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Adjudication Society & Chartered Institute of Arbitrators

GUIDANCE NOTE: NATURAL JUSTICE

1st Edition (04/2013)

[NetDocs No. 4163-1049-6768]

ACKNOWLEDGMENTS

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Published by:

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GUIDANCE NOTES FOR ADJUDICATION

The Adjudication Society and Chartered Institute of Arbitrators established a joint working group in April 2010 in order to produce a series of Guidance Notes dealing with Adjudication. The purpose was to deal with Adjudication in England, Wales and Scotland. Nicholas Gould, Partner, Fenwick Elliott LLP chaired the joint working group, which was established under the policy sub-committee of the Chartered Institute of Arbitrators and the executive committee of the Adjudication Society.

The Guidance Notes are to assist not just adjudicators, but also parties and party representatives in respect of the key issues that they and adjudicators might encounter when dealing with adjudication under the Housing Grant, Construction and Regeneration 1996, and the subsequent Local Democracy Economic Development and Construction Act 2009. The Guidance will take into account the Scheme, amendments to it and also pertinent case law.

The Guidance Notes do not debate all of the legal issues in an attempt to find a philosophical answer to the many problems that could be encountered. Instead, the Guidance tries to identify a sensible or practical approach to some of the everyday problems encountered in adjudication. It is an attempt to establish best practice, so that guidance notes will be provided from time to time.

The first Guidance Note dealt with jurisdiction, and was published on the 25th May 2011. Guidance Notes can be obtained from the website of The Adjudication Society (www.adjudication.org) or the Chartered Institute of Arbitrators (www.ciarb.org).

Nicholas Gould

Chairman, Guidance Note Joint Working Group, Comprising Guidance Note Sub-Committee, Adjudication Society and Guidance Note Sub-Committee, Chartered Institute of Arbitrators.

1. INTRODUCTION

- 1.1. An adjudicator should at all times conduct himself in a manner in accordance with the rules of natural justice. At a general level, this means giving each party a fair hearing and ensuring that he does not place himself in a position where he may be perceived to be biased.
- 1.2. The requirements of natural justice must be considered constantly throughout the adjudication but particularly:
 - 1.2.1. At the outset of the adjudication, when deciding whether to accept the appointment or not;
 - 1.2.2. During the course of the adjudication when dealing with procedural matters; and
 - 1.2.3. At the end of the adjudication when drafting the decision.

2. INITIAL APPOINTMENT

- 2.1. When initially appointed an adjudicator should consider forthwith whether he should accept the appointment. The two particular matters which the adjudicator ought to consider are:
 - 2.1.1. Whether he has any link to either of the parties or their representatives that might lead to, or give the impression of, bias.
 - 2.1.2. Whether the dispute is suitable for resolution by adjudication.

Bias and Apparent Bias

- 2.2. An adjudicator should refuse appointments in disputes where he is, or appears to be, affected by bias. The test to be applied at all times is whether a fair minded and informed observer would conclude that there was a real possibility or a real danger of bias.¹
 - 2.2.1. The most clear instances are where the adjudicator has a direct or indirect financial interest in the outcome of the dispute. For example, if an adjudicator has a shareholding in one of the parties, he should refuse to accept any appointment.

¹ *Amec Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWHC 393 (TCC).

- 2.2.2. Similarly, an appointment should be refused where the adjudicator has ongoing personal or business ties with any of the parties or their representatives.
- 2.2.3. The situation is more difficult where the adjudicator shares historic business ties with one of the parties or their representatives. Indirect and historic links are relatively common in the sphere of construction disputes, not least in the TCC itself where the judges are invariably former barristers. It is not possible to provide definitive guidance on the many possible links which may exist and adjudicators should apply the fair minded and informed observer test in order to determine whether the appointment should be accepted.²
- 2.2.4. Unless exceptional circumstances present themselves, there is no objection to accepting serial appointments between the same parties.
- 2.3. In marginal cases, it is recommended that any link is disclosed to both parties at the outset so that they can be given a chance to register any objections. If no objections are registered, the adjudicator can then proceed with the adjudication in the knowledge that the parties are unconcerned with the apparent link.

Contact Prior To The Referral

- 2.4. In some instances, the referring party has approached an adjudicator prior to the referral to confirm his or her availability for a forthcoming adjudication. Where this has occurred, the adjudicator should inform the other party of such contact at the outset of the adjudication. It is unlikely that such prior contact will lead to a breach of natural justice, particularly if disclosed early.³

Dispute Appropriate for Adjudication

- 2.5. Shortly after receipt of the Referral, the Adjudicator ought to consider whether he can properly decide the dispute. The adjudicator should review the nature of the dispute, appraise himself of the size and complexity of it and satisfy himself that he will be able to do

² For an example of a historic business link that was held to be acceptable, *Fileturn Ltd v Royal Garden Hotel Ltd* [2010] EWHC 605 (TCC).

³ It may be that there is no material breach of natural justice if the approach is not disclosed (*Makers UK Limited v London Borough of Camden* [2008] EWHC 1836 (TCC)) but this is not best practice.

broad justice between the parties in the time available.⁴ An adjudicator ought not to accept an appointment if he is unable to devote the time necessary to resolve the dispute.

- 2.6. It should be remembered that in the ordinary run of the events the parties to a construction contract are entitled to have any dispute resolved by adjudication on an interim basis and that the broad justice of an adjudication is likely to produce a fairer interim allocation of money than simply leaving it in the hands of the party who happens to presently be in possession of it.
- 2.7. As an exception to this rule it has been suggested that some final account disputes may be so large and complex that they cannot properly be resolved by adjudication.⁵ However, there are presently no cases where an adjudicator's decision has not been enforced on this basis and the Courts will generally support an adjudicator who decides that he has enough time to do broad justice between the parties.
- 2.8. The Courts recognise that adjudication is a swift form of dispute resolution which may provide only a very rough form of justice in certain instances. Hence, it can be legitimate to resolve large and factually complex disputes by means such as spot checks.⁶
- 2.9. Another issue that can arise is the timing of an adjudication. Adjudications are sometimes commenced at times when it is known that the other party will be in difficulty responding. A common example of this is adjudications commenced over the Christmas holidays when the construction industry is commonly on a two week break. In such instances, an adjudicator ought to ensure that the responding party is given sufficient opportunity to respond to the referral. Often an extension of time for the decision will become necessary and if so this should be sought as soon as its need becomes evident.

3. CONDUCT OF THE ADJUDICATION

- 3.1. During the course of the adjudication, the adjudicator should be careful to:

- 3.1.1. Give both parties a fair hearing and consider all issues raised.

⁴ *Amec Group Ltd v Thames Water Utilities Ltd* [2010] EWHC 419 (TCC).

⁵ See Coulson on Construction Adjudication, 2nd Ed, 2011 at para 13.13

⁶ *HS Works Ltd v Enterprise Managed Services Ltd* [2009] EWHC 729 (TCC).

3.1.2. Decide the case on the basis of the representations made by the parties unless this is not possible. Where it is not possible, the adjudicator should give the parties the opportunity to comment on the alternative basis upon which it is proposed the decision will be made.

3.1.3. Ensure that all actions are ones which would be viewed as impartial by a fair minded observer.

Submissions timetable

3.2. The adjudicator should set down a timetable for the parties to serve submissions during the course of the adjudication. The timetable will depend upon the nature and complexity of the dispute but each party should be given an equal and effective opportunity to respond to the other parties' submissions. This will ordinarily entail a response and reply following the referral.

3.3. It is common for parties to seek to make additional submissions beyond those permitted by the initial timetable. Such requests have to be considered on an individual basis taking into account the issues raised by the most recent submissions and the time left in the adjudication timetable.

3.4. When preparing the initial timetable and considering any further requests for submissions, the adjudicator should consider whether additional time will be needed to reach, prepare and issue the decision. It is preferable that requests for additional time are dealt with at the outset of the adjudication if they can be foreseen at that time and in any event as soon as possible. Requests for more time in the day or two before the deadline for the decision should be avoided.

Communications with the Parties and their Representatives

3.5. The direct contacting of a party, their representatives or other persons with views on the dispute without informing the other party is liable to be a clear breach of natural justice.⁷

3.6. At the outset of the adjudication, the adjudicator should direct that all communications by one party with the adjudicator should be copied to the other party. Similarly, the

⁷ *Woods Hardwick Ltd v Chiltern Air Conditioning Ltd* [2001] BLR 23.

adjudicator should copy all correspondence to both parties. Forms of communication where this is not possible, such as phone calls, should be avoided.

- 3.7. If one party contacts the adjudicator directly by telephone, ideally his administrator should deal with them and ask for the matter to be dealt with in writing. If this is not possible or does not occur, the adjudicator should take notes during the conversation, seek to terminate the call as soon as reasonably possible and inform the other party of the content of the call as soon as possible.

Hearings

- 3.8. Adjudicators should consider the need for a hearing at the outset of the process although in many cases it will not be possible to reach a final view on the need for a hearing until the Response has been received highlighting the matters in dispute between the parties.
- 3.9. The need for a hearing should be judged in the context of the dispute as a whole. Following the amendments to the Housing Grants etc Act 1996, there may be a particular need for hearings in cases where the contract contains important oral elements.
- 3.10. Adjudication hearings do not need to follow formal procedural rules in the same manner as Court proceedings or, commonly, arbitral proceedings. The nature of adjudications is such that any hearing is likely to be very informal; Adjudicator's are not normally empowered to conduct proceedings under oath.
- 3.11. However, if the adjudicator is to draw a substantial and central conclusion from matters said at the meeting which have not formed part of the parties' written submissions, it is recommended that the party against whom the finding is to be made is given a full opportunity to address the basis of the adjudicator's conclusion.⁸

Site visits

- 3.12. An adjudicator may wish to carry out a site visit as part of the adjudication. If this is to be done, the adjudicator ought to give both parties adequate notice and seek to agree what representatives will be in attendance from both parties. An adjudicator should avoid a site

⁸ *Ardmore Construction Ltd v Taylor Woodrow Ltd* (2006) CILL 2309

visit where only one party will be present unless the other party has agreed to that approach or is deliberately seeking to obstruct the site visit.

4. THE DECISION

Addressing All Issues

- 4.1. An adjudicator should consider all issues raised by both parties provided that they fall within his jurisdiction. A particularly important matter in this regard is the consideration of defences. In particular, where the referring party is seeking the payment of money the responding party is invariably entitled to raise any counterclaims arising out of the same project.⁹
- 4.2. It is recommended that an adjudicator should address separately in the decision each issue that has been raised by each party. If the parties' submissions are set out in an unclear or confusing manner, consideration should be given to drafting a list of issues for the parties to comment upon prior to production of the decision.
- 4.3. It is, however, important to distinguish between the substantive legal or factual issues and the evidence which goes to those issues. It is not usually practicable for every aspect of the evidence to be meticulously considered, weighed up and rejected or accepted in whole or in part and an adjudicator need not do so.
- 4.4. An adjudicator should be sure to differentiate between defences which are rejected because the adjudicator does not consider that he has jurisdiction and defences which are rejected because they fail on the facts of the case. In particular, it is important to note that a failure to serve a withholding or pay less notice does not deprive the adjudicator of jurisdiction to consider a counterclaim, it simply means that the counterclaim should be immediately rejected on its merits.

Preliminary Indications

- 4.5. An adjudicator has been known prior to his receipt of the Defence to issue a provisional draft of his decision for comment by the parties and the Court of Appeal concluded that this

⁹ See *Pilon Ltd v Breyer Group Plc* [2010] EWHC 837 (TCC).

did not amount to bias on his part.¹⁰ Nevertheless this is thought not to be good practice in normal circumstances. However, in instances where, having received all the evidence from both sides, the adjudicator is considering deciding the case on a basis or on evidence not put forward by either party he must provide both parties with the opportunity to comment on said basis or evidence prior to reaching his final decision. This includes instances where the adjudicator has obtained third party assistance such as advice from a legal or professional expert.¹¹

¹⁰ *Lanes Group Plc v Galliford Try Infrastructure Limited* [2011] *EWCA Civ 1617*

¹¹ *BAL (1996) Ltd v Taylor Woodrow Construction Ltd* [2004] All ER (D) 281 (Feb).