

Adjudication: What happens if a party is unhappy with the adjudicator's decision?



As many readers will be aware, the parties to a construction contract have a statutory right to refer a dispute to adjudication. By its nature adjudication is a swift process. What happens following the decision if a party is unhappy with the adjudicator's decision?

Let us use an example of a contractor seeking payment of £100,000. The employer doesn't pay. A dispute over the entitlement to be paid has crystallised and the contractor refers the dispute to adjudication. The adjudicator finds for the contractor. The employer, understandably aggrieved, feels the decision is wrong and does not want to pay. The contractor issues court proceedings for the enforcement of the adjudicator's decision. Is the employer in these circumstances doing the right thing?

The short answer in almost every case would be 'no'.

The purpose of adjudication is to find a swift solution. It is not necessarily the right solution. For that reason decisions of adjudicators are temporarily binding. However that does not mean that parties should just ignore a decision if they do not agree with it. Such a party should, in the normal course of events, issue proceedings in court for a final determination of the question referred to the adjudicator.

When will a court go against a adjudicator?

There are in reality only three circumstances where a court will refuse to make an order for judgment in the same terms of an adjudicator's decision on an enforcement application:

- The decision itself is a breach of the rules of natural justice. In practice this means a decision where there were no reasons given for reaching a decision, alternatively the reasons given make no sense, and as a result a party had suffered substantial prejudice. This is an incredibly high test to satisfy.
- Substantive proceedings to secure a final determination are underway and the court can sensibly deal with those proceedings at the same time as the hearing of the enforcement application. This will only really apply in circumstances where the adjudicator has plainly got the decision wrong and the court can deal with the matter summarily, within the time allowed for the enforcement hearing.
- There is a financial reason why it would be improper to allow the decision to be enforced. An example of this may be that, using our example, the contractor is in financial difficulty and there is a real risk that that if the adjudicator's decision was found to be wrong, that the contractor would not be able to repay the sums to the employer. A court would almost certainly want to see that substantive proceedings to challenge the decision were underway before entertaining such an order. If made, the court still gives judgment in favour of the party who issued the enforcement application but simply directs that payment need not be made to that party. Most likely the court would instead require the payment to be made into an escrow account pending determination of the substantive action.

A party dissatisfied with an adjudicator's decision should not ignore it. If the effect of the decision is to require the aggrieved party to do something, whether that be to pay money or to take some action, it is important that steps are taken if the decision is to be challenged. Whether those steps involve issuing proceedings for a final determination of the subject matter of the adjudication is a question for individual cases.

By communicating dissatisfaction in a substantive and reasoned manner it increases the chances of securing an agreed way forward, notwithstanding the decision of the adjudicator. A party that sits on its hands and allows an enforcement application to be made, only to argue at the enforcement hearing that the adjudicator got it wrong, can expect little sympathy from the other party or from the court. The courts have consistently affirmed the principle that whether an adjudicator's decision is right or wrong is a not a matter for consideration within any enforcement application and it should not be assumed that enforcement can be staved off or delayed by deploying this argument at the enforcement stage.

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