

# **CIPAA Payment Claim Served - *What Next?***

**belden**



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# Fraser J in *Beumer Group UK Ltd v Vinci Construction UK*

*“... for all its time pressures and characteristics concerning enforceability, adjudication is still a formal dispute resolution forum with certain basic requirements of fairness...”*

and

*“... although adjudication proceedings are confidential, decisions by adjudicators are enforced by the High Court and there are certain rules and requirements for the conduct of such proceedings.*

***Adjudication is not the Wild West of dispute resolution.”***

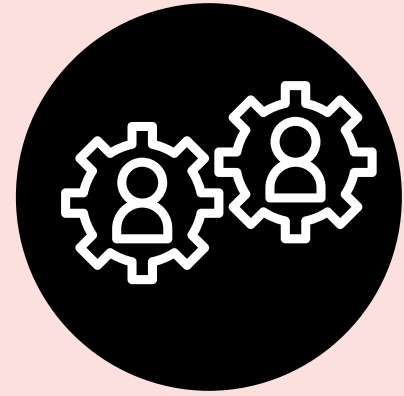


# KEY CONSIDERATIONS

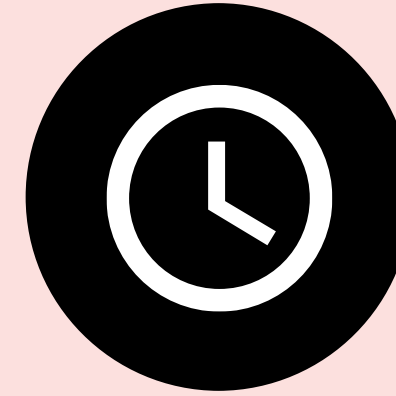


- Tactics - Both pre-adjudication and during proceedings.
- Jurisdictional challenges.
- Speed and quality of presentation - both evidence and narrative.
- Experienced and knowledgeable representative.
- Understanding the adjudicator's likely focus based on his/her background.

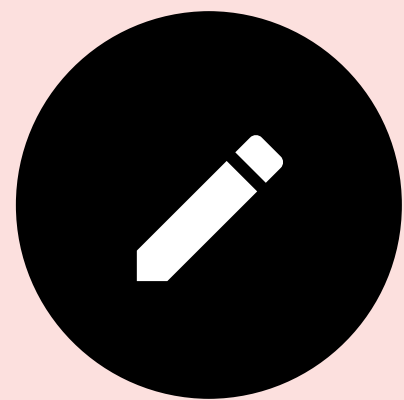
# Roadmap to Claimant's Perspective



Single v Multiple  
Adjudications



Time Strategy -  
for Adjudication Claim  
& Reply



Presentation of Claim,  
Pre-empting Response  
& Extrinsic Evidence



Claimant's  
Jurisdictional  
Challenges



# Single v Multiple Adjudications

- Final account or Extensive number of variations.
- Time constraint for adjudicator - will not benefit Claimant!
- Claims and issues gets lost in volume.
- Risk single adjudicator for all claims?
- Issue based Multiple Adjudications
- Benefit of ambush on Respondent?
- Cost of Multiple Adjudications
- Pros and cons of issue estoppel in multiple adjudications.





# Time Strategy

- Early preparation of Adjudication Claim and appointment of experts and representatives

...or

- Wait till Payment Response / Notice of Adjudication / Notice of Acceptance by Adjudicator?

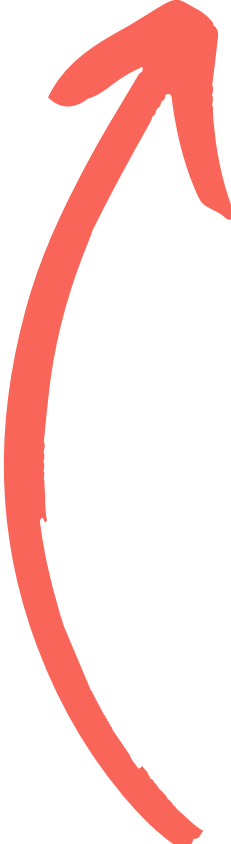
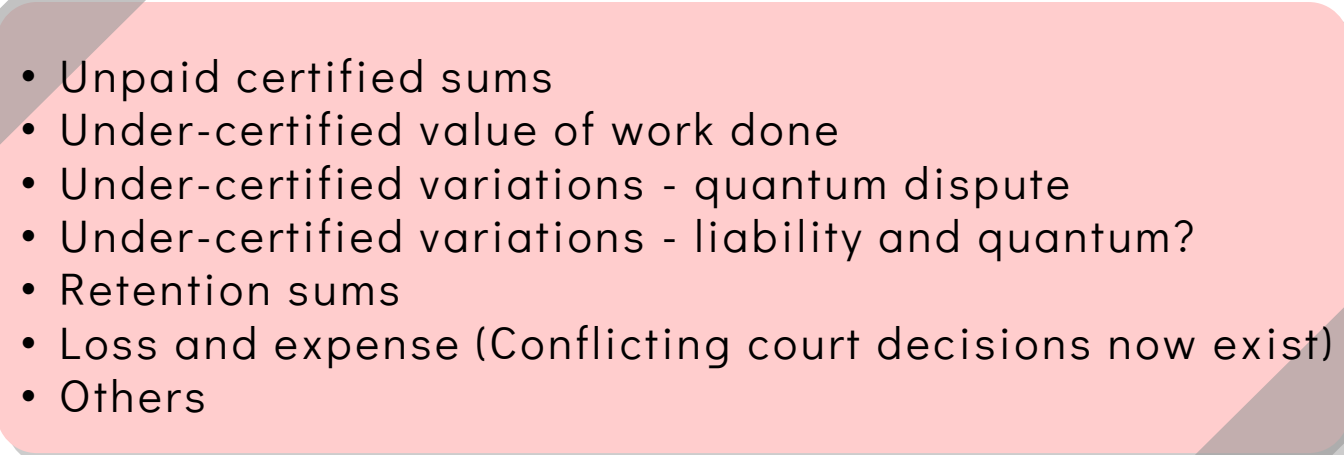


# Adjudication Claim

- How early is early?
- Is settlement expected?
- Are defences already known?
- Pressure Respondent and save 9 working days?
- Do claims require extensive narration & documents?
- Are expert reports required?

# Presentation of Adjudication Claim

- Simple, clear, precise, well-categorised and linked to documentary evidence and case law.
- Heads of claim separately categorised.
- Claim items with common features are grouped together.
- Explain common features & link to the key evidence that is common - eg., progress claim and certificate that certified or did not certify the claim item.

- 
- 
- Unpaid certified sums
  - Under-certified value of work done
  - Under-certified variations - quantum dispute
  - Under-certified variations - liability and quantum?
  - Retention sums
  - Loss and expense (Conflicting court decisions now exist)
  - Others



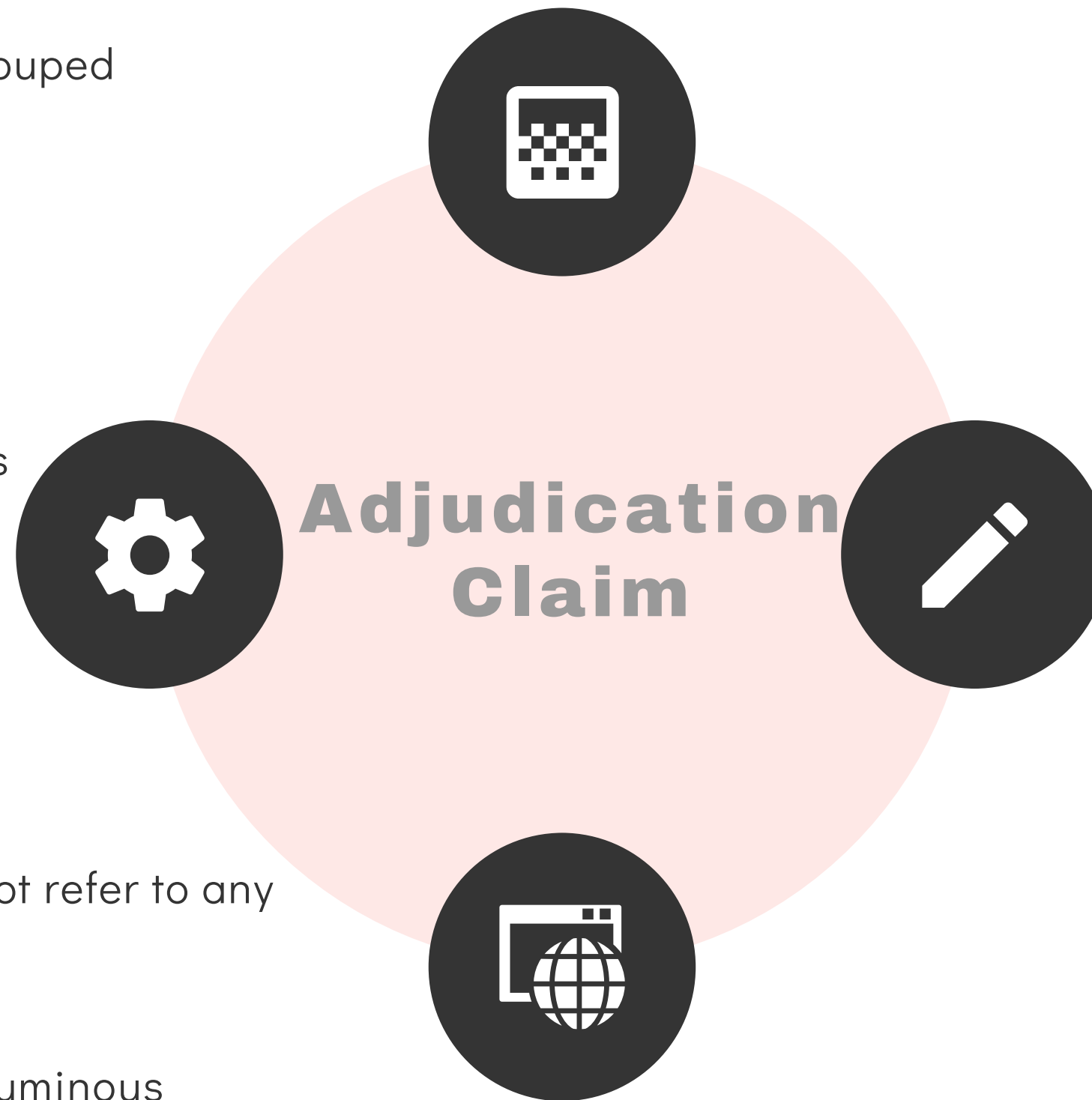


## Don't make adjudicator figure out how the documents link up!

- Explain common features of the grouped items of claim.
- Do not group up claims without explaining the link!
- Evidence - demonstrate with the supporting documents.
- Explain the contractual/legal rights for each head of claim.
- Reference the contract clauses, case law.

### Avoid

- Grandiose statements that do not refer to any evidence to support them.
- Making adjudicator analyse voluminous documents without assistance through narrative & evidential highlights.



## Address Respondent's Position

- Explain the dispute.
- Show Respondent's reasons for rejecting claim.
- If no reason given, highlight to adjudicator.
- Set out the evidential build up to refute Respondent's position.

### Close Strongly

- Summarise at the end of narrative for each group of items.
- Explain effect of evidence & outcome of evidence as linked to the claimed sum.



## Pre-empting the Response



## Refute known defences

- Defences that are about obvious weaknesses in the claim - YES!
- Draw the adjudicator's mind to why defences will fail even before he/she reads the Adjudication Response.
- Has greater impact appearing in Adjudication Claim than in the Adjudication Reply.



## Reply & Rejoinder

- Risk allowing Respondent to counter reasons why defences will fail in the Adjudication Response.
- Can still answer Respondent's counters in Adjudication Reply.
- Minimise risk of request for Rejoinder.

## **Refute Known Set-Offs / Counterclaims in Adjudication Claim?**

- Better not to do so.
- Wait for Adjudication Response to appreciate all weaknesses.
- Resist Rejoinder and prevent Respondent from improving evidence and submission.





# Extrinsic Evidence

## Witness Statutory Declarations?

- Only if absolutely necessary to cover gap in documentary evidence.
- Otherwise seen as highlighting documentary weakness.
- More useful at Adjudication Reply stage.
- But danger of prompting a Rejoinder.



## Expert Reports

- Necessary for evidence that cannot be easily extracted from documents or has technical ambiguity.
- Take-offs from Joint Measurement Sheets / drawings.
- Interpretation of technical info from specifications / drawings.
- Don't wait till Adjudication Reply as will likely lead to a Rejoinder.



# Time Strategy - Adjudication Reply

- 5 working days or less (to read and understand Adjudication Response).
- Prepare narrative & documents to counter known set-offs/counterclaims much earlier and allow time for finetuning.
- Known set-offs: Complex & technical requiring extrinsic evidence.
- Look for easy factual & contractual counter for complex/ technical matters. Don't put all eggs in one basket!
- Is there time for Rebuttal Expert Reports?



- LAD - the counter may be entitlement to EOT.
- Cost overrun for termination - the counter may be rightful/ wrongful termination and challenge cost overrun.
- Defective works - the counter may be who caused the defects or is it even a defect?

# Jurisdictional Challenges

## Against set-offs & counterclaims

- Counterclaims that cannot be used to diminish the claims as a set-off.
- Contractual set-off v Equitable set-off in Malaysia
- Cross-contract set-offs
- Set-offs / counterclaims that accrue after claim sum has fallen due?
- Emphasise and detail jurisdictional challenge in Adjudication Reply.
- Do not save it for Court as setting aside is not useful for Claimant.



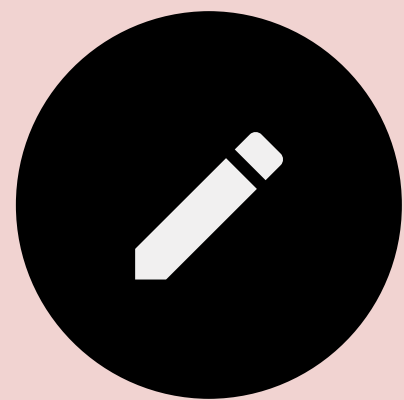
# Roadmap to Respondent's Perspective



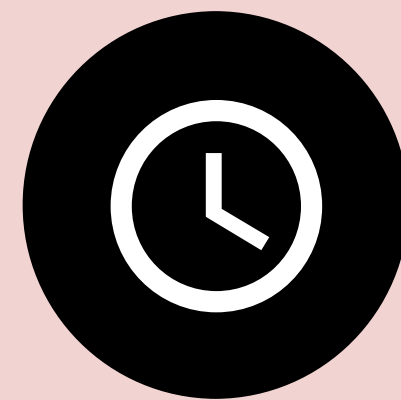
Serve Payment  
Response or Not?



Jurisdictional  
Challenge -  
When to Raise?



Presentation of  
Response,  
Pre-empting Reply  
& Extrinsic Evidence



Time Strategy &  
Adjudication  
Proceeding Tactics

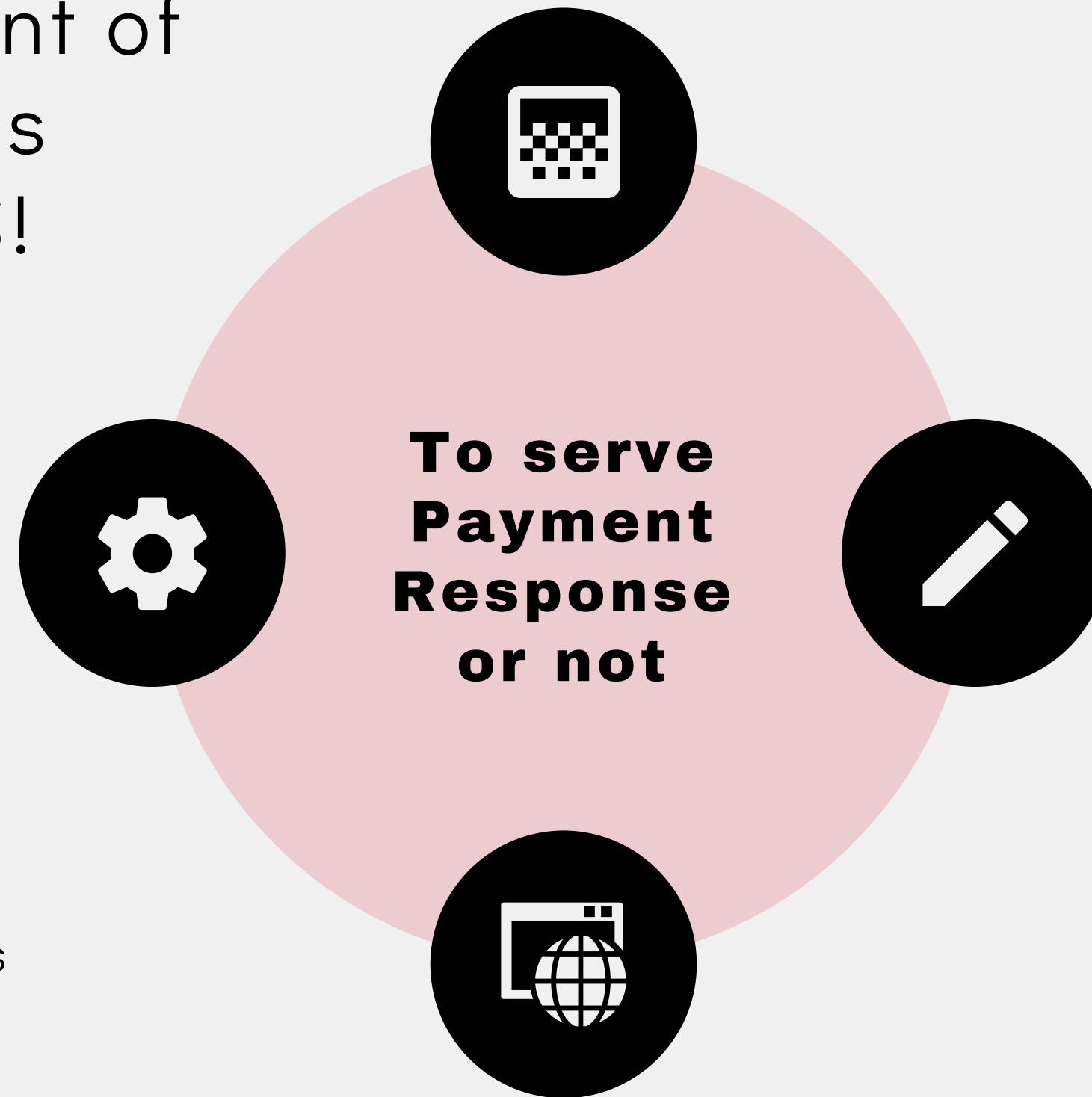


If partial or full  
settlement of  
claims  
- YES!

If no  
settlement:-

Benefit of Payment Response  
is:-

- Focuses on strengths and weaknesses early.
- What if Fed Court changes the position in View Esteem on section 6 CIPAA!
- No prejudice because not limited to matters raised in Payment Response.



If no  
settlement:-

Negatives of Payment  
Response:-

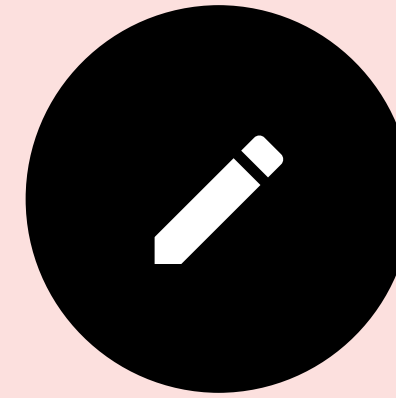
- If still unsure of defences and set-offs.
- Avoid contradictory positions taken after.

# Jurisdictional Challenge: When to Raise?



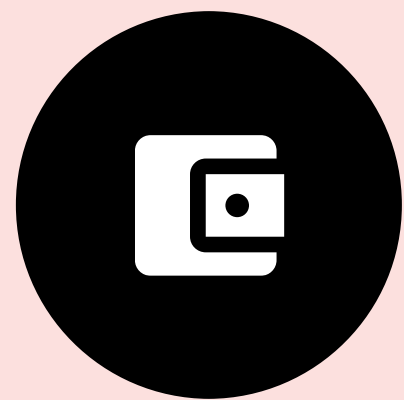
## Payment Response

- Yes if very clear & strong, AIAC may not register the Notice of Adjudication.
- No, if it can be repaired.



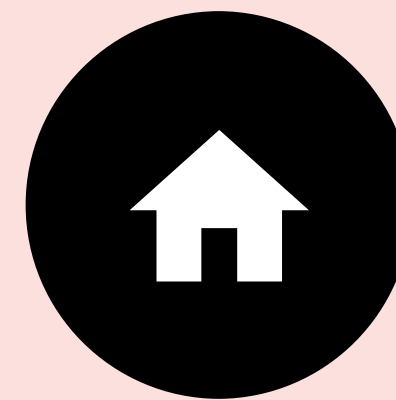
## Adjudication Response

- Yes: hope adjudicator accepts and 2 attempts better than 1.
- No, if it can be repaired.



## Weak Challenges

- No, as it will irritate adjudicator and he/she may use section 27(3) CIPAA.



## Strong Absolute Challenges

- Apply to Court as soon as Notice of Adjudication is served.
- Avoid risk of adverse adjudication decision.

# Time Strategy

- Early preparation of Adjudication Response and appointment of experts and representatives  
...or
- Wait till Payment Claim/ Notice of Adjudication / Notice of Acceptance by Adjudicator or Adjudication Claim?
- Understand that Response may be more extensive than Claim.



# Adjudication Response

- How early is early?
- Claim is well understood during project.
- Defences, set-offs, counterclaims are well-understood during project.
- Do claims require extensive narration & documents?
- Are expert reports required?
- Ambush with new defences ascertained by Representative.
- Clarity of presentation for set-offs/counterclaims.



# Presentation of Adjudication Response

- Clear, simple defences and set-offs / counterclaims that will succeed  
vs...
- Making it difficult for adjudicator to favour Claimant because Claim requires him/her to deal with many complex issues and disputes.
- Make it complex but use simple, clear and precise language.
- Highlight all issues and sub-issues to be decided based on matters raised in Adjudication Response.
- Highlight who has burden of proof and standard of proof.
- Make adjudicator have to consider all the details in reasonable depth.
- Defences to follow categorisation in Adjudication Claim.
- Set-off & counterclaims: follow the approach suggested for presentation in Adjudication Claim.





## **Pre-empting the Claimant's Reply**

### Pre-empt known or likely replies

- Should try to do so as no guarantee that a request for Rejoinder will be allowed.
- Especially difficult for set-offs and counterclaims.
- If early request for Rejoinder is refused - is it a breach of natural justice?





# Extrinsic Evidence

## Witness Statutory Declarations?

- Yes, even if on matters supported by other documentary evidence.
- More corroboration.
- Make it difficult for adjudicator to decide in favour of Claimant.



## Expert Reports

- Yes for as many technical matters that arise in the issues and disputes.
- More corroboration.
- Rebuttal Expert Reports?

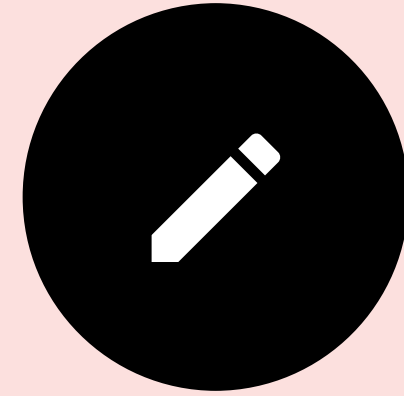


# Respondent's Adjudication Proceeding Tactics

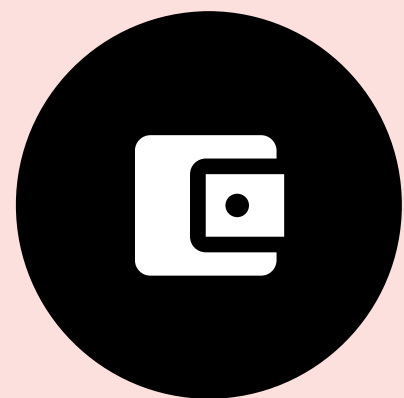


## Force Adjudicator to Consider Details

- Request oral submissions.
- Request presentation by expert.
- If requested early enough and refused - is it a breach of natural justice?

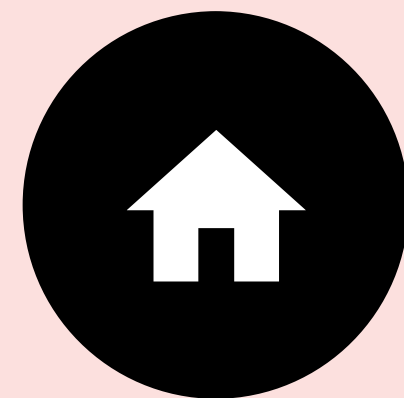


## Extensive List of Set-Offs & Counterclaims



## Extensive List of Issues and Disputes

- Time constraint on adjudicator.
- Fail to consider - grounds for setting aside.
- Indirectly encourage dismissal of claims to avoid time constraint.



## Rejoinders

- Time constraint on adjudicator to consider more matters.
- Will likely lead to a surrejoinder.

**Common  
Perspective for  
Claimant &  
Respondent**



**Understanding Adjudicator's  
Background**

**Documentary Evidence**

# Understanding the Adjudicator's Background

## Legally trained adjudicator

- Clear and precise language in the narrative.
- Stress all the contractual and legal strengths.
- Highlight excerpts from crucial documentary evidence.
- Don't force adjudicator to rummage through extensive documents to find the evidence.
- The lesser the documents, the better.
- Understanding weightage of different types of documentary evidence.
- Witness Statutory Declarations
- Expert reports on technical matters.
- Set out framework on evaluative steps for technical issues.
- Don't expect inquisitorial on technical issues.
- Sometimes expect a mini-arbitration process.





# Understanding the Adjudicator

Technically trained adjudicator

- Less legal narratives and more references to evidence.
- More technical detailing and explanations.
- Use spreadsheets especially for QS-related disputes.
- Use technical text-books and articles for the technical issues.
- Prepare to have a greater inquisitorial involvement.
- Expert evidence tailored for an Expert Adjudicator.



# Documentary Evidence

- Sufficient documentary evidence to establish the ingredients necessary for success and refute any known defences.
- Control the volume of documents, the more that is produced the more that has to be read, the harder it is for the adjudicator.
- Use excerpts from voluminous documents.
- Highlight the relevant passages of crucial documents in the narratives.

Appreciate the weightage, effectiveness and veracity of documents.

- Documents from the other party that admits or concedes matters – extremely useful & reliable.
- Neutral party documents that support matters asserted (highlight the neutrality) – strong usefulness and reliability (minutes of meetings etc.)
- Documents from the submitting party asserting matters that would assist its own position – least effective and needs further support from other corroborating evidence.







Thank you

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