ADJUDICATION
'98 – 11

A DIY GUIDE

THE CIArb and The CIOB
21 June 2018
Warrington
The Notice of Adjudication

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'A little knowledge is a dangerous thing' and 'a little learning is a dangerous thing' have been used synonymously since the 18th century.

The 'little learning' version is widely attributed to Alexander Pope (1688 - 1744). It is found in his An Essay on Criticism, 1709 and I can find no earlier example of the expression in print:

A little learning is a dangerous thing;
drink deep, or taste not the Pierian spring:
there shallow draughts intoxicate the brain,
and drinking largely sobers us again.
DIY Adjudication – The Notice of Adjudication

“The supreme art of war is to subdue the enemy without fighting”

Sun Tzu – The Art of War
DIY Adjudication – The Notice of Adjudication

“I advise you, don’t mess me, I know karate, kung fu, taekwondo, jujitsu and 28 other dangerous words”

Donald Duck – School of Disney
DIY Adjudication – The Notice of Adjudication

Why is the Notice of Adjudication so important?

- The Notice marks the start of the adjudication process.
- It sets the scene for your opponent and the adjudication by:
  - Identifying the Parties.
  - Explaining what the dispute is about.
  - Listing the questions you want answering.
  - Telling the Adjudicator what you want from the adjudication.
- It defines the dispute that the adjudicator has to answer and in doing so sets the initial boundaries of the adjudicator’s jurisdiction.
D I Y Adjudication – The Notice of Adjudication

What form should the Notice of Adjudication be in and how do you issue it?

• What does the contract say?

• Who do you send it to?

• Where do you send it?

• By email? fax? courier? post? combination?
D I Y Adjudication – The Notice of Adjudication

What does the Housing Grants Construction, Regeneration Act 1998 say above the Notice of Adjudication?

- 108 (2) the contract shall include provision in writing so as to

(a) Enable a party to give notice at any time of their intention to refer a dispute to adjudication.
D I Y Adjudication – The Notice of Adjudication

What does the Scheme say above the Notice of Adjudication?

1.  
   1) Any party to a construction contract (the “referring party”) may give written notice (the “notice of adjudication”) at any time of his intention to refer any dispute arising under the contract, to adjudication.

   2) The notice of adjudication shall be given to every other party to the contract.

   3) The notice of adjudication shall set out briefly-

      a) the nature and a brief description of the dispute and of the parties involved,

      b) details of where and when the dispute has arisen,

      c) the nature of the redress which is sought, and

      d) the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices).
DIY Adjudication – The Notice of Adjudication

When should I draft and issue the Notice of Adjudication?

- Draft and issue the Notice after the Referral is complete.
- It will not become clear until your Referral is finished that you will know exactly what questions you wish to be answered in the adjudication.
- No matter how tempted you are to issue the Notice straight away – resist the temptation!
The Application to the Adjudication Nominating Body ("ANB")...
DIY Adjudication – The Application to the Adjudication Nominating Body (“ANB”)

Which ANB should I apply to?

- What does your contract say?
- Have you a choice?
- Does the subject of your dispute dictate which ANB you would prefer to appoint?
  - EG Quantum – RICS
  - Design – RIBA
  - Engineering – ICE
  - Legal – TeCSA
- The chances are your contract will identify the ANB you have to apply to.
D I Y Adjudication – The Application to the Adjudication Nominating Body (“ANB”)

Completing the ANB Application Form

- Answer all the questions truthfully
- List the professional background of the adjudication you want appointed
  - Quantity Surveyor / Arbitrator / Mediator
  - Good looking
  - Debonair
  - Offices in Bolton, Manchester, Nottingham, Liverpool and London
DIY Adjudication – The Application to the Adjudication Nominating Body (“ANB”)

If I am asked to identify any adjudicator who might have a conflict of interest who do I have to list?

- An individual who is already involved in the dispute.
- An individual who is personally known to you – personally or in a professional capacity.
- Somebody you are in dispute with.
- If you are unsure, leave blank.
- No adjudicator in his right mind would accept a nomination with a known conflict.
The Submissions

Richard Barnes BSc(Hons) MSc FRICS FCIArb
What are you trying to do?

• “In order to succeed in a claim for compensation against the Respondent the Claimant must prove on a balance of probabilities that the Respondent has broken some term express or implied of the contract which existed between them, or failed in the duty of care which the Respondent owed to the Claimant, and that as a result of this breach the Claimant has suffered loss. If no breach or loss is proved, the Respondent will not be liable to pay compensation.”

Source: Consumer Arbitration Award Template
What are you trying to do?

• “In order to succeed in a claim for compensation against the Respondent the Claimant must prove on a balance of probabilities that the Respondent has broken some term express or implied of the contract which existed between them, or failed in the duty of care which the respondent owed to the Claimant, and that as a result of this breach the Claimant has suffered loss. If no breach or loss is proved, the Respondent will not be liable to pay compensation.”

Source: Consumer Arbitration Award Template
What are you trying to do?

• “In order to succeed in a claim for compensation against the Respondent the Claimant must prove on a balance of probabilities that the Respondent has broken some term express or implied of the contract which existed between them, or failed in the duty of care which the respondent owed to the Claimant, and that as a result of this breach the Claimant has suffered loss. If no breach or loss is proved, the Respondent will not be liable to pay compensation.”

Source: Consumer Arbitration Award Template
The Referral Notice

• The Referral Notice is the claim document and should comprise of all the arguments the Adjudicator is to address and all the evidence that the Referring Party relies upon in support of its case*.

• It is good practice to have the Referral Notice fully drafted and ready to be served before issuing the Notice of Adjudication.

• The Referral Notice may be the only chance a Referring Party has to put its case to the Adjudicator.
What should be in the Referral Notice?

There is no magic formula but a good Referral will exhibit:

- An index.
- An executive summary.
- Identify who the Parties to the dispute are.
- Identify the Parties contract.
- A narrative of the overall dispute – who, what, where, when etc.
What should be in the Referral Notice (Cont’d)

• An explanation of how the contract applies.

• Assessment of the claim or claims being made.

• If applicable, what declarations are required.

• Interest – how calculated and on what basis.

• Who should pay the Adjudicator’s fees.

• Supported by EVIDENCE (RECORDS!)
What should be in the Referral Notice (Cont’d)

Other elements to consider are:

• Consider arguments being put forward by the other party and why they are incorrect. Remember it is the ‘dispute’ that is referred to adjudication rather than the ‘claim’. Hence the Referral should ideally set out both sides of the argument, not just the contentions of the Referring party.

• Relevant law.

• Provide copies of the documents in the native format; word, excel etc.
IN THE MATTER OF THE HOUSING GRANTS CONSTRUCTION AND REGENERATION ACT 1996 AS AMENDED BY THE LOCAL DEMOCRACY, ECONOMIC DEVELOPMENT AND CONSTRUCTION ACT 2009

AND IN THE MATTER OF AN ADJUDICATION

BETWEEN:

XXX Construction Limited
(The Referring Party)

AND

XXX Construction (UK) Ltd
(The Responding Party)

The Referral

For works carried out at:

XX Drive
Cheadle
Manchester
THE PARTIES

1. The Referring Party is XXX Construction Limited XX Street, Manchester, M14 2XX (“XXX”)
2. The Responding Party is XXX Construction (UK) Ltd, Manchester, M34 6XX (“XXX”)
3. The Referring Party’s representative is YY (“YYY”)

THE AGREEMENT BETWEEN THE PARTIES

4. The Parties entered into an agreement for subcontract works (“the Sub-Contract”) at XX Drive.
5. The contract was entered into on or around April 2014 and is evidenced by a series of emails and conversations relating to the extent of works that needed to be undertaken.

THE ADJUDICATION PROVISIONS

7. Section 104 of the Act confers the right on a party to a construction contract to refer a dispute arising under the contract for adjudication under a procedure complying with that section.
8. The Sub-Contract does not include provisions for adjudication. Accordingly, the adjudication provisions of The Scheme for Construction Contracts (England and Wales) Regulations 1998 as amended by The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011 (“the Scheme”) apply to this dispute.

THE PAYMENT PROVISIONS

9. Section 110 of the Act states that every construction contract shall (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and (b) provide for a final date for payment in relation to any sum which becomes due.
10. The Sub-Contract does not include these provisions. Accordingly, the Payment provisions of The Scheme for Construction Contracts (England and Wales) Regulations 1998 as amended by The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011 (“the Scheme”) apply to this dispute.
THE DISPUTE

11. The dispute concerns the non-payment of monies due from an application dated 11th December 2014 (“the application”) Appendix 1. The gross sum stated on the application was £52,929.31. The application included a deduction of £3,000 for the supply of “Eco Top Soil”. This was originally instructed by XXX (the Responding Party) to be supplied to the site, this was subsequently rejected by a third party and had to be replaced. The deduction was made by XXX following an email from XXX rejecting the claim for the topsoil two days earlier, for speed of payment the Referring Party revised the application to include a deduction for these monies. On conclusion of these proceedings XXX intend to reclaim these monies. For the avoidance of doubt the Referring Party do not accept that email rejecting the claim was a valid payless notice.

12. XXX have on various occasions attempted to settle this account with XXX. Unfortunately, there has been no movement on XXX’s part or willingness to review the account. XXX have failed to pay in full the valuation of the previous valuation which was agreed by their QS in the sum of £43,568 (Appendix 2 refers).

13. XXX have used various reasons not to pay for the works undertaken, they have claimed:
   a. The monies claimed are not correct, yet fail to provide any assessment other than a previous assessment of the works which indicates a higher value of the works than has been paid.
   b. That XXX abandoned the site, this is denied by XXX.
   c. That work is defective and that their client has informed them of driveways collapsing however XXX have failed to provide any further substantiation. XXX have recently visited the site and cannot find any evidence of this. (Appendix 3) XXX can only conclude this is an attempt by XXX to avoid the payment of monies due.

14. There has been no payment notice issued.

15. XXX have not issued a Pay Less Notice.

16. Section 111 of the Act requires payment of the notified sum, which in this instance is XXX’s application for payment in the absence of any notices from XXX.

17. As XXX have failed to issue a Payless Notice, the amount due is that stated in the application for payment less previous payments received by XXX. XXX calculate the amount due in respect to this application to be £14,929.31 at the final date for payment.
18. The Scheme states the final date for payment of the application is 28 December 2014. This payment has not been received.

19. In accordance with Section 1 of the Late Payment of Commercial Debts (Interest) Act 1998 (as amended) – XXX contends it is entitled to statutory interest.

20. In accordance with Section 5A Subsection (2) (c) of the Late Payment of Commercial Debts (Interest) Act 1998 (as amended) – XXX contends it is entitled to the fixed sum of £100.00.

THE REMEDY SOUGHT

21. XXX requests the Adjudicator to decide as follows:

   a. Payment of outstanding monies or other such sums as the adjudicator may decide.
   b. XXX shall make payment of interest on all late payment to XXX as aforesaid or in such other sum as the Adjudicator shall so decide. In this instance XXX contend that Statutory Interest applies and that the amount to the date of the referral is £410.25.
   c. In accordance with Section 5A Subsection (2) (c) of the Late Payment of Commercial Debts (Interest) Act 1998 (as amended) – XXX are entitled to the fixed sum of £100.00.
   d. The Adjudicator shall decide the apportionment of the whole of the cost of the Adjudicator’s fee and reasonable expenses in this adjudication in line with the Scheme, however as monies are outstanding XXX contend that XXX should be responsible for the fee and expenses.
   e. XXX shall make payment of VAT at the appropriate rate in accordance with statute on sums decided by the Adjudicator as payable by XXX to XXX in this adjudication.
   f. Within seven days of the date of the Adjudicator’s decision or by such other date as the Adjudicator shall so decide, shall make payment of the sum decided by the Adjudicator to XXX.
REASONS

22. XXX issued an application for payment on 11 December 2014.
23. No Payment Notice or Payless Notice has been issued by XXX.
24. XXX are therefore obliged by the Act to pay the notified sum in accordance with Section 111 Subsection (1) of the Act.

Section 111 Subsection (1) states:

“111 Requirement to pay notified sum

(1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.”

25. XXX contend that the remedy for late payment is implied the Late Payment of Commercial Debts (Interest) Act 1998 (as amended).

Signed

On Behalf of XXX Construction Limited

Date 27 April 2015

ENC

1. Appendix 1 - “the application (4a)”
2. Appendix 2 - “the XXX assessment for Valuation 3”
3. Appendix 3 - “the Site Report dated 25/4/15”
4. Appendix 4 - “Email dated 11/1/15”
5. Appendix 5 - “Email dated 12/4/15”
6. Appendix 6 - “Email dated 20/4/15”
7. Appendix 7 - “Statement”
The Response

- There is no reference in the Act or the Scheme to a Response or Defence to the Referring Party’s claim.

- Many forms of contract identify a requirement for a Response.

- Adjudicators will invariably allow a Responding Party to submit a Response to a Referral in order to comply with the “rules of natural justice”.

- The Response should answer every point made in the Referral Notice and should clearly set out any point agreed or rejected.
The Response (Cont’d)

• A Responding Party may raise any defence it wishes in response to the claim.

• The Response may be a straightforward defence to the claim.

• The Response may rely on a set-off as a defence to the claim.

• The Response may rely on cross claim as defence to the claim.

• Whatever the case, the Response must convince an Adjudicator that they are right and the Referring Party is wrong.
The Response – Content

There is no prescribed formula but a good Response will:

• Include an index.

• Include an executive summary.

• Agree who the Parties to the dispute are, or provide an explanation to demonstrate otherwise.

• Respond to the items in dispute, agreeing facts and values were appropriate or providing alternatives.

• Provide any evidence to support the case / defence.
The Response – Content (Cont’d)

There is no prescribed formula but a good Response will:

• Include a comment on the interest claimed and perhaps a calculation for interest.

• Say who should pay the Adjudicators Fees and Expenses.

• Provide copies of the document in the native format; word, excel etc.

AND IN THE MATTER OF AN ADJUDICATION

BETWEEN

XXX CONSTRUCTION LIMITED

Referring Party

-and-

XXX CONSTRUCTION (UK) LIMITED

Responding Party

RESPONSE TO REFERRAL

Concerning a dispute regarding
XXX Drive, Cheadle

REF: 3914.ADJ1

11 MAY 2015
APPENDICES

Appendix 1 Witness Statement of Mr XXX
Appendix 2 Adjudicator Decision Extracts
1. **Introduction**

1.1 It is not XX Construction (UK) Limited’s ("XXX") intention to reply to each and every paragraph of XXX Construction Limited’s ("XXX") Referral. XXX replies as necessary.

1.2 Save insofar as the Response contains admissions, unless specifically admitted, the Referral is denied in its entirety.

1.3 For ease of reference, XXX adopts the headings contained in the Referral in this Response.

1.4 The Adjudicator is also referred to the Witness Statement of Mr XXX, Managing Director of XXX (Appendix 1) in support of its contentions.

1.5 It is XXX’s position this this adjudication and XXX’s claim for money is entirely without merit it being based on an unsolicited demand for payment issued outside the confines of the Contract some four months after XXX had ceased works and the final value of those works had been agreed.

1.6 In order to assist the Adjudicator, XXX sets out the background to this project and XXX’s purported claim.

**Background to the Dispute**

1.7 In April of 2014 XXX’s QS, Mr Peter XXX, made contact with XXX Construction and requested prices for groundworks at 2 houses at XX Drive Cheadle.

1.8 Mr XXX of XXX and Mr QS subsequently had a meeting during which they agreed prices for flagging, block paving and soft landscape areas.

1.9 They also agreed various rates for other elements of groundworks and agreed to measure these works as the job progressed.

1.10 The agreement was that these works would be valued at the end of each month and paid by the end of the following month.

1.11 For Valuations Nos. 1, 2 and 3, Mr XX submitted a spreadsheet at the end of each month listing his claim for work done which was reviewed by Mr QS and agreed between them.

1.12 Mr XX would then raise a VAT invoice which XX processed and paid.

1.13 XXX ceased work on the project during the first week of July 2014. During the first week of August 2014 Mr QS visited site and valued XXX’s work claimed under Valuation No.3. XXX[agreed with this valuation less the deduction made for the costs incurred]
5.35 As this is such a settled point of law, there is no direct authority so the Adjudicator is referred to Appendix 2 of the Response which contains extracts from two recent Adjudicator’s Decisions to which XXX’s representative has been a party and which in both instances denied costs on the aforementioned basis.

5.36 The Adjudicator is therefore requested to dismiss XXX’s claim for its costs of the adjudication in their entirety.

6. Remedy Sought

6.1 XXX has demonstrated that XXX has no entitlement to be paid the sum of £14,929.31 or any other such sum and therefore the Adjudicator is requested to determine that XXX is not entitled to any further payment from XXX.

6.2 As no further sum is due to XXX, the Adjudicator is requested to determine that XXX has no entitlement to claim interest.

6.3 In light of the express provisions of the Act, the Adjudicator is requested to determine that she has no jurisdiction to award party costs in this adjudication and XXX’s claim in this respect is therefore valued at nil.

6.4 On the basis that XXX has failed to demonstrate any entitlement to the sums claimed, the Adjudicator is requested to determine that XXX is to bear the Adjudicator’s fees expenses in their entirety.

7. Reasons

7.1 XXX has demonstrated that XXX has no entitlement to be paid the sum of £14,929.31 or any other such sum for the following reasons:

7.1.1 Valuation No.3 was XXX’s final valuation under the Contract. No further sums were due and so there was no contractual or statutory entitlement to raise a further application for payment;

7.1.2 Further, or in the alternative, purported Valuation No.4 is not based on the value of work performed in accordance with the Contract and therefore the sums claimed are not due. A payment notice and pay less notice is only required in respect of a sum which is due;

7.1.3 Further, or in the alternative a valid pay less notice was issued by XXX in the form of the email dated 11 December 2014. This email stated that the sum to be paid was nil and the basis of calculation of this sum was XXX’s failure to provide any substantiation or justification for the costs claimed;
Other Submissions

The Adjudicator must continue the timetable to deal with:

- Possibly a Reply
- Possibly a Rejoinder
- Possibly a Surrejoinder

Generally it is not permissible to introduce new claims into these later documents. The objective is to comment on the submissions of the other party and provide evidence as required to support those statements.

The size of the documents should reduce in size.
Proving the Case

Paul Jensen FRICS FCI Arb Barrister Chartered Arbitrator
Referral

“Value and pay the following variations:
   No. 1  £x
   No. 2  £y
   No. 3  £z”

(Sherwood & Casson Ltd –v- Mackenzie Construction Ltd)

Question
What should the Adjudicator do?
Referral

In the tender period the PQS estimated £10million, which matched our budget. The tender was £15million. We claim the costs of a re-design to match our budget.

Question

If the Respondent did not take part what should the Adjudicator decide?
Referral by Contractor

The Respondent’s M.D. agreed the value at a meeting with our QS and appended is his Witness Statement to that effect.

Response

My client is adamant that no agreement was made.

Question

What should the Adjudicator decide?
Rule No. 1

All allegations of fact must be proven:

Documents

Witness Statements
Rule No. 2

All matters of expertise must be evidenced by an expert report.

e.g. Measurements

Values and rates

These are all matters of expertise.

Expert can be in-house.
Witness Credibility

“One typewriter is as credible as another.”

Therefore:

Meetings

If your witnesses and experts would be more credible than those of the other party then ask for a meeting.
Note

Having a good case is of no value – it is only what you can prove that has value.

Do not expect help from the Adjudicator – his task is not to find the truth but to make a Decision – based on the evidence and submissions given to him.
Conduct in communications and at meetings

Michael Pye MSc DiplICArb DipArb FCIArb FCIIOB Chartered Arbitrator
• Bringing a claim – Referring Party
• Defending a claim – Responding Party
Adjudicator’s T&C’s

• Accepting the adjudicator’s terms of engagement
• Acceptance by conduct
• Christopher Linnet V Harding EWHC 1781 (TCC) (25th July 2017)
Service of submissions

- Read the contract for rules on service of submissions
- Usually 7 days from Referral Notice to Response and 3 days thereafter for service of Reply
- Application byResponding Party for extension of time to serve Response
- Application by adjudicator for extension of time (up to 14 days with consent of Referring Party or joint party agreement) for Decision
- Application by Referring Party to serve Reply and extensions of time to serve a Reply.
General Conduct

- How to address the adjudicator in correspondence
- Words/narrative used in correspondence should be respectful
- Use plain English and avoid the use of Latin
- Invite the adjudicator to agree with you as opposed to using words like “you must” or “you cannot” - use persuasive language
- “Take the adjudicator “by the hand” and show him/her the “way home”
- Remember your mission is to persuade the adjudicator that yours is the version to accept
Procedural matters

- Prompt response to adjudicator’s queries & participation in the process
- Do not contact the adjudicator by phone and always simultaneously copy correspondence/communications to the other party
- Most adjudications proceed on documents-only basis
- Be as accommodating yet assertive as you comfortably can
- Avoid the “bunker” mentality
The Power of Words

“Her eyes they shine so bright that even the birds would sing and think it not night”

William Shakespeare
The Power of Words

“…we shall fight on the beaches, we shall fight on the landing grounds, we shall fight in the fields and in the streets, we shall fight in the hills …”

Winston Churchill
Meetings & Site visits

- Difference between meetings, hearings and trials
- Purpose of requesting a meeting/site visit
- Adjudicator has duty to avoid incurring unnecessary expense
- Configuration of attendees at a meeting
- Venue – time and place
- Addressing the adjudicator/spokesperson
- Rehearsal
Defending a claim

- The Ostrich Approach – doing nothing – silence isn’t golden
- Lobo V Corich (2017) EWHC 1438 (TCC)
- Reserving your legal rights
- Always a good idea to put a general marker down
- ‘All our rights remain reserved’ or ‘All our rights including the adjudicator’s jurisdiction and the matter of natural justice (procedural fairness) remain reserved’
- CPR Part 8 application for declaratory relief will only be considered if certain criteria are met - see Hutton V Wilson (2017) EWHC (TCC)
  - Short and discrete
  - Issue must have been raised during adjudication process
  - The issue requires no oral evidence
  - The issue would be one in which it would be unconscionable for the court to ignore
  - Failed application would be penalised on the indemnity basis
  - Application must be started immediately following publication of the Decision
Future Events

19 July 2018 – Keating Construction Law Update
13 Sept 2018 – Arbitration and Adjudication Surgery
11 Oct 2018 – Mock Arbitration
15 Oct 2018 – Introduction to Construction Adjudication
17 Jan 2019 – The Manchester Lecture

Further details of events are available at:
http://www.ciarb.org/branches/great-britain/north-west