

RESOLUTION

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Wishing you a Happy New Year from all of us at Arbicon ADR

Expert opinions—what are they worth to you?

If you have been involved in a dispute ending with a decision by a judge, arbitrator or adjudicator or you have attended lectures relating to dispute resolution you will have seen a reference, in some form, to the effect:-

“ the burden of proof is on the claimant” or “ the claimant will succeed only if on the balance of probabilities his evidence is more convincing than his opponent.”

The importance of this fundamental principle of proof is always stressed to obsession by those who determine disputes and in such determination there is nearly always a partial failure of claim on the basis that evidence is inadequate.

As a claimant or defendant you are required to provide evidence to support your case. If you could weigh your evidence on a set of scales, and you are the claimant, if your evidence weighs the same or less than the defendant then you would lose. Only if your evidence weighed more would you win.

So how is it decided which is the weightier argument? There is no exact yard stick for valuing and measuring evidence. The measurement of evidence is based on the quality of the evidence submitted. It is therefore no surprise that there is often confusion and misun-

derstanding. Evidence is open to interpretation and this can lead to differences in how the decisions are arrived at between different personalities. The decisions therefore of the individuals who determine disputes are to some extent unpredictable.



To give you the optimum chance of succeeding you need to fully understand what is required. The best way to do this is to seek the expert opinion of someone who is qualified in construction arbitration and or adjudication.

Where there is a case to answer they will be able to assess your position and produce a report/analysis that will enable you to add more weight, favourably, to your case. They can also add much needed clarity by highlighting swiftly where cases do not exist or where there are weaknesses. This will enable you to assess the risks associated with taking the dispute on or moving it to negotiation level.

It is not uncommon for disputes to drag on due to formal legal proceedings and a seemingly obstructive respondent. Sometimes it is years before a court or tribunal will order the use of an expert or experts to prepare reports. It is fair to say though, that when the experts detailed analysis begins, parties more often than not settle the matter between them.

Common sense would actually dictate that as a claimant the expert report should be commissioned at the outset - why wait for years for a court to decide? This would highlight the evidential requirements and/or improvements plus provide further weight to the case in the balance of probability.

With many years of experience as construction expert witnesses—Arbicon can provide invaluable advice so, please do not hesitate to call us to find out about our professional expert report services, ask for either Jonathan Nugent or Ian Purser in the first instance - 01480 426560 or email jon@arbicon.co.uk or ian@arbicon.co.uk



Contracts coming under the microscope—how will yours fair?

Adjudication section 107– your appendix is now essential

There is little doubt that the right to adjudicate, since the Housing Grants Regeneration and Construction act 1996 came into force, has transformed the way in which disputes are resolved in the construction industry.

However to exercise that right the law requires a construction contract to be a “contract in writing” as per section 107. There are now calls from most adjudicators and arbitrators to delete section 107 from the act as the case law that has evolved in the past year has presented difficulties in enforcing adjudication decisions, if there is a non-compliance with section 107.

The construction industry suffers from poor procurement practice, including clarity as to the exact contract terms. In most cases the adjudicator is asked to determine what was agreed between parties. This is a fundamental realistic characteristic of construction contract disputes. Such disputes will now fall foul of section 107.

Until recently, there was an unwritten rule held by those in the dispute business that as long as the “essential terms” were agreed in writing then this was adequate

for the purpose of section 107. The essential terms are price, time for performance and scope of work to be carried out. Then a case known as RJT Consulting Engineers Ltd Vs D M Engineering (Northern Ireland) Ltd (CA March 2002), made it law that all the terms had to be in writing. In this case for example the liquidated damages value was not agreed, not considered an essential term by most, but it was held by the court to be essential. The court stated that in respect of section 107 of the act, what had to be evidenced in writing was literally the agreement, which meant all of it, not part of it. Where the entire agreement is therefore not wholly in writing, the adjudication process runs the risk of being void at enforcement.

The decision in RJT makes nonsense of the adjudication process and was therefore not welcomed by adjudicators. Since RJT two further cases have enforced the initial decision, West-dawn Refurbishments V Roselodge (April 2006) and Hart investments Vs Fidler & another (Nov 2006). In West-

dawn minor terms such as a mechanism for completion triggered by exchange of keys was held to be essential terms that were not in writing. In Hart the RJT decision was confirmed as trite law in respect of the need to agree all the terms in writing so as to comply with section 107.

It is therefore essential now that all the terms of a contract are agreed in writing. The best way to achieve this is to take on a standard form of contract and make sure the appendices (articles of agreement) are complete and agreed prior to the starting of work. If not there is a risk that the adjudication process will fail due to rules generated from RJT, Westdawn and Hart. We look forward to parliament swiftly deleting or dramatically modifying section 107 to eliminate the impractical nature of the law that has developed.

Until then you need to ensure that your contracts/proposed contracts are compliant with section 107 – call Arbicon ADR and ask for Jon or Ian for a consultation - 01480 426560.

A date for your diary - free half day

“We hope that our seminars can be utilized to instill in all construction firms a regime of record keeping sufficient to enable them to recover monies to which they are due”
Ian J Purser, Director

As we promised we have now organized the first of our half day seminars. The date for your diary is 22 January 2007. We have sent out the invites and await your response - so far this has been very positive. We do have a limited number of places so you need to confirm your free place quickly. If you haven't received an invite please contact us. The day starts at 9.30am and ends at 13.00pm.

We will be looking at an overview of preventative measures that can be taken to reduce your chances of ending up in a dispute and how you can apply the preventative measures in a practical way.

Refreshments and a buffet lunch will be provided during the seminar which will take place at our offices in Huntingdon. For those

with the benefits of sat-nav, the postcode is PE29 3GH.

Contact Pauline@arbicon.co.uk for a full agenda.



Arbicon - A full range of services for all



Arbicon are actively seeking good quality QS staff to join their team and would like to hear from anyone interested in joining either via email or

Arbicon aim to provide appropriate and equitable solutions to all contractual issues, through the wide range of dispute prevention and resolution services they offer. These include:-

- **Negotiation**
- **Adjudication**
- **Arbitration**

- **Support in litigation**
- **Risk management and dispute prevention**
- **Expert witness**
- **Quantity surveying and cost management services**

You might chose to employ our services simply on the

basis of :-

- One off issues—where you simply use us on a straight fee basis
- A telephone help line service for day to day issues providing an immediate response

Call us on 01480 426560