

## Ways to obtain Payment following an Adjudicator's Award

### Introduction

The Housing Grants Construction and Regeneration Act 1996 (“the Act”) introduced the process of adjudication. Adjudication was not a new idea – it was found in several of the standard forms of contract. What the Government introduced was the right to adjudicate in any construction contract. A Construction contract has a specific definition under the Act.

Adjudication was seen as a way to ensure that payment went down the “chain” of contractors/sub-contractors without too much delay because the Act abolished the “pay when paid” provisions which had previously lead to so much hardship to the small sub-contractors at the bottom of the contractual chain.

Adjudication was to be a short process (28 days but could be extended to 42 days maximum). At the end a decision would be given which was final until the contract came to an end. The process was of its nature quick and adjudicators liable to make mistakes but it was again envisaged that any errors would be dealt with at the end of the contract when the final accounts were agreed. Because of this no process for enforcement of an adjudicator's decision was set out in the Act or the supporting Statutory Instrument which set out details of the adjudication scheme (“the Scheme”).

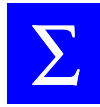
However, when adjudication was put into practice, it was found that not all would abide by the adjudicator's decision and had to be forced to pay up.

### Enforcement of an Adjudicator's decision

Many arguments have been put up as reasons for non-payment of an adjudicator's decision. These essentially boil down to the following:

- The Adjudicator did not have jurisdiction to deal with the claim either because there was no dispute in the first place or that there was no construction contract
- The Adjudicator got his sums wrong or misunderstood the nature of the defence
- There are other disputes relating to the contract
- The paying party has no money/cash flow problems

Many complex and legal arguments have been heard by the Courts in respect of the first 3 points above and it is not intended to review these in this paper which will instead look at the last point – how to make the paying party pay.



## **Enforcement through the Courts**

Because the Statutory Scheme does not set down a procedure for enforcement of an adjudicator's decision, one can apply to the Court for an order that the amount awarded by the adjudicator be paid.

To do this it is necessary to issue actual Court proceedings. The process is simple but can be time consuming because not only do you have to draft out the Claim form (that which used to be known as the "Writ"), but also an application for summary judgment and supporting evidence. If the matter is urgent then one can at the same time request an abridgement of time for acknowledgement of the proceedings with supporting evidence showing why this is necessary. The usual time for acknowledging proceedings is 14 days from the date of service. If urgent, the Courts will shorten the time to either 3 or 7 days from the date of service.

When the first applications for summary judgment were made to the Courts, it was thought that the whole process would only take about 14 days to obtain an order for payment. However, due to judge availability it is usually about 1 month from the date of lodging the papers at Court before the date for hearing of the application for summary judgment. This time allows for issue and service of the proceedings, lodgement of the acknowledgement and service of statements in response, if any, setting out why the claim is disputed.

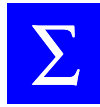
The Courts have shown that they are prepared to uphold and enforce an adjudicator's decision even if it has been shown to be wrong because Statute states that the decision is final until the contract is brought to an end either by litigation, arbitration or settlement. This has been qualified slightly in later decisions but the basic rule remains the same.

It should also be remembered that the Judge in an enforcement hearing is only dealing with one small point – should or should not the adjudicator's decision be upheld and enforced. The Judge should not be looking at any of the other problems that may have arisen in respect of the contract.

If the paying party absolutely disputes the adjudicator's decision, it should issue proceedings (whether litigation or arbitration dependent on the contract) immediately so that the matter can be fully debated with all evidence being presented.

One important aspect is the question of costs. Whilst adjudicators do not award costs to the winning party unless they have been given the power to do so, costs of issuing the enforcement proceedings can be claimed. The Courts will allow the successful party's legal costs (as assessed by the Court) to be added to the judgment debt. However, since January of this year, the Court fees have increased substantially and from April 2005, it is proposed that judges will charge for their time in hearing trials. This will add now to the cost of enforcement through the Courts.

Since adjudications first started in May 1998, there have been some 150 judgements given by the Courts in respect of disputes relating to adjudicators' decisions.



Compared to the many thousands of adjudications the actual number that is disputed is very small.

### **Statutory Demands/Winding up Petitions**

At first it was thought that if payment was not made following an adjudicator's decision then a Winding up Petition could be issued. A Winding up Petition is the first step to liquidating a company for non-payment of its debts.

The Courts however did not agree that this was an appropriate step to take to obtain payment. The Courts held that an adjudicator's decision is an Interim but final decision which is effective until the construction contract comes to an end either by agreement, litigation or arbitration. In those circumstances the immediate issue of a winding up Petition could not be done.

However, the issue of a Statutory Demand can be made. A Statutory Demand is a formal request for payment of an undisputed debt. If payment is not made within the time specified i.e. 21 days then the Company is deemed to be unable to pay its debts and can thus be considered to be insolvent. At that point, if payment is still not made then a winding up petition can be issued.

It is very important to make the distinction between disputed and undisputed. If the adjudication was bitterly fought and resulted in a partial victory then the issue of a statutory demand on non-payment is inappropriate. If however the paying party acknowledges the money is due but does not make the payment then the service of a statutory demand is appropriate.

If the debt is disputed but a statutory demand is issued then the receiving party can apply to the Court for the Demand to be set aside. If the Demand is set aside, the Court can order the costs of making this application be paid by the person issuing the Statutory Demand.

Issuing a statutory demand can be effective but should only be used when the debt is undisputed.

### **Negotiation**

Negotiation can be an effective tool but is often a forgotten one. Often by the end of the adjudication positions are entrenched and the losing party is vowing never to pay. However negotiation can save time and costs especially if the parties are still in a commercial contractual situation. In this case, future contracts need to be considered. Alternative payment terms can be agreed which may save face all round.

Negotiations can be carried out through an intermediary either informally or formally. Mediation is an alternative way to settle disputes but is probably more effective on the higher value claims because of the costs involved. The Courts are keen to see parties mediate their disputes rather than litigate. Mediation is a form of formal negotiation with an independent person acting as a broker encouraging each side to reach an



agreement. Once agreement is reached it is set out in a contract signed by both parties. If the terms are breached then Court proceedings can be issued for breach of contract.

## **Conclusion**

The options for obtaining payment are either

- By issuing proceedings in the Courts, or
- By issuing a statutory demand, if the debt is not disputed, or
- By negotiating payment, either formally or informally

Each has their advantages and disadvantages but all can be used effectively in obtaining payment.

Author: Sarah Shemmings

Date: February 2005

Email: [sas@shemmingsllp.co.uk](mailto:sas@shemmingsllp.co.uk)