



GUIDE TO COMPLETING APPLICATION TO NOMINATE AN ADJUDICATOR

UNDER SECTION 33 OF THE CONSTRUCTION CONTRACTS ACT 2002

This guide has been prepared for the purpose of assisting claimants and/or their advisors to complete the Building Disputes Tribunal (NZ) Limited (BDT) application to nominate an adjudicator. Should you have any questions please do not hesitate to contact us for assistance.

1.0 KEY DATES

Date contract entered into

Select the date the contract was entered into.

Please note, if the contract was entered into on or after 1 December 2015, you must wait until the 2nd working day after the notice of adjudication was served on the respondent before making this application. Please note the application must also be made before the end of the 5th working day after service of the notice of adjudication on the respondent.

Date notice of adjudication served

Select the date the notice of adjudication was served on the respondent and/or owner.

Notice of adjudication

The first and most important step in the proceeding is service by the claimant of the notice of adjudication. Adjudication is initiated by a claimant serving written notice of the claimant's intention to refer a dispute to adjudication on the other party or parties to the construction contract, and the owner of the construction site if a determination of an owner's liability is sought under section 30(a) and approval of a charging order is sought under section 30(b).

The requirements for a notice of adjudication are set out in section 28(2) of the Act. The requirements are mandatory. There is very little discretion regarding compliance with section 28(2) of the Act afforded to the adjudicator under section 64 of the Act, in the event of a failure on the part of the claimant to include the required information.

The notice of adjudication **must** state:

- the date of the notice;

- the nature and a brief description of the dispute and of the parties involved;
- details of where and when the dispute arose;
- the relief or remedy that is sought;
- whether approval for the issue of a charging order under section 29 is being sought;
- whether a determination of the owner's liability under section 30(a) and an approval for the issue of a charging order under section 30(b) are being sought; and
- details sufficient to identify the construction contract to which the dispute relates including: the names and addresses of the parties to the contract and, if available, the addresses that the parties have specified for service of the notices.

A notice of adjudication must also set out prominently, in the prescribed form, a statement of the respondent's rights and obligations in the adjudication and a brief explanation of the process.

Great care should be taken with the preparation of the notice of adjudication because it is from this document that the adjudicator derives his or her jurisdiction in relation to the nature and scope of the dispute that may be determined. In short, if the notice does not include a matter or matters subsequently raised in an adjudication claim, there is simply no jurisdiction for an adjudicator to determine those matters unless the parties agree.

If the claimant wishes to seek approval for the issue of a charging order in respect of the construction site and/or a determination that an owner who is not the respondent is jointly and severally liable to make a payment to the claimant, the claimant **must** record that in the notice of adjudication and the notice must be served on the owner and every other party.

Notwithstanding the requirement for strict compliance with section 28(2), it is not necessary for a claimant to establish the full details of the quantum of a claim before referring that dispute to adjudication. The relief or remedy sought may be couched in the form of a question, ie *what sum is due?* or made *in the amount of* [\$amount] *or such other sum as the adjudicator may determine*. It should be noted that an adjudicator could not determine an amount payable in excess of any stated amount claimed and any determination so made would be invalid for want of jurisdiction and unenforceable. Therefore, a claimant should be careful not to limit the adjudicator's jurisdiction in a claim brought on the merits under the contract by fixing the amount claimed in any particular sum.

Notice of adjudication in respect of construction contracts entered into before 1 December 2015

For construction contracts entered into before 1 December 2015, a notice of adjudication served on a respondent who is a residential occupier as defined in section 5 of the Act **must**, in addition to the matters set out in section 28(2), set out prominently a statement of the residential occupier's rights and obligations in the adjudication and a brief explanation of the adjudication process (s62). These matters must be set out in the prescribed form (Form 2) which may be found in Schedule 1 of the Construction Contracts Regulations 2003. It is important to be aware that under section 62(3) of the Act, a notice of adjudication served on a residential occupier that fails to comply with the requirements in section 62(1) (ie fails to set out prominently a statement of the residential occupier's rights and obligations in the adjudication and a brief explanation of the process), has no effect and, in order to initiate an adjudication, a claimant would need to serve a new notice that complies with these additional requirements.

To make it easy for parties and their advisers, BDT has developed a template for a valid notice of adjudication that can easily be downloaded and completed by a claimant. It is worth noting that many disputes are settled without any intervention whatsoever on the part of BDT simply by service of a notice of adjudication. Service of a notice of adjudication sends a very strong signal to the respondent that the claimant is serious about recovery of money payable under the contract, or

damages for breach of contract, or the determination of the parties' rights and obligations, and unless the matter is resolved immediately, the claimant can and will secure the appointment of an adjudicator which will cost both parties significant time and money, win, lose or draw. Service of the notice of adjudication costs a claimant absolutely nothing and is much more effective in bringing about early resolution of the dispute than a letter, which, if the claimant is lucky, may generate a response, but no money!

Notice of adjudication in respect of construction contracts entered into or renewed from 1 December 2015

For construction contracts entered into or renewed from 1 December 2015, every notice of adjudication served on a respondent must set out prominently a statement of the respondent's rights and obligations in the adjudication and a brief explanation of the adjudication process. Please note: the form is different to the form required to be provided to residential occupiers under contracts entered into before 1 December 2015.

2.0 THE CLAIMANT

The claimant is the party to a construction contract who initiates an adjudication by serving written notice of the claimant's intention to refer a dispute for adjudication on the other party or parties to the construction contract, and the owner, if a determination of the owner's liability is sought under section 30(a) and an approval for the issue of a charging order is sought under section 30(b).

The claimant is also charged with the responsibility for securing the appointment of an adjudicator within the time limits set out in section 33.

If the parties are unable to agree on an adjudicator and/or the claimant seeks the adjudicator's approval for the issue of a charging order over the subject construction site, the claimant **must** request an Authorised Nominating Authority to nominate an adjudicator.

Building Disputes Tribunal (NZ) Limited (**BDT**) is an Authorised Nominating Authority under the Construction Contracts Act 2002.

It is important to record in the 'Claimant's Details' section the exact name of the entity that entered into the construction contract. For example, if it was a company, please ensure that you use the exact name that is registered at the Companies Office. If you are an individual trading under another name, please clearly set out your full name and the name you trade under ie John Smith trading as John Smith Builders.

If there are joint claimants, please provide the full names of each person. In the case of a trust, please specify the full names of all trustees.

3.0 THE RESPONDENT

The respondent is a party to the construction contract against whom a claim is made by the claimant in an adjudication. If there are joint respondents, please provide the full names of each person. In the case of a trust, please specify the full names of all trustees.

Please check your contract to ensure that you record in the 'Respondent's Details' section, the exact name of the other entity or entities that entered into the construction contract.

Please provide the address for service (the address for delivery of notices or documents) that was specified in the contract. If no address for service was specified in the contract, then please provide the respondent's last known place of residence or business in New Zealand.

4.0 OTHER PARTIES

A claimant may seek a determination that an owner of the construction site who is not the respondent, but is an associate of the respondent as defined in section 7 of the Act, is jointly and severally liable with the respondent to make payment to the claimant and for approval for the issue of a charging order in respect of the construction site.

Please ensure that you have the exact name of the owner as recorded on the Certificate of Title for the construction site and the correct contact details for that person.

5.0 APPLICATION FOR APPROVAL FOR ISSUE OF CHARGING ORDER

In every case where the claimant seeks approval for the issue of a charging order over the construction site in an adjudication, the claimant will be requested by BDT to provide a current copy of the Certificate of Title of the construction site over which approval to grant charging orders is sought immediately prior to the issue of the adjudicator's determination.

The request for, and the provision of the Certificate of Title is simply a function of the necessary process to deal with the application, and is not of course to be taken as an indication of the success of the application.

6.0 PAYMENT

BDT does not charge an application fee for the nomination of adjudicators, however a notice of acceptance will not be served on the parties to the adjudication by or on behalf of an adjudicator until security for the adjudicator's fees has been paid to BDT and the funds are clear funds.

Low value claims (LVC's)

BDT provides a fixed price adjudication service for Low Value Claims of limited complexity (**LVC's**).

Special conditions attach to this service including limiting the items that may be determined in any one adjudication proceeding to only three items at issue, and limiting the number and extent of documents that may be submitted by a claimant in support of any claim (see Schedule of fees below).

The fixed price does not include any allowance for a conference of the parties or for inspection of the construction work or any other thing to which the dispute relates.

If any party or the adjudicator requires a conference to be convened or an inspection to be undertaken, BDT will charge a further amount of \$500.00 inclusive of GST together with mileage/travel expenses, and this amount will be required to be paid to BDT before the adjudicator's determination will be given to the parties.

In the event that a claim presents undue complexity, notwithstanding the low value of the claim or the limited number of matters at issue, BDT retains the right to decline any such application for the LVC adjudication service at its sole discretion and from which decision there shall be no right of appeal.

More complex claims may of course be determined by BDT's adjudicators under BDT's General Claims procedures. The cost of a General Claim will be determined by the time engaged on the duties of such adjudications by the adjudicator together with any expenses incurred by the adjudicator in the execution of those duties.

A notice of acceptance of appointment as adjudicator will not be served on the parties to the adjudication by or on behalf of a BDT adjudicator until the claimant, or the parties jointly, have paid (in clear funds) into the trust account of BDT the security required for the adjudicator's fees and expenses.

Schedule of fees for Low Value Claims (LVC's)

The adjudication fees (inclusive of GST) for LVC's are as follows:

Code	Amount of claim	Fee	Conditions
LVC5	Less than \$5,000.00	\$1,250.00	Claim limited to 3 items at issue*. Documents that claimant may file in support of the claim limited to: notice of adjudication, adjudication claim, and contract documents together with 15 single sided A4 pages (font size no less than 12) of submissions and evidence in relation to the claim and the matters at issue. No conference of the parties or inspection of construction work is included in the fixed fee. Only limited reasons provided in the determination.
LVC10	\$5,000.00 ≤ \$9,999.00	\$ 2,350.00	Claim limited to 3 items at issue*. Documents that claimant may file in support of the claim limited to: notice of adjudication, adjudication claim, and contract documents together with 15 single sided A4 pages (font size no less than 12) of submissions and evidence in relation to the claim and the matters at issue. No conference of the parties or inspection of construction work is included in the fixed fee.
LVC20	\$10,000.00 ≤ \$19,999.00	\$ 3,550.00	Claim limited to 3 items at issue*. Documents that claimant may file in support of the claim limited to: notice of adjudication, adjudication claim, and contract documents together with 20 single sided A4 pages (font size no less than 12) of submissions and evidence in relation to the claim and the matters at issue. No conference of the parties or inspection of construction work is included in the fixed fee.
LVC30	\$20,000.00 ≤ \$29,999.00	\$ 4,750.00	Claim limited to 3 items at issue*. Documents that claimant may file in support of the claim limited to: notice of adjudication, adjudication claim, and contract documents together with 30 single sided A4 pages (font size no less than 12) of submissions and evidence in relation to the claim and the matters at issue. No conference of the parties or inspection of construction work is included in the fixed fee.
LVC40	\$30,000.00 ≤	\$ 6,000.00	Claim limited to 3 items at issue*. Documents that

	\$39,999.00		claimant may file in support of the claim limited to: notice of adjudication, adjudication claim, and contract documents together with 40 single sided A4 pages (font size no less than 12) of submissions and evidence in relation to the claim and the matters at issue. No conference of the parties or inspection of construction work is included in the fixed fee.
LVC50	\$40,000.00 \$49,999.00	≤ \$ 7,250.00	Claim limited to 3 items at issue*. Documents that claimant may file in support of the claim limited to: notice of adjudication, adjudication claim, and contract documents together with 50 single sided A4 pages (font size no less than 12) of submissions and evidence in relation to the claim and the matters at issue. No conference of the parties or inspection of construction work is included in the fixed fee.

Conference of the parties and/or inspection of construction work or any other thing to which the dispute relates, at the request of any party or at the adjudicator's discretion (the additional fee for a conference and/or inspection is payable to BDT prior to release of the adjudicator's determination). Please refer to heading 9 below for more information on inspections.	Fee: \$500.00 plus mileage/travel expenses
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***The number of items at issue that may be dealt with under the fixed price LVC service is strictly limited ie three variations, or three items of allegedly defective work, or extension of time for one event and two variations etc.**

General Claims

For General Claims a notice of acceptance will not be served on the parties to the adjudication by or on behalf of a BDT adjudicator until the claimant, or the parties jointly, have paid (in clear funds) into the trust account of BDT a deposit as security for the adjudicator's fees and expenses in accordance with the following table:

Amount of claim	Security payment required
≤ \$24,999.00	\$ 6,000.00
\$25,000.00 ≤ \$49,999.99	\$ 8,000.00
\$50,000.00 ≤ \$99,999.99	\$10,000.00
\$100,000.00 ≤ \$499,999.99	\$15,000.00
\$500,000.00 ≤ \$999,999.99	\$17,500.00
≥ \$1,000,000.00	\$20,000.00

Please note that any amount paid as security for the adjudicator's fees and expenses is a nominal amount only and **is not, and shall not be considered, an estimate of the cost of the adjudication** which shall be calculated according to the time engaged on the duties of the adjudication by the adjudicator together with any expenses incurred by the adjudicator in the execution of those duties.

In the event that the adjudicator's fees and expenses prove to be less than the amount held by BDT as security, BDT will provide the adjudicator's determination to the parties to the adjudication as soon as practicable after the adjudicator has made his or her determination and BDT will disburse

the balance of the monies held as security for the adjudicator's fees and expenses to the parties in the manner determined by the adjudicator.

In the event that the adjudicator's fees and expenses prove to be greater than the amount held as security, the parties will be advised of the adjudicator's actual fees and expenses by BDT and the parties will be invited to pay the balance in order to uplift the determination. When the balance is paid in full, a copy of the determination will be provided to each of the parties to the adjudication by BDT.

Methods of payment

Payment of all BDT fees and adjudication expenses may be made by cheque, direct credit, or by credit card (Visa and Mastercard only).

No steps will be taken by BDT to issue a notice of acceptance under section 35(2), or to provide an adjudicator's determination until payment is made and the funds are cleared.

Please note that a bank cheque, a solicitor's trust account cheque or payment by direct credit will result in the shortest processing times. Personal or company cheques and credit card transactions may take up to five working days to clear.

Administration fee payable on withdrawal or settlement of claim

In any case where an adjudication claim is withdrawn or terminated, or the dispute between the parties is resolved after receipt by BDT of an application to nominate an adjudicator and before the provision of a determination, BDT will charge a fee being not less than \$500.00 in respect of the fees and expenses incurred in the adjudication up to and including the date on which the adjudication claim was withdrawn or terminated or BDT was notified that the dispute had been resolved.

7.0 APPLICANT'S DETAILS

Many application forms are completed by a representative of the claimant. If you are making this application for or on behalf of the claimant, please ensure that your contact details are correct in case we need to contact you to clarify any aspects of the application.

8.0 PREFERRED EXPERTISE OF ADJUDICATOR - PREFERRED ADJUDICATOR

All BDT adjudicators are capable of determining any building or construction dispute by virtue of their training and experience. However, in rare cases, specialist knowledge, skills and expertise may be required of an adjudicator.

You may think it desirable that the adjudicator should have particular knowledge skills or expertise and/or should come from a particular professional background. Accordingly, you are asked to state any preferred expertise, knowledge, or professional background of the person to be nominated as adjudicator. As this issue is one that is often hotly contested by parties to a dispute, you are requested to advise whether the parties have agreed on this matter and if so, to provide evidence of any such agreement.

In the absence of agreement between the parties, the registrar will nominate the person whom the registrar considers to be most appropriate in the circumstances.

The parties may have agreed on a person to act as adjudicator in a particular dispute but are required to have an adjudicator nominated by an Authorised Nominating Authority because the claimant seeks approval for the issue of a charging order in respect of the construction site. You are requested to advise whether the parties have agreed on this matter and if so, to provide evidence of any such agreement.

BDT invites the parties to provide the names of up to three adjudicators from its panels in the order of preference, as the preferred person(s) may not be available to accept an appointment at the time the application is filed.

9.0 INSPECTION OF CONSTRUCTION WORK

In some adjudication proceedings, particularly those involving qualitative matters (ie the standard of work and/or finished surfaces), an inspection of the construction work or any other thing to which the dispute relates may assist the adjudicator to determine the disputed matters promptly and efficiently.

You may think that it is desirable for the adjudicator to inspect the construction work, and/or some other thing to which the dispute relates (ie certain work or materials used as a sample for the type or standard of the contracted work) to assist the adjudicator to determine the disputed matters.

BDT will have regard to the applicant's advice that an inspection may be of assistance to the adjudicator when it nominates the adjudicator, but it will not necessarily be determinative in selecting the person to act as adjudicator in any particular matter.

Please note that the decision to carry out an inspection of the construction work or any other thing to which the dispute relates will be solely at the discretion of the adjudicator. Any request for same should be made directly to the adjudicator and at the earliest possible time after receipt of the adjudicator's notice of acceptance.

The parties should not assume that any request for an inspection will be agreed to by the adjudicator, and each party should proceed to prepare its submissions on the disputed matters (either the adjudication claim and the reply statement in the case of the claimant, or the written response to the adjudication claim in the case of the respondent and any other parties), and all other documents and evidence submitted in support of same, on the basis that the adjudicator's determination may be made entirely on the basis of those submissions and that evidence alone.

10.0 CONSENT FOR INFORMATION TO BE GIVEN IN ELECTRONIC FORM

BDT is committed to corporate and product carbon neutrality. Accordingly, it is our preference to communicate with parties to adjudications electronically whenever possible.

Under sections 9 and 10 of the Construction Contracts Regulations 2003, a notice or document may be sent by email or other means of electronic communication only if the information in the notice or document is readily accessible so as to be usable for subsequent reference, and the person to whom the information is required to be served or given consents to the information being given in electronic form and by means of an electronic communication, if applicable.

Whilst consent may be inferred from a person's conduct, we would prefer to have a person's express agreement to having notices or documents provided by email.

Accordingly, we strongly urge all parties to an adjudication to agree to being given notices and documents by email. Your agreement and co-operation in this regard would be appreciated. Please simply select **Yes** in the application form.