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HOW TO WIN!

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ADJUDICATION UPDATE SEMINAR

1. The title of this talk was thrown down to me as a challenge by a couple of clients following our last Adjudication Update Seminar, when they said in the bar afterwards that it was all very well being told about the finer points of enforcing adjudicators' decisions in the Technology and Construction Court, but what they really wanted to know was how to win an adjudication in the first place.

2. I picked up the gauntlet, as one does, and only realised how provocative the title of this talk was after our advertisement for this seminar went into *Building* magazine and, without fail, every single representative on the other side of each of my cases said to me. "How do you know anything about winning? You're going to lose this case!"

3. Before preparing this paper, I thought that I would have a look at Amazon's website for inspiration. They currently have 1,013 books with "How to Win" in the title, including how to win arcade games, alternatively the Lottery; how to win friends and influence people; how to win the War on Terror; how to win at aptitude tests; how to win a man or woman you thought you could never get – obviously keeping your options open; how to win at poker, and, perhaps my favourite, how to win an argument with a meat eater.

4. Some in the audience would say that most, if not all, of these titles could easily apply to the adjudication process.

5. Let's have a look to see what you actually do need to do to be successful; I use the word "successful", as when I did my evening classes for my exams for the Fellowship of the Chartered Institute of Arbitrators, I was told very firmly that there was no such thing as a "winning" party or a "losing" party, merely "successful" and "unsuccessful" parties. Against the background of the battlefield of adjudication, I doubt that many people would agree with that statement nowadays.

6. So how <u>do</u> you win?

7. The simple answer to that question, albeit a rather trite one, is to make sure that you have a good case. You might well think that that is a blindingly obvious thing to say

but it is surprising how often people want to have a quick punt at adjudication without first having carried out certain very basic steps to put their claim in order and work out how best to present and pursue it.

Pre-Contract

8. The foundations for winning any dispute referred to adjudication are laid in the contract itself, if you have one. Many people never look at the adjudication provisions in their contract, as they obviously like to think they will never need to use them. Many people never even look at the payment provisions, either! If you don't look at all these clauses pre-contract, however, when you are in a possible position to change them, you may well be stuck with provisions and procedures which are far more favourable to the other side.

9. For example, if you are the weaker party to the contract, and thus more likely to be the referring party in an adjudication, if you are not careful you might only find out at the point of adjudicating that you are constrained by your contract to limiting your referral notice, which is the principal submission in the adjudication, to a certain number of words, with only a very small number of pages of supporting documentation allowed to be served with it in support of your claim. This is hardly an ideal position to be in.

10. You might find that the adjudication procedure in the contract does not allow you to reply to the other side's response to your referral notice.

11. You might also find that draconian provisions have been included in your contract providing that you have to pay not only your own legal costs but also those of the other side and all the adjudicator's fees and expenses if you are the one who has instigated the adjudication, even if you are successful at the end of it. These costs provisions are very likely to be outlawed following the review being carried out by Sir Michael Latham and his team to the HGCRA but in the meantime they are very much with us and there is nothing more galling than a party "winning" an adjudication but finding that their victory is Pyrrhic in that their financial recovery is virtually nil after they have paid all the various costs, fees and expenses.

12. Another point to watch at the pre-contract stage is whether there is a named adjudicator in your contract, whose name has of course been put forward by the other contracting party. Although an adjudicator is under a duty to act impartially[1], this does not mean that the adjudicator has to be independent. If the adjudicator is named in the contract, they may well not be independent and one might then well question how impartial they are actually likely to be. Would you, as employer or main contractor, continue to name in your main/sub-contracts an adjudicator who consistently decided against you? Probably not.

13. Apart from a question mark over a named adjudicator's impartiality, you also need to make sure that you will have the right man (or, preferably, woman) for the job. If the adjudicator is named, there will be no choice. How do you know that they will have the right skills when a dispute arises? Would you want a quantity surveyor

[1] Section 108(2)(e) HGCRA 1996

dealing with a matter of legal principle, or vice versa? Many quantity surveyors are of course aspiring lawyers, but most lawyers would curl up and die at the prospect of having to carry out a valuation of a final account.

14. If no adjudication is actually named, has an Adjudicator Nominating Body ("ANB") been chosen? This is the organisation to which you will need to apply for an adjudicator to be appointed if/when the time comes.

15. In summary, you should check at the pre-contract stage what the adjudication procedures are going to be and, if you don't like them, try to change them while you still can. If you can't change them, you at least go into the process with your eyes open. Whilst they won't impact directly upon the merits of your actual claims, they can certainly help to smooth the process and help you win.

16. If you discover at the pre-contract stage that your contract is not going to include any adjudication provisions or procedures, now is the time to raise this with the other contracting party and either agree a bespoke procedure or standard set of adjudication rules or, alternatively, allow the fallback Scheme for Construction Contracts to apply instead – this will automatically be the case if a construction contract, as defined by the HGCRA, does not comply with the eight requirements of Section 108(2) to (4). You should also agree which organisation is to be the ANB.

Getting Started: Don't run before you are ready to walk

17. Before you actually embark on the adjudication process, you should run through a check-list of points to make sure that the adjudicator will have jurisdiction, or authority, to deal with the dispute.

18. Section 108(1) of the HGCRA provides that "*a party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section*".

19. Are you "a party to a construction contract"? A "construction contract" is defined in the legislation[2], as are the exclusions and exemptions.

20. Many people are still unaware that the definition of "a construction contract" includes agreements "*to do architectural, design or surveying work, or to provide advice on building, engineering, interior or exterior decoration or on the laying out of landscape, in relation to construction operations*"[3] and many construction professionals remain unaware of their right to refer a dispute over a fee claim to adjudication.

21. The provisions of the HGCRA do not apply to a construction contract with a residential occupier[4]. If you are operating on a bespoke construction contract with a residential occupier which in fact includes an adjudication procedure, then you must be aware that you should specifically draw this to the residential occupier's attention

[2] Section 104, Section 105
[3] Section 104(2)(a) and (b)
[4] Section 106

before the contract is executed, as it is otherwise likely to be regarded by the Courts as an unfair contract term[5] and unenforceable.

22. The provisions of the HGCRA apply only where the construction contract is in writing[6]. Although it had been thought that the definition of "an agreement in writing" was very wide, it has now been held by the Court of Appeal[7] that the whole contract must be in writing; in that case, Lord Justice Ward said "*…what has to be evidenced in writing is, literally, the agreement, which means all of it, not part of it*". Many people still fall foul of this statutory requirement; if you do, then the adjudicator will have no jurisdiction to deal with your dispute and you will not be able to succeed in adjudication.

23. If you fulfil the criteria of being a party to a construction contract which consists of an agreement in writing in respect of the carrying out of construction operations (as defined), then you are well on the way to getting started. What many people still do not realise they then have to do is crystallise the dispute.

<u>A "dispute"</u>

24. Case law has established that you can only refer "a dispute" to adjudication, not a "claim"[8]. Myriad cases have dealt with the question of when "a dispute" crystallises; as well as ensuring that you are referring " a dispute" to adjudication, you should also be careful not to refer a number of disputes at the same time, unless the adjudication procedures in your contract specifically allow you to do so[9].

25. Useful judicial guidance includes the following:-

    1. "*The statutory language is clear. A "dispute" and nothing but a "dispute" may be referred. If two or more disputes are to be referred, each must be the subject of a separate reference… Equally, what must be referred is a "dispute" rather than "most of a dispute" or "substantially the same dispute"*."[10]

    2. "*A party cannot unilaterally tag on to the existing range of matters in dispute a further list of matters not yet in dispute and then seek to argue that the resulting "dispute" is substantially the same as the pre-existing dispute.*"[11]

    3. "*Whether what is in issue is a dispute or several disputes is…a matter of circumstance which the adjudicator must, in the first instance, decide for himself if the point is raised. It is very easy to subdivide and analyse what is in substance one dispute into its component parts and to label each part a separate dispute. That is not, however, the correct, approach.*"[12]

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[5] *Picardi -v- Cuniberti*
[6] Section 107
[7] *RJT Consulting Engineers Ltd -v- DM Engineering (Northern Ireland) Ltd*
[8] *Edmund Nuttall Ltd -v- RG Carter Ltd*
[9] For example, if the adjudication is to be governed by the TeCSA Adjudication Rules: *Balfour Kilpatrick Ltd -v- Glauser International SA*, per HHJ Gilliland QC
[10] *Fastrack Construction Ltd -v- Morrison Construction Ltd* per HHJ Thornton QC
[11] *Fastrack Construction Ltd -v- Morrison Construction Ltd* per HHJ Thornton QC
[12] *Barr Ltd -v- Law Mining Ltd* per Lord MacFadyen

4. *"For there to be a dispute for the purposes of exercising the statutory right to adjudication, it must be clear that a point has emerged from the process of discussion or negotiation has ended and that there is something which needs to be decided."*[13]

5. *"The whole concept underlying adjudication is that the parties to an adjudication should first themselves have attempted to resolve their differences by an open exchange of views and, if they are unable to, they should submit to an independent third party for decision the facts and arguments which they have previously rehearsed among themselves. If adjudication does not work in that way there is the risk of premature and unnecessary adjudications in cases in which, if only one party had had a proper opportunity to consider the arguments of the other, accommodation might have been possible."*[14]

26. You therefore have to be careful not just adequately to identify the matters in dispute but also to identify the precise scope of the supporting arguments before referring the dispute to adjudication. A change to the details being used in support may well result in you having a "claim" rather than a "dispute", and the adjudicator will not have jurisdiction to deal with it.

27. The other party has to have an opportunity of considering your claim and its supporting documentation, and accepting or rejecting it, before a dispute is deemed to have crystallised.

28. The "dispute" will consist of exactly what is in contention at the time you serve your notice of intention to refer that dispute to adjudication. The adjudicator must only consider the dispute as formulated at that time.

29. This check-list will, I am sure, be regarded by those sophisticated in the adjudication process as being somewhat elementary. It is surprising, however, how many people still continue either to ignore or fail to satisfy these basic requirements. If you do, the adjudicator will have no jurisdiction to decide your dispute and if you obtain a decision in your favour, it will not be enforceable in court. If this is the case, then you will have lost a considerable amount of time as well as money and you will be the loser, not the winner, of the process.

<u>Nuts and Bolts</u>

30. The "nuts and bolts" stage is laborious but has to be done before you refer your dispute to adjudication; it consists of marshalling your evidence, by collecting together all your paperwork, especially correspondence relating to the dispute, and extracting the relevant provisions from your contract documentation. If you suspect you are about to be on the receiving end of an adjudication, start getting ready early. Once the referral notice is served, you will have very little time indeed.

31. You should ensure that everything is in chronological order and cross referenced to make it as "adjudicator friendly" as possible – remember that the adjudicator will

[13] *Sindall Ltd -v- Solland* per HHJ LLoyd QC
[14] *Edmund Nuttall Ltd -v- RG Carter Ltd* per HHJ Seymour QC

only have 28 days from the time the dispute is formally referred to him/her to reach his/her Decision, and things will be moving at a very fast pace.

32. Don't overload the adjudicator! Ensure that the documentation is relevant to the dispute and that you do not include vast multitudes of extraneous papers in an attempt to intimidate the other side, as this will only confuse the adjudicator, run up unnecessary costs and work against you. Referral notices running to several hundred pages are not a good idea.

33. Check on the adjudication provisions in your contract. If there are no such provisions, the adjudication procedure in the Scheme for Construction Contracts applies. You are then entitled to approach an ANB to nominate your adjudicator, once you have served your notice of intention to refer a dispute to adjudication.

34. If an ANB is named in your contract, make sure that you apply to it, and don't apply to another one because you think it would be better or because you have forgotten what was in your contract in the first place. If your contract provides for, say, the RICS to be the ANB, then any adjudicator appointed by, say, the CIOB will not have jurisdiction to act.

35. If your adjudicator is named in the contract, don't apply to someone else, either on purpose or by mistake. Check whether the named adjudicator is able/willing to take on the job. Only if their answer is no can you approach somebody else instead.

<u>Notice of Intention to Refer</u>

36. The Notice of Intention to Refer a dispute to adjudication sets the adjudication procedure in motion.

37. Before serving the Notice of Intention to Refer, you should make sure that your Referral Notice itself, with supporting documents, is ready to go, as it needs to be served within seven days of the Notice of Intention to Refer, during which period the adjudicator will be appointed.

38. Don't rush the process. If you are the Referring Party, you have the advantage of time: you can decide when to set things in motion and should only do so once your evidence is in place and your documents are in apple pie order with everything put together as efficiently as possible. Remember that, once you are on board, the adjudication train is unstoppable, unless and to the extent that there is a complete derailment.

39. Before serving your Notice of Intention to Refer a dispute to adjudication, be absolutely certain what it is that you are referring to the adjudicator to decide. Assuming that you have ticked the check-list item of a crystallised dispute, are you sure that you want to refer the whole dispute to adjudication or can/should you refer just part of it? For example, if you have a significant extension of time claim, with loss and expense riding on it, do you want to lump the two together in an adjudication or would it be better, in terms both of time and money, to deal with the extension of time claim first and the loss and expense claim thereafter, as separate disputes? Remember that 28 days is a very short time for the adjudicator and it may

work against you if the adjudicator simply cannot get to grips with the facts and issues behind a very complex dispute within that time scale. Keep it simple!

Should you adjudicate at all?

40. Nowadays there is a marked trend towards very large and complicated disputes being referred to adjudication, for example final account disputes totalling many millions of pounds. Those claiming the money often find that the adjudication process does not always work very well in their favour in those sorts of cases, as there is simply too much for the adjudicator to deal with. Sometimes decisions in these cases are not enforced by the judges, some of whom clearly feel that adjudication is not designed for certain types of disputes, such as complex final accounts or professional negligence cases. For example, in a recent case[15] the judge said

> "*Even where an adjudicator is prepared to firmly and impartially exercise the powers given to him under the Scheme to investigate, control and manage the hearing of a dispute there may well be cases which because of their complexity and/or the conduct of a Claimant are not susceptible of being adjudicated under the Scheme fairly and thus impartially.*
>
> *The Scheme does not envisage that there should be a provisional resolution of a dispute by an adjudicator at all costs. That would be far greater an injustice and mischief than that which the HGCRA was enacted to remedy.*"

41. So, don't feel that you <u>must</u> adjudicate. Remember the alternatives: negotiation, mediation/conciliation, arbitration and/or litigation. These days, with the advent of adjudication having proved so popular, as well as successful, the workload in the Technology and Construction Court is considerably reduced and cases are thus now dealt with far more quickly than used to be the position. If you have a very complex dispute, you may be better off by going to court instead of adjudication. You will not have to have a "construction contract" complying with the requirements of the HGCRA, or fulfil all the other criteria on the check-list I have outlined above, in addition to which you may have greater security with the end result, in that you will not face possible jurisdictional challenges upon enforcement of a decision in your favour. In addition, if you are successful in court, you will normally recover a proportion of your legal costs which, in the absence of express agreement to this effect with the other party, will not be the case in adjudication.

Deciding a point of principle/preliminary issue

42. Assuming that you are now secure in your desire and ability to adjudicate, and have decided whether or not you are going to be engaged in one complex dispute or in a series of streamlined adjudications, one point also to consider is whether there is a point of principle in dispute which, when decided by the adjudicator, could decide many of the other items in dispute without the necessity of referring those items to adjudication as well.

43. For example, if there was a dispute about an item of work carried out by a contractor, with that contractor claiming that the item of work was a variation in

[15] *London & Amsterdam Properties Ltd -v- Waterman Partnership Ltd*, per HHJ Wilcox

respect of which it was entitled to an extension of time, but you felt, as employer, that the work carried out by the contractor was merely the contractor remedying its originally defective work, you could refer to an adjudicator the question of whether or not that work was indeed a variation or the remedying of defective work. That would be a short point which the adjudicator could easily deal with by reference to the facts of the case and the provisions of the contract between you. If decided in your favour, then the contractor would clearly have no entitlement to an extension of time, or, for that matter, loss and/or expense arising directly from that work, and a large part of its other claims would thus simply fall away.

The Referral Notice and supporting documents

44. When working out how best to prove your case, make sure that you leave no gaps. If the documents are silent in respect of a certain aspect of the dispute, as they of course so often are, make sure that you have evidence from a witness of fact who can cover it. You do not need to have lengthy witness statements with voluminous appendices mirroring what happens in the High Court. Simply make sure that somebody with actual and practical knowledge of the point prepares a brief statement saying who said and/or did what, includes a statement of truth and signs it.

45. When referring the dispute to adjudication, you know perfectly well what the other side is likely to say in their response. Out flank them, and comply with the provisions of the HGCRA, by referring the "dispute" to adjudication, not just your side of it. If you put both sides to the adjudicator, you will have the opportunity of defending in advance whatever the other side are going to say in their Response to the Referral Notice, and you can then have yet another go when it comes to replying to that Response, thereby giving you the chance to fire not just the first shot but also the last shot in respect of the other side's arguments.

46. Make sure that you include no documents with your Referral Notice which the other side have not seen before (other than witness statements) as otherwise the adjudicator will not have jurisdiction to consider them. If you are the defending party, however, and know that a claim is coming your way, there is no reason why you cannot, for example, instruct an expert to prepare a report to have up your sleeve and use by way of response to the Referral Notice when it arrives. The adjudicator will probably give the referring party a little bit more time to reply to that response than would otherwise be the case but you will still maintain a considerable tactical advantage.

Challenging jurisdiction

47. If you are the responding party in an adjudication, and have concerns about the adjudicator's jurisdiction, now, i.e. upon referral of the dispute to the adjudicator, is the time to say so. Don't wait until you have a decision against you. You should articulate and detail your objections as soon as you have grounds for so doing; although an adjudicator normally has no power[16] to decide and determine their own jurisdiction, they will usually investigate, seek the views of the parties, and then

[16] Save under, for example, the TeCSA Adjudication Rules

reach their own conclusion on the merits of any challenge; they are indeed advised to do so[17]. If they fail to do so, it may seem that they are not acting impartially.

48. If the adjudicator concludes that they do have jurisdiction, they will normally tell the parties immediately and then continue with the adjudication. If they conclude that they do not, they will normally tell the parties immediately and then give notice in writing of their intention to resign. If they are unsure whether or not they have jurisdiction, they will nevertheless make a judgment – as they indeed have to do – as to whether to proceed or resign.

49. Alleging that the adjudicator lacks jurisdiction to deal with the issues raised in an adjudication is now almost the only way in which a party can stop an adjudication proceeding. "How to win" applies equally to "winning" a defence, so if you are on the receiving end of an adjudication, be aware of the strengths of any potential challenges you have, and be sure to make them at the earliest possible opportunity. Do not, however, make spurious challenges as they will not only fail but also cause delay and increase the costs unnecessarily.

<u>Meetings</u>

50. Adjudicators these days frequently hold meetings with the parties, not least to comply, as they see it, with the principles of natural justice and ensure that each side has ample opportunity of putting forward its side of events.

51. If you are involved in an adjudication where there is to be a meeting, make sure that you are properly prepared for it and that you take along with you to the meeting anyone else you will need to deal with issues which may be raised.

52. Be aware that you will often now encounter intimidatory or bullying tactics from the other side, either directed at you or, sometimes, at the adjudicator either in a meeting or generally during the proceedings. For example, the other party may try to put undue pressure on the adjudicator to adopt a course of action which it itself wants in order to reduce the control which the adjudicator has over the process. The adjudicator will normally recognise such tactics early, and counter them firmly, but you may need to assist the adjudicator in doing so.

53. If the aggressive tactics are directed at you, or, as is more frequently the case, your representative, try to ignore them, and don't lose your temper, however tempting that may be. Stick to your guns, and to your case. As we all know from the school playground, bullies are normally trying to cover up for some rampant insecurity on their part, which when translated to adjudication proceedings, means that the bully is normally trying to cover up the fact that they have a lousy case. Aggression is often a substitute for merit.

54. If you have prepared properly for the adjudication, no matter which side you are on, and have done everything possible to establish and prove your case then, assuming that you do in fact have a good case, you should normally be successful in the adjudication proceedings, and "win".

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[17] Guidance for Adjudicators: Construction Umbrella Bodies Adjudication Task Group, July 2002

55. In order to be on the safe side, remember to ask the adjudicator to give a reasoned decision, so that if you win, you can enforce the decision more easily and so you can consider your options more fully if you lose. For example, if you are the responding party and the adjudicator has made the decision against you which he clearly did not have jurisdiction to do, you may possibly not have to comply with it.

56. Check the decision carefully once you receive it in case the adjudicator has made a clerical or arithmetical error which you can then ask him/her to correct under the "slip rule".

57. If you fail to establish your case as referring party, then the reasons in the adjudicator's decision will help you understand why you have not been successful, and will help you to prepare for any litigation, arbitration or alternative form of dispute resolution in which you may want to engage as your next step.

58. When considering the arsenal of weaponry which you have available in the adjudication proceedings, and how best to deploy these weapons in order to win, remember the leadership secrets of Attila the Hun[18]

    1. Do not waste stamina trying to negotiate with implacable, unco-operative enemies – conquer them by more effective means.

    2. Do not let your chosen enemy have the advantage in any situation.

    3. Do not neglect the opportunity to deceive your enemy. Make him think of you as a friend. Let him think of you as weak. Let him act prematurely.

    4. Do not make enemies who are not worthy of your every effort to render them into a state of complete ineffectiveness.

    5. Do not fail to use an enemy's weakness to your advantage. On the other hand, when it becomes apparent that an enemy is too formidable, retreat and return another day when you can conquer him.

59. Last, but not least, pick your enemies wisely.

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[18] Encapsulated in a book by Wess Roberts PhD, Bantam Press, 1989