



Welcome to the March edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

**In this issue find out some practical tips on adjudication**

# Insight

## Adjudication - some practical tips for the responding party

This is the second of a two part series on practical tips for the responding party on (i) how best to respond to adjudication proceedings (ii) tactics and (iii) possible lines of defence that might be advanced in answer to the adjudication proceedings.

*Issue 8 of Insight* considered adjudication from the referring party's perspective.

### Whilst the dispute is brewing

Whilst most of the initial work in adjudication is carried out by the referring party, a Notice of Adjudication very rarely arrives out of the blue and you should therefore have at least some advance notice that an adjudication is in prospect.

As soon as you suspect proceedings will be issued, you should take immediate steps to ensure that (ideally contemporaneous) supporting documentation is available to support your position. These documents carry the most probative weight. Who are the key personnel who could give direct witness evidence? Do they still work for you? Thought should also be given as to whether any external expert assistance might be needed (for example, from a QS or programming expert) in response to any technical matters that might be raised.

Of equal importance (in light of the very concentrated timetable that accompanies adjudication), is for you to ensure adequate in-house and external resources are available to deal with all matters that are likely to be raised in the Referral, and for the likely duration of the adjudication.

You should also consider making a final approach to the referring party to see whether there is any common ground between the parties that can be discussed at a round table meeting. Beware the danger of becoming locked into the dispute process. If some of the matters in dispute can be agreed, you can reduce the scope and cost of the adjudication. This would be to everyone's advantage.

### The response

It goes without saying that as soon as the Referral is served, you should immediately begin to prepare the Response as you will usually only have seven days to serve it: your priority should be to avoid any last minute rushing which may impact on the quality of the Response.

In terms of the content of the Response, the same rules apply to Responses as to Referrals. They should be to the point, clear and follow a logical structure, usually with reference to the points raised in the Referral as appropriate. As with Referrals, fully supporting documentation, witness statements and expert comment (as might be appropriate) should be included. If these can be cross-referenced so much the better. Do what you can to make the adjudicator's life easier. You want to be sure your case can be understood.

There is no limit as to what can be raised in the Response and so you may wish to marshal new arguments that you have never previously raised.

### Challenging the adjudication process

Once the adjudication is on foot, there are two avenues open to you to object to the adjudication process. You may (i) challenge the jurisdiction of the adjudicator and / or (ii) argue that there has been a breach of the rules of natural justice. Each of these are considered in turn below.

#### Contesting jurisdiction

The first thing you should consider when adjudication proceedings are commenced is whether you have valid grounds to challenge the jurisdiction of the adjudicator. If you have a genuine argument as to jurisdiction, then you must raise it without delay and maintain it throughout the adjudication proceedings. This is because the courts have made it very clear that if a jurisdictional issue is not raised whilst the adjudication is underway, the responding party will lose the right to raise it at any later enforcement proceedings. As a matter of practice therefore, reservations are often issued out of an abundance of caution and an adjudication with no reservation as to jurisdiction is rare.

The most common jurisdictional objections are that (i) no dispute has crystallised (ii) there is no contract (or



# Insight

that there was no written contract in the case of contracts entered into before 1 October 2011) (iii) the contract is not a construction contract for the purposes of the Housing Grants, Construction and Regeneration Act 1996 or (iv) there are multiple disputes and only one dispute can be referred to adjudication at any one time.

Some responding parties seek to raise jurisdictional challenges that have little merit as a matter of course as a tactical device to try and place the referring party on the back foot. However, these challenges tend to be unproductive as they can increase the costs of the adjudication and the courts will usually enforce adjudicators' decisions unless there is a clear jurisdictional error. Adjudication decisions only bind the parties on an interim basis (in other words, until the dispute is finally determined by legal proceedings, by arbitration or by agreement between the parties) and the courts' approach is reflective of the rough and ready nature of the adjudication process.

## *Breach of natural justice*

A breach of the rules of natural justice might also entitle you to resist enforcement of the award at any subsequent enforcement proceedings.

The rules of natural justice require every party to have the right to a fair hearing and to be heard by an impartial tribunal.

The most common breaches of the rules of natural justice are failures by the adjudicator to (i) consider defences that are properly put forward (ii) address (but not necessary rule correctly on) the substantive legal or factual issues (iii) consult with the parties on communications he has received or his approach to the dispute or (iv) use his own knowledge

and experience in respect of matters raised during the adjudication without first giving the parties an opportunity to comment.

As can be seen from the above, natural justice might seem to be a relatively vague concept which appears easy to prove in enforcement proceedings. However, in practice, establishing a breach of the rules of natural justice is deceptively difficult and you should think very carefully about the merits of any challenge prior to proceeding.

As a general rule, trivial or peripheral breaches of natural justice will not invalidate adjudicators' decisions. The breach must usually be (i) material (ii) significant and (iii) prejudicial. These are quite difficult tests to overcome and it will therefore not come as a surprise that the increasing body of case law confirms the courts' tendency to support enforcement. The most common situation in which a challenge might be successful is if, for example, the adjudicator fails to consider an aspect of the defence which is manifestly and seriously unfair to the responding party. But this is relatively rare in practice. Remember you only read about the cases which make it to court. These are a small percentage of the adjudications that take place.

A word of warning if you do seek to make a challenge and do not succeed: unmeritorious or superficial challenges on enforcement carry the risk of an order that you pay the referring party's legal costs of the enforcement application on an enhanced, or indemnity basis. You would also have to pay your own costs of the enforcement proceedings on top of the referring party's costs. Unsuccessful challenges can be costly.

## Conclusion

The key to success in adjudication is adequate preparation. The timescales are very short and last minute rushing should be avoided if at all possible to ensure that the Response is of good quality.

It is equally important for the responding party as it is for the referring party to undertake appropriate preparatory work as soon as adjudication proceedings seem inevitable. Steps should be taken to start preparing the Response, any supporting documentation, witness and / or expert evidence that may be needed as soon as the Referral is served. Key personnel should also be made available for the likely duration of the adjudication.

Whilst the adjudication is on foot (and even more so if the adjudicator's decision goes against you) it can be very tempting to raise as many technical points as possible relating to jurisdiction and possible breaches of the rules of natural justice, in an effort to obtain a tactical advantage over your opponent. Do not lose sight of the bigger picture when making these challenges and remember it is becoming increasingly difficult to challenge enforcement of an adjudicator's decision unless the circumstances point to a clear error. Equally, any breach of the rules of natural justice would have to be quite serious.

Prior to taking steps that you may later regret, you should think carefully about whether the time and cost of challenging jurisdiction and / or alleging a breach of the rules of natural justice is warranted, as it might do more harm than good and you may be left with nothing more than an adverse costs order.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston. [lkingston@fenwickelliott.com](mailto:lkingston@fenwickelliott.com). Tel +44 (0) 207 421 1986

Fenwick Elliott LLP  
Aldwych House  
71-91 Aldwych  
London WC2B 4HN  
[www.fenwickelliott.com](http://www.fenwickelliott.com)