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THE EXTENT AND IMPACT OF INTIMIDATION IN UK STATUTORY ADJUDICATION

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ABSTRACT

Intimidation of adjudicators has been a controversial issue for several years; widely acknowledged as a concern, but rarely brought to light in the public arena. More recently, there has been an increase in discussion of the topic in the form of articles, talks and guidance; however much of this centres on the severely limited case law available, as well as some hypothetical discussion of what tends to happen in practice.

Anecdotal evidence would seem to indicate that intimidation can take a range of forms, from spurious jurisdiction challenges; to deliberately delaying the process; or threatening to take some action against the adjudicator. However, there is a real and present lack of reliable research into intimidation and the extent to which adjudicators, and the process, are affected by it. Accordingly, research has been conducted in order to explore the issue and provide a starting point and benchmark for further investigation.

From this initial analysis, it would appear that current guidance does not accurately reflect adjudicators' perceptions and experiences of, or tolerance for, intimidation, nor does it take into consideration the necessary distinction between 'real' forms of intimidation and simple discourtesy.

Keywords: alternative dispute resolution, construction disputes, intimidation, statutory adjudication.

INTRODUCTION

Now in its 16th year, it is felt by some that statutory adjudication, under the Housing Grants, Construction and Regeneration Act 1996 (*"the Construction Act"*), has experienced a decline in formality, as parties have grown accustomed to the process. Some consider this has manifested itself in a discourteous approach to adjudicators, with parties and their representatives considered to be increasingly aggressive and bullish in their approach and conduct. In order to test these arguments and determine the true extent to which intimidation has, or has not, impacted on the effectiveness of adjudication; as well as the impartiality and independence of adjudicators' decisions; research was conducted in the form of a survey seeking details of adjudicators' personal experiences of intimidatory tactics. The initial results were presented for discussion with a focus group at a UK national conference. The findings of this research will provide valuable insight into the practical implications of intimidation in the adjudication process, as well as facilitating discussion of the most appropriate methods to be employed in tackling the issue.

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The United Kingdom was the first jurisdiction to introduce statutory adjudication, following the recommendations of the Latham Report (1994). The empirical research gathered and presented herein concentrates on the UK experience, largely due to the fact that statutory adjudication is younger in other jurisdictions and the UK model has not been adopted universally. Those with statutory legislation include the Australian states; New Zealand; Singapore and most recently Malaysia and the Republic of Ireland. The paper includes some of the differences in legislation in some of the foregoing with the potential impact on the issue of intimidation being considered.

BACKGROUND AND CONTEXT

As well as reviewing relevant literature, case law and available discussion, the paper identifies historical data collected by the authors (all of CDR), since 1998 until 2012 in conjunction with Glasgow Caledonian University's Adjudication Reporting Centre (ARC, 2012). Since 2012 research data has been published (Construction Dispute Resolution, 2014) from questionnaires issued by the authors independently. The research objectives have been consistent throughout drawing from responses from both practicing adjudicators and Adjudicator Nominating Bodies (ANBs).

The author's database initially comprised each ANBs list of adjudicators, however it has expanded through personal contacts and responses to industry invitations. From this database, 172 individuals were randomly selected and invited to complete an intimidation specific questionnaire covering all 16 years since the introduction of statutory adjudication in the UK. This request generated 60 responses covering approximately 8,200 adjudications. To put these figures in context, there are a total of 847 adjudicators registered to ANBs across the UK (Construction Dispute Resolution, 2014). As a rule of thumb, the authors consider, based on previous findings (ARC, 2012), that each adjudicator will be registered with at least three ANBs. Accordingly, the number of practicing adjudicators in the UK is estimated to be nearer 282. Thus, the sample captures around 61% of all practicing UK adjudicators. Research indicates that in the same 16 years there has been a total of 23,511 ANB appointments in the UK (*ibid*). ANB appointments have consistently accounted for between 83% and 96% of appointments (*ibid*). Accordingly, the research presented herein is equivalent to around 30% of all UK adjudications carried out in the wake of the Construction Act.

INTIMIDATION AS AN ISSUE

Within UK adjudication circles, there is an increasing suggestion that intimidation of adjudicators is a growing concern. As interest in the topic has developed, several articles and discussion papers have been published; however, what is apparent is that the alleged concern is rarely substantiated by statistical research. Generally, discussion is based upon individuals' experiences, along with reference to somewhat limited case law; for example, *CIB Properties Ltd v Birse Construction* [2004] EWHC 2365 (TCC), *Linnet v Halliwells LLP* [2009] EWHC 319 (TCC), and *PC Harrington Contractors Ltd v Systech International Ltd* [2012] EWHC Civ. 1371. These cases

predominantly consider the non-payment of adjudicators' fees; an issue identified in this research as one of the most prominent intimidatory tactics. It is evident that quantifiable research is required in order to fully comprehend the impact of intimidation on adjudication, with a particular focus on the impact of intimidation on the effectiveness of the process, as well as the, perceived and real, impartiality and independence of adjudicators themselves, being an underlying principle of statutory adjudication (Anderson, 2000; Construction Umbrella Bodies Adjudication Task Group, 2004).

A starting point with regard to a definition of intimidation was the guidance published in 2002 by the Construction Umbrella Bodies Adjudication Task Group ("the Task Group"), suggesting a list of tactics that may be adopted by parties and their representatives in a bid to intimidate the adjudicator and manipulate the decision in their favour. The guidance was framed on the basis that these tactics were designed to reduce the control of the adjudicator, and could involve;

"Making spurious challenges to the adjudicator's jurisdiction; causing delay with the intention of obtaining an extension of time; deliberately confusing the adjudicator through the use of technical or esoteric legal arguments; threatening to take no further part in the adjudication or to take legal action against the adjudicator, or to report him to his professional institution." (p.5)

In response to this guidance, Redmond (2002) noted that whilst this issue was not covered by the Scheme for Construction Contracts [(England and Wales) or (Scotland), respectively] Regulations 1998 ("*the Scheme*") or case law (at the time) it had been experienced by "*most*" adjudicators at one point or another. Indeed, the guidance and definition was welcomed by the industry as "*sensible, digestible, practical and helpful*" (*ibid*: p.4).

Coulson (2011) has echoed the Task Group's (2002) definition in his discussion of intimidatory tactics, also noting that "*in a small minority of adjudications*" parties and their representatives may conduct themselves in an intimidatory manner, noting that "*such tactics are to be depreciated and will be the subject of criticism by the courts*" (p.456).

Given that the Task Group's guidance was published 13 years ago, it is evident that intimidation in UK adjudication is not a new phenomenon. Indeed, Bingham (2002) discussed intimidation in both adjudication and arbitration, noting that the Department of Trade and Industry (DTI) had raised the issue in 2000, and that adjudicators and arbitrators themselves had been aware of the problem long before this. The importance of protecting decisions from the effects of intimidation was highlighted, given that the aim of intimidation is to influence the adjudicator in making the decision, thus potentially having a direct effect on the impartiality and independence of the adjudicator (Bingham, 2002).

The Scottish Executive (2004) issued a report, setting out the results of an earlier consultation paper examining the effectiveness of adjudication legislation and guidance, as well as proposing certain improvements. One particular issue examined was the “*perceived use*” of intimidatory tactics in adjudications. However, overall, it was considered that intimidation did not present itself as a significant problem in practice and accordingly updated legislation was not necessary. Instead, further guidance was considered beneficial in order to appease any concerns whilst remaining mindful of resource constraints. No specific guidance was published following this consultation and although the Task Group published a further report in July 2004, it did not mention intimidation.

In recent years, the issue has been further considered, with a focus on control of the proceedings. Golden (2014), in discussing the use of meetings and Witness Statements in the process highlighted that “*often people in dispute...can become very heated in an environment which is not properly controlled*” (p.12). Reference to various tactics is made, in particular the hijacking of proceedings by arriving at meetings with previously undisclosed representation in tow, and the practice of overwhelming the adjudicator at hearings or meetings with voluminous spreadsheets, photographs and other documentation (*ibid*). One explanation provided by Bingham (2010) for such conduct was that disputes are, by their very nature, fraught by tension and aggravation, with parties often under significant pressure due to resource restrictions. Accordingly, it is perhaps only natural that parties may have a negative reaction to the individual who is tasked with deciding the dispute, particularly as it involves a further cost.

Of particular note, Bingham (2014) made reference to the issue of jurisdiction challenges and the role they play in intimidating or bullying the adjudicator. Key to the findings presented herein is the threat of non-payment of the adjudicator’s fees following such a jurisdiction challenge. Of course, as Bingham (2014) points out, this is entirely unlawful, and where parties continue to participate in the adjudication, they remain liable for the adjudicator’s fees despite any protests as to their jurisdiction. Reference has also been made in the literature to natural justice, and the link between this issue and jurisdiction. In this regard, Walls (2004) noted that as “*the law on jurisdiction becomes more settled*” (p.8), parties are placing increasing emphasis and reliance on matters of natural justice, with the result that adjudicators are under rising pressure, as natural justice “*is a far more difficult issue for an adjudicator to address and manage than a challenge to his jurisdiction*” (p.17).

ADJUDICATION AROUND THE WORLD

The preceding discussion has concentrated on the procedure in the UK, given that much of the intimidatory tactics employed by parties and their representatives have not been explored in the context of other jurisdictions with ‘younger’ legislation. However, the varying procedural nuances experienced in these younger jurisdictions may indeed restrict the impact of employing intimidatory tactics.

In Queensland and New South Wales, Australia, the legislation follows the ‘East Coast Model’ (Sheridan and Helps, 2007) requiring a decision to be issued within 10 days of receipt of the adjudication response; as set out in the Building and Construction Industry Payments Act 2004. This shorter timescale actively discourages the adjudicator from holding hearings (*ibid*), thus eliminating the issue of intimidation at such proceedings. The limited timescale is also likely to prevent parties from inundating the adjudicator with voluminous submissions, as often experienced in the UK.

Similarly, adjudicators in Singapore have a timescale of just 14 days to issue a decision, subject to extension by agreement of the parties; as provided for by the Building and Construction Industry Security of Payment Act (Cap 30B) (Rev Ed 2006), corresponding 2005 Regulations, and the Adjudication Procedure Rules.

The approach in Malaysia presents entirely different challenges for adjudicators given the significantly extended timescale of 100 days. This longer process accommodates a period of 10 days within which the adjudicator is to negotiate the terms of their appointment and the fee to be recovered. Perhaps, on this basis adjudicators are less likely to encounter issues with recalcitrant parties refusing to pay at a later date. However, this extended process also allows scope for the respondent to be increasingly uncooperative. Given the lack of restrictions on the response submission, there is an increased potential for the respondent to submit voluminous documentation, incorporating fresh contra charges or reasons for withholding (Cannon and Gibson, 2014).

As well as timescales for adjudicators’ decisions being different in various jurisdictions, it is acknowledged that the nature and scope of dispute that can be referred is also confined often solely to payment issues.

EMPIRICAL RESEARCH

In light of the available literature, a questionnaire was issued by the authors, focusing on conduct which had been identified in the Task Group’s guidance, and anecdotal commentary, to be the most common forms of intimidation; as well as some open-ended questions in order to gain further insight into intimidation as an issue. The responses were coded in order to categorise the largely unstructured data so that ideas could be simplified and specific characteristics identified and focused on. This coding was initially open, however further analysis took the form of axial coding, in order to recognise relationships between categories. Initial conclusions were then presented for discussion with a focus group at a UK national conference, to develop the research and findings for this paper.

As with all qualitative research, responses are open to subjectivity and not all adjudicators will interpret parties’ conduct in the same way. Different adjudicators will have varying tolerances for particular discourteous behaviours, whereas certain tactics will not be tolerated by most adjudicators. Despite any subjectivity in the results and consequent limitations in the findings, the research presented herein is considered

valuable in that it provides; as far as the authors are aware; the first in-depth insight into the extent and impact of intimidation in adjudication in the UK (and worldwide).

Results

Perhaps of most importance in terms of implications and recommendations, the research indicates that there is currently no clear, published definition of intimidation which accurately reflects the practices of parties and the concerns of adjudicators.

Adjudicators consider the threat of non-payment of fees as clear intimidation; however, there is no reference to this in the Task Group's definition. Indeed, 54% of adjudicators captured in the study noted that they had encountered such a tactic on at least one occasion. It is perhaps not surprising that this is a concern as non-payment constitutes a direct threat to adjudicators' livelihoods; whereas inconveniences; such as a failure or unwillingness to accommodate an extension to the decision date; may not. Similarly, adjudicators identified the threat of complaints to their professional body as a key concern, with 43% of adjudicators having been threatened with a complaint of this nature during the process, and 55% following the issuing of their decision. Of significance is that 47% of adjudicators have had a complaint made against them, however, only 1 complaint was noted as being upheld. Again this attempt to discredit the adjudicator could impact on their livelihood.

Adjudicators also indicated a distinction between parties rightfully making use of their rights under the process and parties behaving discourteously. Of particular note in this regard is that unwillingness to grant an extension, experienced by 39% of adjudicators, was typically viewed as nothing more than part and parcel of the process. On the other hand, adjudicators did not consider it correct that parties purposefully seek to intimidate the process by behaving aggressively or discourteously; 50% of adjudicators who responded agreed that they had experienced such tactics.

Despite being experienced by many adjudicators, tactics such as the threatening of complaints; jurisdiction challenges; intimidation of proceedings; and unwillingness to comply with directions or accommodate extensions (i.e. those tactics considered to be intimidation in the Task Group's Guidance), all occurred at a rate of between 0.5% and 2% of all adjudications captured by this research. Therefore, it would seem that such tactics are not as common as may have been envisaged. However, it must be borne in mind that the research covers the previous 16 years, and so whilst the percentages may appear insignificant, this does not necessarily provide evidence that there has been no increasing trend toward intimidation in that period.

Of key concern to this body of work is the impact and effect of intimidation on the effectiveness of adjudication and the independence of adjudicators. In this regard, it has been identified that the growth rate in adjudication referrals in the UK continues to show signs of recovery after the dip experienced following the financial crisis in the late 2000s. Throughout recent years the number of adjudicators registered with ANBs has remained relatively consistent, with only minor growth recorded in the most recent reporting period (Construction Dispute Resolution, 2014). Accordingly, it would

appear that the prospect of intimidation has not deterred parties from considering adjudication, nor has it deterred adjudicators themselves from practicing.

In terms of the impact of intimidation on the independence and impartiality of adjudicators, the research indicates that there may be some room for concern, with 23% of adjudicators questioned agreeing that intimidation may play a role in influencing the decision. Of those adjudicators who considered it did not have an effect, several noted that significant effort was required on the adjudicator's part to ensure such conduct did not have an effect on the outcome.

It was also considered fruitful to consider the issue in reverse, namely adjudicators conducting themselves in an intimidatory manner throughout the process. As such, those adjudicators questioned, who also fulfilled the role of party representative, were asked if they had experienced such behaviour. In response, 29% of those who answered agreed that adjudicators could themselves be guilty of intimidation in the process. Again there was some ambiguity in terms of what is true intimidation, and what party representatives consider to be little more than "*sheer awkwardness and bossiness*". The responses to this question did however offer some interesting insights. In particular, one response suggested that adjudicators may now be adopting the mantra "*if you can't beat them, join them.*" Ultimately, the responsibility for ensuring the process is not unduly affected by intimidation lies with the adjudicator, with the effectiveness of the process resting largely on their behaviour and conduct (see, for example, Scottish Executive, 2004; Walls, 2004). Perhaps adjudicators should actively engage the parties in an agreement as to conduct throughout the proceedings, possibly including such a provision in their terms of appointment. Of course, the responsibility of the adjudicator to control the process also extends to general formality. Indeed, in light of the perceived decline in formality, noted as an issue by several of the adjudicators consulted, it is evident that improvements need to be made in this area.

In terms of taking a proactive approach to tackling this issue, training for adjudicators is considered the most favourable. This echoes the view of the Scottish Executive (2004) that training is considered paramount to providing adjudicators with the "*requisite expertise to carry out their role properly*" (p.12); as well as the Adjudication Society (Willis, 2005), in considering improvements in training to be most appropriate in terms of improving adjudicators' general conduct. Such training would enable adjudicators to remain in control in the face of intimidation or discourtesy. It is recommended that training through mock adjudications, allowing adjudicators experience of intimidatory tactics in a controlled environment, be employed. However, as noted above, such training, with its focus on intimidation at hearings, would be inappropriate in the Australian and Singaporean context. In addition, Australian adjudicators, appear to be subject to greater regulation than their UK counterparts (Glover, 2007). Perhaps then a more formal, or legislative approach would be more appropriate in this context, following further research into the issue.

It is also recommended that up-to-date guidance be published defining intimidation and reflecting the key issues now identified, to complement the training offered to

adjudicators. A combination of both training and guidance has been identified as highly beneficial by the Adjudication Society (Willis, 2005) in respect of improving adjudicators' conduct and performance in general.

Some may argue that the onus should rest on parties and their representatives. However, this raises a number of questions, particularly in respect of potential disciplinary action; the form this would take; and the body responsible for administration. There is also the issue of revised codes of conduct, a subject shrouded in uncertainty (see, for example, Willis, 2005), with regards the code's content and structure, as well as the communication of and adherence to these codes. In order to combat these difficulties, it is recommended that all appointing bodies in each respective jurisdiction work collectively in order to devise a uniform code of conduct to be issued to both parties upon appointment of an adjudicator. Where there is only one nominating body, e.g. the Kuala Lumpur Regional Centre for Arbitration (KLRCA) in Malaysia, such collusion is unnecessary; however, it is suggested that such a code in Malaysia be informed by global experience. The research team recognises that ensuring compliance with such a code, particularly where recalcitrant parties are involved, presents several practical concerns. However; the importance of developing a code of conduct and communicating this to parties should not be overlooked.

As previously noted, 47% of those adjudicators surveyed had had a complaint made against them with only 1 complaint being upheld. Accordingly, it is recommended that the ANBs and professional bodies recognise their duty to educate parties as to the correct complaints procedure; specifically the issues that will, and will not, be investigated by the ANBs in connection with the adjudication. This is of particular relevance as the main source of adjudicators' appointments in the UK remains through an ANB; accounting for 96.0% and 93.5% of all appointments in 2013 and 2014, respectively (Construction Dispute Resolution, 2014).

CONCLUSIONS AND RECOMMENDATIONS

As stated above, the research conducted by the authors would appear to indicate that intimidatory tactics; both those identified by the Task Group (2002) in its guidance, and those discussed in anecdotal research; are not encountered in the UK as commonly or frequently as the prior discussion would have us believe. Whilst this may be the case, further research is considered necessary in order to determine whether there has been an increasing trend toward intimidation and discourtesy year on year, as well as researching the issue in the context of each of the jurisdictions identified above. This should not downplay the importance of this body of research in providing the first detailed analysis of intimidation in adjudication, thus setting the benchmark for future studies. It is also of note that many adjudicators are passionate about this issue.

In light of the responses received from practicing adjudicators, the research team would suggest that the only 'real' forms of intimidation are threats of non-payment and threats of complaint, during the process. Case law goes some way to stopping non-

payment of fees being a real threat, but case law alone is not enough. A concerted effort should, therefore, be made in the industry to crack down on these practices and drive them out of the adjudication process once and for all.

It would appear that in the minds of adjudicators themselves, any other issues identified in previous discussion simply amount to discourtesy. This distinction is incredibly important in terms of making positive progress, in providing both a definition and guidance reflective of practice, and in terms of constructing effective training for adjudicators to deal with these issues, where appropriate. However; whilst the research team proposes that the key focus of any strategy to tackle intimidation should be these aforementioned ‘real’ forms of intimidation; to entirely ignore the related behavioural issue of discourtesy would be in error, particularly in the face of an increasingly aggressive and bullish approach by many parties and their representatives. It is in this respect that identification of a trend, as noted above, is of great importance.

Evidently, of most concern is the potential for intimidatory tactics or discourteous behaviour to have an impact on the independence and impartiality of adjudicators. Whilst it has been indicated that intimidation has had little effect on the popularity of adjudication, there does appear to be cause for concern in respect of the independence of adjudicators in conducting the adjudication and producing their Decision. In light of this, it is obvious that the industry must stand up and take action to combat intimidation and discourtesy in order to protect and underpin the key principles and authority of statutory adjudication.

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