

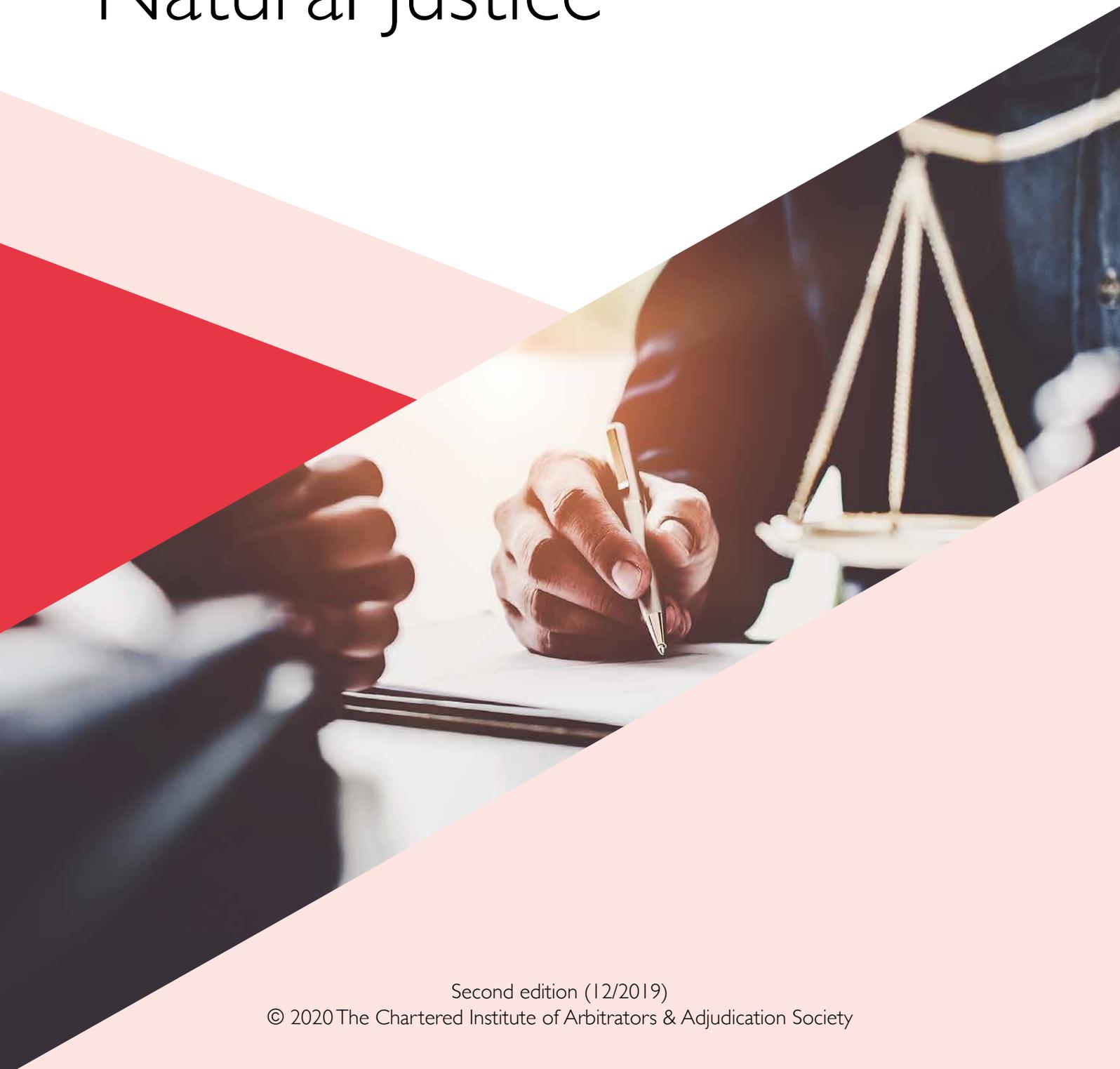


Adjudication
Society



CI Arb
evolving to resolve

Guidance Note: Natural Justice



Second edition (12/2019)

© 2020 The Chartered Institute of Arbitrators & Adjudication Society

Table of Contents

1. Introduction	2
2. Initial Appointment	2
3. Conduct of the Adjudication	4
4. The Decision	7
5. Postscript	8

Acknowledgments

Ciaran Fahy (Chairman of the Working Group)

Jeremy Glover, Partner, Fenwick Elliott LLP

Matt Molloy, MCMS

Philip Fidler, Dispute Decisions Ltd

Rob Horne, Osborne Clarke LLP

Susan Francombe, The Business of Building

John Riches, Henry Cooper Consultants

Lawrence Davies, Pinsent Masons LLP

Nicholas Gould, Fenwick Elliott LLP

Published by

Adjudication Society
www.adjudication.org

The Chartered Institute of Arbitrators (CI Arb)
12 Bloomsbury Square London
WC1A 2LP
www.ciarb.org



Guidance Notes for Adjudication

The Adjudication Society and Chartered Institute of Arbitrators have worked jointly since 2010 to produce a series of Guidance Notes dealing with Adjudication in England, Wales and Scotland.

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 Notes try to identify a sensible or practical approach to some of the everyday problems encountered in adjudication. It is an attempt to establish current best practice and, to that end, updated guidance notes will be provided from time to time.

The first edition of this Guidance was published on the websites of The Adjudication Society (www.adjudication.org) and the Chartered Institute of Arbitrators (www.ciarb.org) in April 2013. This current edition results from a review by a Working Group set up by the Practice and Standards Committee (PSC) of the Chartered Institute of Arbitrators with assistance from the Adjudication Society.

Ciaran Fahy

Chairman, Guidance Note Working Group



1. Introduction

1.1. An Adjudicator should at all times behave in accordance with the rules of natural justice. At a general level, this means giving each party a fair hearing and ensuring that the conduct of the Adjudicator does not give rise to a perception of bias. As Mr Justice Fraser reminded us in 2017, adjudication is:

“a formal dispute resolution forum with certain basic requirements of fairness.”¹

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 to accept the appointment. The two particular matters which the Adjudicator ought to consider are:

2.1.1. Whether the Adjudicator 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 the Adjudicator is, or appears to be, affected by bias: in particular thought must be given to the appearance of bias. The test to be applied at all times is whether a fair minded and informed observer² would conclude that there was a real possibility or a real danger of bias.³

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. This means that potential Adjudicators should consider carefully the extent of their previous involvement with either of the parties to the adjudication in question, including the

¹ Beumer Group UK Ltd v Vinci Construction UK [2016] EWHC 2283 (TCC).

² In the case of Helow v The Secretary of State for the Home Department [2008] UKHL 62, which decided whether or not a female judge should have recused herself and set out the thought processes such a person should adopt, Lord Hope said that the “fair minded observer:” is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious... she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.”

³ Amec Capital Projects Ltd v Whitefriars City Estates Ltd [2004] EWHC 393 (TCC)

number of times they have been appointed in adjudications (or other cases) with the parties to the dispute or their advisors.⁴

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.⁵

2.2.4. Unless exceptional circumstances present themselves, there is no objection to accepting serial appointments between the same parties. However, an Adjudicator should disclose any involvement in a simultaneous adjudication involving one of the parties.⁶

2.3. Where there is some doubt, 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 may approach an Adjudicator prior to the Referral to confirm that individual's 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.⁷

Dispute appropriate for adjudication

2.5. Shortly after receipt of the Referral, even if the issue is not raised by the parties, the Adjudicator ought to consider if the dispute can be properly decided and, in particular, should consider the following:

- Is the dispute too complex to be fairly determined within 28 days?
- Does the Adjudicator have the necessary expertise?
- If there has been a previous adjudication, has the Adjudicator been asked to decide a matter on which there is already a binding decision by another Adjudicator

2.6. Therefore the Adjudicator should review the nature of the dispute, including its size and complexity, and only proceed if satisfied that broad justice can be done between the parties in the time available.⁸ An Adjudicator ought not to accept an appointment if the Adjudicator is unable to devote the time necessary to resolve the dispute.

⁴ See *Eurocom Ltd v Siemens Plc* [2014] EWHC 3710 (TCC) and *Cofely Ltd v Bingham and Knowles Ltd* [2016] 2 All ER (Comm) 129. In *Cofely*, the arbitrator's failure to disclose the fact that Knowles had been involved (either directly as a party or in its role as representing parties) in appointing him as arbitrator/Adjudicator in 25 cases over the course of three years, despite the requirement in his nomination form to disclose 'any involvement, however remote' with the parties, contributed to the finding of apparent bias.

⁵ 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).

⁶ *Beumer Group UK Ltd v Vinci Construction UK* [2016] EWHC 2283 (TCC).

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.

⁸ *Amec Group Ltd v Thames Water Utilities Ltd* [2010] EWHC 419 (TCC).

2.7. 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.

2.8. 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.⁹ 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 decided there was enough time to do broad justice between the parties.

2.9. 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.¹⁰

2.10. 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.

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, at the outset of the adjudication, 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.

⁹ See *Coulson on Construction Adjudication*, 3rd Ed, 2015 at para 13.13

¹⁰ *HS Works Ltd v Enterprise Managed Services Ltd* [2009] EWHC 729 (TCC).

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 and, thus, must be avoided.¹¹

3.6. At the outset of the adjudication, the Adjudicator should direct that all communications by one party with the Adjudicator should be in writing, copied to the other party at the same time and marked as such. Similarly, the 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 this should be passed to the Adjudicator's administrator who would 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 immediately afterwards.¹²

Dealing with unrepresented parties

3.8. The Adjudicator must always remain independent of the Parties. This can be difficult where one of the parties is unrepresented and/or unfamiliar with the adjudication process. Helping the unrepresented Party may easily create the impression of bias. An Adjudicator cannot make the case for that party, only try to prevent one party from taking unfair advantage.

Employing third parties and assistants

3.9. An Adjudicator can seek the assistance of third parties and/or assistants provided that this is notified in advance and the parties are given a fair chance to review any formal advice that may be obtained. For example:

3.9.1. In the case of *John Sisk & Son Ltd v Duro Felguera UK Ltd*,¹³ the Adjudicator employed an assistant to attend at a meeting with the parties and thereafter to go through the 20 lever arch files of information and assemble data, check calculations and proof documents. This was not a breach of natural justice as the Adjudicator did not delegate the decision-making role;

¹¹ *Woods Hardwick Ltd v Chiltern Air Conditioning Ltd* [2001] BLR 23.

¹² If the practice recurs, the Adjudicator should advise the party concerned to cease. Particular care should be taken in disputes where there are a number of adjudications. In *Paice & Anr v MJ Harding (t/a MJ Harding Contractors)*, 2015] EWHC 661 (TCC) was one such case and the Adjudicator's assistant had lengthy telephone calls with one of the parties, conversations which were not subsequently disclosed by the Adjudicator. This amounted to a breach of natural justice.

¹³ 2016] EWHC 81 (TCC).

3.9.2. *Highlands and Islands Authority Ltd v Shetland Islands Council*.¹⁴ The Adjudicator made a three-minute call to senior counsel to check a point. Even though the advice was free, this was a breach of natural justice, because the advice was not shared with the parties, who were not given the chance to consider it.

3.9.3. *RSL (South West) Ltd v Stansell Ltd*. The Adjudicator based their decision upon the final report of an appointed planning expert without giving the parties the opportunity to review the report. Whilst the decision-making role was not delegated, this was still a breach of natural justice.¹⁵

3.9.4. In the case of *Dickie & Moore Ltd v McLeish & Others*¹⁶, where the Adjudicator had employed a quantity surveyor as a quasi-pupil, Lord Doherty considered that whilst the adjudicator ought to have told the parties what the pupil was doing, in the whole circumstances the failure to do so was not a material breach of the requirements of natural justice. The services which were provided were essentially of an administrative nature. They were not quantity surveying advice. All of the material decisions in the adjudication were taken by the Adjudicator himself solely on the basis of the information which the parties presented.

Making use of own experience

3.10. An Adjudicator can make use of that Adjudicator's own experience; It is after all, one reason for the appointment. However, some care should be exercised. In the case of *Herbosch-Kiere Marine Contractors Ltd v Dover Harbour Board*,¹⁷ the Adjudicator used a method, based on the Adjudicator's own knowledge and experience, to assess the sum due to the contractor pursuant to the final account. However, the method used was not one which had been put to the Adjudicator by either party. Consequently, they should have been given the opportunity to comment. Thus, inappropriate use of the Adjudicator's experience is likely to be seen as a breach of natural justice and lead to an unenforceable decision.

Hearings

3.11. 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.

3.12. 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.

3.13. 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; an Adjudicator is not normally empowered to conduct proceedings under oath.

¹⁴ [2012] CSOH 12.

¹⁵ [2003] EWHC 1390 (TCC).

¹⁶ [2019] CSOH 71

¹⁷ [2012] EWHC 84 (TCC).

3.14. 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.¹⁸

Site visits

3.15. An Adjudicator may wish to carry out a site visit as part of the adjudication.¹⁹ If this is to be done, the Adjudicator must give both parties adequate notice and seek to agree what representatives will be in attendance from both parties. An Adjudicator should avoid a site 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. Care must be exercised on such site visits to avoid discussions which could be seen as inappropriate evidence taking.

4. The Decision

Addressing all issues

4.1. An Adjudicator should consider all issues raised by both parties provided that they fall within the Adjudicator's 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 defence/set off arising out of the same project.²⁰

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 of lack of 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 defence/set off; it simply means that the defence/set off should be immediately rejected on its merits.

¹⁸ *Ardmore Construction Ltd v Taylor Woodrow Ltd* (2006) CILL 2309

¹⁹ The courts have held that the procedure of the adjudication, including whether or not there should be a site visit, was a matter uniquely for the Adjudicator to decide in order to reach a decision. See *Wycombe Demolition Ltd v Topevent Ltd* [2015] EWHC 2692 (TCC), where the Adjudicator was criticised by one of the parties for refusing to make a site visit and *The Vinden Partnership Ltd v Orca LGS Solutions Ltd & Anor* [2017] EWHC B24 (TCC) where the Adjudicator was criticised for holding a site visit. The court supported both the Adjudicators in question.

²⁰ See *Pilon Ltd v Breyer Group Plc* [2010] EWHC 837 (TCC).

Preliminary indications

4.5. An Adjudicator has been known, prior to receipt of the Defence, to issue a provisional draft decision for comment by the parties and the Court of Appeal concluded that this did not amount to bias on the part of the Adjudicator.²¹ Nevertheless this is thought not to be good practice in normal circumstances. However, if, 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, the Adjudicator must provide both parties with the opportunity to comment on said basis or evidence prior to reaching the final decision. This includes instances where the Adjudicator has obtained third party assistance such as advice from a legal or professional expert.²²

5. Postscript

5.1. Mr Justice Coulson at a Society of Construction Law meeting held on 11 May 2010, set out his “seven golden rules for Adjudicators”. Whilst not all of these relate directly to natural justice, and do not address the time period before the Adjudicator accepts the appointment, they are a very useful checklist:

(1) Be bold;

(2) Address jurisdiction issues early and clearly: The Adjudicator should always deal expressly with any jurisdictional challenge as soon as it is raised;

(3) Identify and answer the critical issues(s);

(4) Be fair: Wherever possible, the Adjudicator should properly consider every aspect of the parties’ submissions. Ensure the decision is clear and free from ambiguities;

(5) Provide a clear result: Explain precisely what each party must do as a consequence of the decision;

(6) Complete and issue the Decision on time: Keep control of the agreed timetable;

(7) Try and avoid slips and errors.



²¹ *Lanes Group Plc v Galliford Try Infrastructure Limited* [2011] EWCA Civ 1617

²² *BAL (1996) Ltd v Taylor Woodrow Construction Ltd* [2004] All ER (D) 281 (Feb).



Adjudication
Society



CI Arb
evolving to resolve

www.ciarb.org

