

from the desk of Jess



# ADJUDICATIONS: SECURITY OF PAYMENT ROLLERCOASTER



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In today's challenging economic climate, the increase in adjudications—both large and small—reflects tightening cash flow and a growing trend of individuals and businesses seeking to reclaim what they're owed.

On this episode of Desk of Jess, and in case you're about to launch your next Adjudication, read my top 5 tips drawn from the latest rollercoaster of rulings, handed down from the courts.

# 1

## **WAIT ... WHAT?**

### **ADJUDICATORS CAN GET IT WRONG?**

We are seeing an increased number of determinations which are colourful, creative and quite frankly make no sense whatsoever. Your automatic reaction might be to take steps to have it overturned. So, how easy is that to do these days?

Only in rare circumstances will a determination be overturned for 'jurisdictional error'. Adjudicators are allowed to interpret the contract in any manner they like (even if you think its crazy), allowed to misapply the law (YES! You heard correct) and determine any amount they believe the claimant is owed.

"Pay now argue later" – This still holds true – if you are going to appeal, then you'll need to pay the funds into court.



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# WE NOW HAVE SECURITY OVER THE RETURN OF YOUR SECURITY!

Until recently, it was nearly impossible to make a security of payment claim for the return of a bank guarantee as this was not considered “construction work” under the Act.

*EnerMech v Acciona* has now changed this position meaning that subbies and head contractors can use the Act to have their BG returned if they can prove to the adjudicator the time for release has arrived.

This decision could not have come any sooner. It's what was needed for the industry. For too long contractors and subcontractors have struggled to get their bank guarantees back after the end of the job.

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# 3 PAYMENT CLAIMS – GOOD LUCK! NO PRESSURE!?

Payment claims should be simple. All you need is an amount, a respondent, a description of work and the magic words. Even so, we often see basic errors being made. Some quick tips:

- Make sure the respondent is named exactly how it is stated in the contract including the right ABN. This sounds simple enough, you'll be amazed how often people get it wrong.
- Make sure a component of work was done in the last 12 months! If not, you will not have a valid claim.
- You can now have one payment claim for multiple projects. Be careful if you opt for this option and make sure the time for submitting a claim under each project is the same so you don't get caught out on a 'reference date' argument.





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# 4 PAYMENT SCHEDULES

## THROW IN THE KITCHEN SINK, LAUNDRY SINK, ENSUITE SINK ...

When it comes to payment schedules, you would be wise to adopt that age old saying "*Throw everything but the kitchen sink.*" If it's not raised in response via your payment schedule you can't raise it in adjudication!!

AND if you run out of time, feel free to attach documents and correspondence! It's a short cut to including your reasons but equally as effective.

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# 5 SHOW ME THE MONEY \$\$

It's exciting to hear that you have won an adjudication but what happens when the other side simply doesn't pay? It's the worst feeling to think that you won the battle but lost the war. Put simply, your options are limited:

- **A garnishee order** – if you know bank details and believe there might be money in the account, then this option is for you as its cheap and quick! Otherwise, I wouldn't bother.
- **A wind-up order** – this can get expensive but might be the push that is needed for the other side to take you seriously; or
- **Call the sheriff!** You can call the sheriff to seize their assets – an old law that has been around for a long time. However, this option is not quick, and I have never seen it actually eventuate in money being received.



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For more information on  
the upcoming reforms,  
speak to the team at  
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