Chartered Institute of Architectural Technologists

Lest Ye Be Judged

The huge rise in out-of-court settlements in construction means that adjudication will affect YOU, writes **Paul Greenwood MCIAT.**

As a Chartered Architectural Technologist all you want to do is get on with nuts and bolts of designing and administering. Not for you all this convoluted stuff about disputes and adjudication. It's not surprising, therefore, that much of what has been written on adjudication has washed over large sections of our profession. It is therefore easy to see, against such a backdrop, how the true implications of adjudication have by-passed the profession.

There has been over the last three years a tidal wave of coverage in the construction press on adjudication. Firstly on how adjudication was going to revolutionise the construction industry by implementing recommendation 26 of the 1994 Latham report. Secondly, on how successful it has been at achieving this objective since the introduction in May 1998. You could perhaps be forgiven for not taking a great deal of notice about the various high powered debates on the subject by a variety of well respected authors, most of whom are lawyers.

I speak here as a practising adjudicator, who sees first hand how adjudication is being used by the various parties involved in the construction process. What I see, (and what I also hear from other adjudicators), worries me and it should worry you too because professional advisers, whether they be technologists, architects or surveyors, are living on borrowed time. Let me explain.

The Housing Grants, Construction and Regeneration Act 1996 deals with two very important areas which, over the years, have caused the industry a great deal of pain and suffering.

Payment provisions

The first important area to be dealt with by the Act (albeit at section 110 and 111) is payment provisions – every construction contract, with few exceptions, has to have provisions compliant with the Act for paying the other person for the work he or she has done. No more is it acceptable to put an amount into a payment that is plucked out of thin air. The payer now has to inform the payee what is to be paid and how that figure is calculated. This is what has been referred to by some as the 'green notice'. The notice doesn't have to be on green paper or in any standard format, providing it contains the requisite information. Issue this notice and you can proceed (hence the analogy with green for go).

If, as often happens, money is to be withheld (damages for example) then such money cannot be withheld without issuing what has been referred to as the amber notice. Again it doesn't have to be on amber paper or in any standard format but it must comply with the requirements of Section 111 of the Act. Forget to issue this notice or issue it late at your peril!

If the paying party doesn't pay the sum due to under the contract by the final date for payment then the person who is due payment can run away and sulk, providing the defaulting party has been given at least seven days notice under section 112 of his/her intention to suspend performance, together with the grounds for such action. The red notice!

The common practice of incorporating paid when paid clauses in sub-contracts, or any other form of contract for that matter, is now not permitted.

Disputes

The second important area dealt with by the Act is how disputes are to be resolved. Before the introduction of the Act the only viable options to resolve a dispute was to either refer it to arbitration or litigation, neither being particularly cheap nor quick. The act resolves this by allowing a party to a construction contract to refer a dispute to adjudication at any time. There are some provisos, most notably that the contract must be 'evidenced in writing' and that contracts with a residential occupier are exempted.

A construction contract includes architectural design and surveying work, so you can refer your dispute with your client for the payments of your fees to adjudication if you wish, providing it is not with a residential occupier.

Adjudication

The contract must comply with the provisions of Section 108 and if it doesn't the Scheme for Construction Contracts (England & Wales) Regulations 1998 comes into play to govern any adjudication procedure.

The adjudication process is quick, the Act requires a decision from the adjudicator within 28 days unless additional time is granted. It is certainly cheap, although there is an increasing trend for parties to be represented by lawyers. This is not surprising because the number of cases now being referred to arbitration and litigation has significantly reduced since the introduction of the Act.

To date the process has largely been used by sub-contractors and contractors to resolve their disputes. It has been extremely successful, largely because the courts have fully supported the process, with few exceptions, providing the adjudicator sticks to the ground rules. But here comes the rub. Contractors are now using adjudication against the employer – if the employer loses out because of technical breaches by his contract administrator you can rest assured that the contract administrator will be next to receive a notice of adjudication. To date there have been very few such adjudications but it is only a matter of time before these become common place, not least because the lawyers will be advising their clients, quite rightly, to recover their losses from the person who caused them.

So what is to be done? In my experience, and that of many other adjudicators, it is horrifying how ignorant many so-called contract administrators are of the adjudication and payment provisions. Wise up or else – you are on borrowed time!

Read the Act, it is surprisingly easy to read even though the adjudication and payment provisions are hidden within the middle of a more substantial document dealing with non-related matters. Also read the Scheme of Construction Contracts. Be familiar with how they work and what you must do to discharge your duty properly. This may mean you have to take a greater interest in the many articles on adjudication that continually appear in the construction press.

Remember if your client receives a notice of adjudication just before you leave for your holiday it may be too late to advise him or her what to do when you eventually get round to dealing with it on your return, because you did not appreciate the speed with which the whole process works, and work it does. With the knowledge of how the adjudication and payments provisions work you will, hopefully, be better placed to give your client the service he/she is entitled to and will perhaps also avoid being dragged into the process as a reluctant participant. You may also be able to use it to your advantage to pursue payment of your fees without recourse to the courts.

Paul Greenwood is Sole Practitioner and is an Adjudicator, Arbitrator and Expert Witness on construction disputes. He can be contacted on 01253 899085.

CIAT have a free information sheet available from City Road on the adjudication process. Please call Diane Dale on 020 7278 2206 to order.