Will the introduction of adjudication in Professional Negligence cases have the same impact as the introduction of a similar scheme in the Construction Court? by Francesca O'Neill

On 1 February 2015 a voluntary pilot scheme for the adjudication of solicitors' professional negligence claims was launched. Mr Justice Ramsey was to consider three test cases (with a quantum value of £100,000 or less) with feedback on those cases due to be provided by June 2015. It is now nearly November 2015, and not much has been heard: the latest update is that only one pilot case has been adjudicated upon, with the Adjudicator being 1 Chancery Lane’s Ivor Collett. There are presently no other pilot cases in train, but all signs point to determination that other pilot cases should be heard in the next few months.

However, it was clear from the excitement provoked by the announcement of the scheme that there was an appetite within the industry for alternative means of dispute resolution for solicitor’s negligence claims. The confidentiality of adjudication proceedings are of great interest, particularly to defendant solicitor’s firms, for whom adverse publicity can be very problematic.

No other legal sector has been as affected by the introduction of adjudication as the construction sector. Adjudication has been used as a form of dispute resolution for construction claims arising during or after completion of projects for many years pursuant to the statutory right to adjudicate under the Housing Grants, Construction and Regeneration Act 1996 (which was later amended by the Local Democracy, Economic Development and Construction Act 2009).

Key advantages of adjudication (as applicable to professional negligence claims) are:

1. It is possible to obtain a reasoned judgment enforceable in Court for much lower cost than using Court proceedings.
2. The scheme can work with the pre action protocol claim and response letters as submissions from the parties.
3. The PNBA have appointed a panel of 5 adjudicators for the pilot all with many years of experience in this type of claim on standard terms of business and cost.
4. The scheme itself is designed as a precedent which can be adapted by agreement for individual cases – adaptations agreed will be useful in assessing the feedback.
5. Interlocutory points/preliminary issues could be adjudicated if a barrier to other forms of ADR like mediation and/or as a cheaper and quicker alternative to Court hearings.
6. The meeting and process could be agreed as similar to mediations at similar cost.

Whilst the decision of an adjudicator is only temporarily binding, as Mr Justice Ramsey (a veteran of the introduction and expansion of the adjudication in construction dispute scheme) comments in his introduction, experience has shown that parties do not usually seek a final determination through the courts and accept the decision as a means of settling the dispute.

The scheme is run along similar lines to that for construction disputes though there are some differences and, in particular, parties can adapt two aspects. The first relates to the binding nature of the decision and the second concerns costs:

1. The parties can agree that the decision will be temporarily binding until it is finally determined (by litigation, arbitration or agreement) or they can agree that it will be finally binding.
2. If the parties so choose, the adjudicator will have power direct one party to pay the other’s reasonable costs and if appropriate can be given directions to enable him/her to determine those costs subject to a cap of £5,000. The parties can also agree for the adjudicator to have no such power and each party would therefore bear their own costs.

Related disputes can be referred to adjudication together and a decision from the adjudicator is to be provided within 56 days of his or her appointment (which can be extended by agreement).

The 56 day deadline is also applicable to the time between an adjudication being agreed upon as the way forward, as opposed to the rather more rigid 28 days in construction adjudications. It is hoped that the extra flexibility will make the scheme easier to prepare for.

The pilot is not a statutory scheme. The Ministry of Justice will be involved in further discussions once the feedback has been analysed which will consider whether adjudication should be included as part of civil procedure in professional negligence claims.

It may therefore be some time before the report into the pilot scheme is finalised. If the results are positive, and the scheme is expanded, it will be interesting to see if the impact on the professional negligence sector is as striking...
as in construction (where the number of construction disputes litigated in the Construction Court has dropped to 22% of what it was in 1995, when the scheme was introduced).

My view is that while adjudication will undoubtedly assist the swift and ready resolution of some lower-value solicitor’s negligence cases, the very fact of those limitations will ensure that the impact is not as fulsome as has been noted in the construction sector.

Until the result of the pilot scheme are released, the sector remains in the dark.

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