in an adjudication, it is important to appreciate that the procedure and the outcome can be unpredictable. The quality of the adjudicators can be variable and there are often widely differing approaches adopted depending upon the professional background of the adjudicator. The problem is that within the confines of a statutory procedure and a presidential appointment of an Adjudicator, it is very difficult for the parties to control this.

Also, although adjudication is supposed to be a 28 day process, it can become very protracted and very expensive. For example, (admittedly an extreme one) I know of one adjudication which took over a year to complete by the time preparation and enforcement is taken into account, and cost over a million pounds. Surely this is a nonsense.

In fact one of the advantages of adjudication, its 28 day timetable, may also be one of its disadvantages, because the timescales involved may mean that a fair decision is impossible. How can an adjudicator fairly determine the critical path through a project that has been delayed for months and months and has overrun by millions of pounds in 28 days? The fact is in most cases he can't and so he has three options. He either:-

- resigns;
- asks for more time – as was given in the year long adjudication I just mentioned; or
- makes an unfair arbitrary decision.

If he resigns, the whole process has been a waste of time. If he is given more time, the process becomes very expensive, and if he makes an unfair decision, that decision is likely to be unenforceable and is unlikely to lead to a deal.

Let us not forget, adjudication is also an interim and non binding process. Once the next stage is entered into, such as litigation or arbitration, the entire adjudication proceedings are rendered irrelevant because the new tribunal looks at matters completely afresh.

Considerations

So before turning to the third element of this talk, and the alternatives to adjudication, let us look at what considerations we should take into account when deciding whether to adjudicate or whether to adopt some other dispute resolution process.

The value of the dispute is vitally important. If the dispute is worth millions of pounds, it is very unlikely that an adjudication will be the end of it. The losing party will doubtless commence court or arbitration proceedings and the whole thing will be looked at afresh. Surely, if you are going to end up in Court or Arbitration, the sooner you get there the better? Unless cash flow is a serious and burning issue, is there any point in introducing an additional layer of dispute resolution by adjudicating?

In this respect, adjudication was always intended to be a pay now, argue later procedure. What we are seeing in some circles is an argue now, argue now approach. That cannot be what parliament intended.

Secondly, the complexity of the case is an important issue. For instance, with the best will in the world, it is hard to see how an adjudicator can make a fair decision in 28 days on some of our more complex cases. In one adjudication[1], where £12 m dispute was at stake, the referral notice incorporated 49 files and 16 witness statements. I doubt whether an adjudicator could read the documents in 28 days, let alone make a fair decision upon them.

If it appears inevitable that the adjudicator will need to be given a substantial extension of time to deal with the issues, think again. What you may be doing is engaging in a medium timescale procedure, such as 100 day arbitration which I will come to in a moment, but the process is only interim and non binding. Is it really worth spending such vast sums on an interim process?

[1] See CIB Properties Limited –v- Birse Construction Limited

Another important consideration is the existence of jurisdictional arguments. The law reports are littered with failed attempts at enforcing adjudication, either because the parties or the adjudicator made a cock up. The whole enforcement process can be an expensive distraction which fails to focus upon the real issues and the real dispute. Why bother?

The Alternatives

Finally, I want to briefly run through some of the alternatives available to you. This is not an exhaustive list, and there are many different options and hybrids of each process which may be suitable for your particular dispute. However, Mediation, Early Neutral Evaluation, 100 Day Arbitration, Part 8 and Expert Determination are the principal options you ought to be considering.

Mediation

I have some fairly strong views about mediation. In essence, I don't believe there is any dispute which is not appropriate for it. I always hear people talking about the fact that the parties are too far apart to mediate, or that the case is all or nothing and so settlement will never take place at a mediation. With respect, I cannot accept these arguments. In fact, it is when the parties are miles apart, or when there is a big issue of principle that we should be looking to mediate.

The fact that a deal is not done in a mediation does not mean it hasn't been a success. Some of the best mediations I have been involved with have been where no deal was done there and then. What mediation gives you is the opportunity to really explore what the other side is looking for, and to really identify and focus upon the issues. I hate debating the merits of issues at mediation – it is invariably a waste of time. No one is ever going to turn round and say "Yes, ok you've persuaded me", and there is little point in trying to convince a mediator of your arguments because ultimately he has no power to impose his beliefs upon you.

Therefore, instead of focussing on a destructive and heated debate about the merits of the issues, focus on identifying what the key issues are and, most importantly how best they can be resolved.

Also, focus on the peripheral issues – it may be many of these can be disposed of by agreement, leaving the parties to focus upon the big money elements, and how these best can be resolved.

It was exactly a process such as this that I was involved with in a case called Earls Terrace. This was a £10 million defects claim, - £6 million of which related to the developers claim for holding costs associated with 12 month delay to the development arising out of the defects and the consequential locking up of the funds invested. The problem was that the contractor had in fact done the developer a favour because during the 12 months delay the property market shot up, so that the developer's increase in sales revenues more than offset his holding costs.

The dispute resolution process we adopted was an initial mediation, at which about £1 million worth of issues were resolved. A second mediation was then held to discuss how best to resolve the no loss legal point. That discrete question was resolved by His Honour

Judge Anthony Thornton[2] in TCC proceedings. The parties then mediated for a third time and a deal was done. That was exactly the sort of case that many people might have thought inappropriate for mediation.

Early Neutral Evaluation

This process seems to be more and more popular these days. If effect, the parties appoint an evaluator, usually a Judge or QC, to provide a non binding appraisal of the parties arguments in a particular case. The procedure is very flexible but commonly there may be a short hearing to give the evaluator the opportunity to assess important pieces of evidence.

The real merit in ENE is where there are major legal arguments. The sort of case I have in mind is the age old no contract argument. Say a contractor has been proceeding on a letter of intent, against a background of contract negotiations which are nearing completion. No contract is ever signed, the limit of the letter of intent is not increased and eventually the contractor walks off. The Employer claims damages for breach of a contract he says was already entered into, despite the fact it was not signed. The contractor claims all his costs in *quantum meruit* despite the fact that he has exceeded the authority in his letter of intent.

An evaluation on such an issue ought to be possible at a cost of about £10,000 and the earlier the process is embarked upon the better. With the benefit of an early opinion by a respected tribunal, the wheels towards a deal will hopefully be well oiled.

Even if you end up in the next stage of dispute resolution, the process is much quicker and cheaper than adjudication and at worst does provide a useful rehearsal of the arguments at relatively low cost.

100-Day Arbitration

This is a procedure introduced by the Society of Construction Arbitrators, partially as a response to the success of adjudication. It fills the gap between adjudication and full scale arbitration in terms of time and cost and may well be appropriate for all but the most substantial of cases.

As with any arbitration, agreement of a good arbitrator is the key.

The striking advantage with this procedure as compared with adjudication is that it is binding, at least in relation to the arbitrator's decisions on the facts, although his decisions on the law may be appealable.

To date there has not been a substantial take up of the procedure, but it is certainly something to look out for.

Expert Determination

This is another variation on a similar theme, but tends to be a less formal, less legalistic approach. A common format would be for a construction professional of an appropriate

[2] Earls Terrace Properties Limited –v- Nilsson Design Limited 2004 CILL 2095

discipline to sit down with the parties, round a table, with or without lawyers and try to get to the bottom of the dispute as quickly as possible.

The sorts of cases that very much lend themselves to expert determination are those which don't really turn on legal issues, such as measurement disputes, or disputes about the causes from a technical perspective of a particular defect such as water ingress.

I have been involved in a couple of very successful expert determinations where the lawyers were involved to begin with, in setting up the procedure and terms of reference of the expert, and then the parties themselves and the expert were left to deal with the dispute within the confines of the agreed procedure. The parties agreed the expert's decision was binding upon them and in both cases a deal was done at a fair level at minimal cost and effort shortly after the expert determinations were completed.

In my view, we should all make more use of expert determination.

CPR Part 8

This is a procedure whereby the parties can submit specific questions to the Court for determination by way of a declaration. So for instance, in the example I quoted earlier concerning the dispute about the contract, it may be possible to ask the Court to decide once and for all what the terms of the contract are – in other words, was there a contract for the whole of the works or not? Or is the contractor entitled to be paid on the basis of a *quantum meruit*.

The parties can then be left to resolve the matters consequential upon the declaration, such as *quantum* themselves.

Theoretically, the procedure is a good one. The problem is that under the rules, Part 8 is only appropriate where there is not a substantial dispute of fact. The danger is that if the Court decides that Part 8 is inappropriate, you may end up being bounced into full scale Part 7 proceedings where the lack of control available to the parties and the notorious escalation of costs that can take place may be unattractive.

Conclusion

The reason why adjudication is popular is because it is available to any party at any time and there is no requirement for agreement.

That does not mean to say however that you shouldn't try and agree upon a better process.

Gone are the days of saying "The other side suggested it -if its good for them, it must be bad for us, so lets refuse to agree." In my view that approach is wrong.

The fact is that by tailor making your dispute resolution process you can adopt the very best elements of adjudication and leave behind the worst. You can put in place a system where the fairest decision can be made, within the shortest time period at minimum cost and effort. Surely this has to be in both party's interests?

Go on, be innovative – after all, if the worst comes to the worse, you can always adjudicate anyway. By all means, adjudicate - but don't do so before thoroughly exploring and discussing the alternatives.

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