HOW TO PREPARE FOR AN ADJUDICATION - TACTICS, STRATEGIES, PLANNING AND PANIC

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Construction dispute interim adjudication has been introduced in the new *Construction Act*[1] and will apply as of October 1, 2019 to all public and private sector construction contracts entered into on or after October 1, 2019, except with respect to those contracts or subcontracts that were the subject of a procurement process relating to the improvement at issue prior to October 1, 2019. (A procurement process is commenced at the earliest of the making of a request for qualifications, request for quotation, request for proposals, or a call for tenders.[2])The *Act* provides for adjudication as a cost effective, flexible, and swift means of enforcing the prompt payment regime set out in the Act, which will take effect as of the same date as interim adjudication. Parties to a construction contact or subcontract will not be able to contract out of the prompt payment or adjudication provisions set out in the *Act.*

The UK Experience

As noted in the report entitled *Striking the Balance: An Expert Review of Ontario's Construction Lien Act*[3] which led to the introduction of prompt payment and adjudication through amendments made to the *Act*, the phrase "pay now, argue later" has been used to describe adjudication under the *Construction Act* (UK).[4] This description is equally applicable to adjudication under the new *Act.* By design, adjudication is "rough justice", insofar as, "the justice that is meted out is not always as pure and as well prepared for as cases which proceed to a full trial court or to a substantive hearing before an Arbitrator."[5]

In *Jacques (t/a C&E Jacques Partnership) v Ensign Contractors Ltd.*,[6] the court emphasized the distinctive aspects of adjudication, namely that the right answer is subordinate to the expediency with which an answer must be obtained.

In the UK, matters being referred to adjudication include large and complex disputes involving multiple issues rather than being distinct payment issues resulting in an increase in the cost of adjudication. Such cases, more often than not, require both parties to have legal representation, and depending on the nature of the dispute, expert evidence may also be required. Another study of the adjudication experience in the UK bemoans the procedural and jurisdictional wrangling that has arisen. In a paper entitled "UK Construction Participants' Experiences of Adjudication" wherein the author notes there is criticism of the increasingly legalistic character of adjudication, noting that:

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[1] *Construction Act*, RSO 1990, c C.30, PART II.1, ss 13.1-13.23 [*Act*]; O.Reg 306/18, Adjudications under Part II.1 of the *Construction Act* [*Adjudications Reg*].

[2] Act, section 1(4).

[3] Ontario, Report prepared for the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure, *Striking the Balance: An Expert Review of Ontario's Construction Lien Act* (Bruce Reynolds & Sharon Vogel: Delivered April 30, 2016) [*Expert Report*].

[4] Nicholas Dennys, Mark Raeside & Robert Clay, eds, *Hudson's Building and Engineering Contracts, 13th ed* (London, UK: Sweet & Maxwell, 2010) at 11-010 [*Hudson's*] citing *RJT Consulting Engineers Ltd v DM Engineering (N.I.) Ltd*, [2002] EWCA Civ 270; *Thomas-Frederic's (Construction) Ltd v Wilson*, [2003] EWCA Civ 1494; *Pegram Shoplifters Ltd. v Tally Weijl (UK) Ltd.*, [2003] EWCA Civ 1750, as cited in the *Expert Report*, *supra* note 2 at 202..

[5] *Hudson's*, *supra* note 3 at 11-010, citing *Gipping Construction Ltd. v Eaves Ltd.*, [2008] EWHC 3134 (TCC) at para 8.

[6] [2009] EWHC 3383 (TCC) at para 21.

> It has now adopted all of the hallmarks of a mini litigation...Most adjudications start with rather pointless jurisdictional and procedural wrangling. They continue with lengthy position papers that are pleadings in disguise. Parties then produce reports from independent programmers or cost advisers and even witness statements. Finally, as we have seen, despite the exemplary lead taken by the Technology and Construction Court, there is endless argument about enforcement.[7]

The UK Adjudication Society's report entitled "Report No. 16: Research analysis of the development of Adjudication based on returned questionnaires from Adjudicator Nominating Bodies (ANBs)" [8] provides some insight into the impact of adjudications in the construction industry in the UK. First, Report No. 16 notes that adjudications have become increasingly "legalistic" in nature. The top three disciplines of adjudicators are lawyers, quantity surveyors and civil engineers, accounting for 83.7% of all adjudicators in Year 19 and 85% in the six month period to October 2017.[9] Of particular note is that lawyers account for around 42% (in year 19 of the adjudication regime) of all adjudicators registered with the authorized nominating boards in the UK; an increase from 35% in the previous year.[10] The authors note that these statistics reflect a continued trend of an increase in the number of lawyer adjudicators having steadily risen in recent years, which suggests that adjudication is increasingly a legalistic process, rather than a technical process, contrary to what was originally envisaged. Report No. 16 also concludes that adjudication remains a popular choice for resolving construction disputes and parties are increasingly opting to refer legally complex disputes to adjudication.[11]

Stories abound of adjudication by ambush wherein a requesting party who has had months to prepare its case, including the preparation of the notice of adjudication and supporting documentation, drops the bomb on the responding party at a time designed to instill both panic and hardship, leaving the responding party with a short time frame of as little as 5 or perhaps 14 days (with an extension granted by the adjudicator) to respond to voluminous material. Such disputes can include disputed changes, assessments of extension of time claims and any associated costs arising from such delays as well as defects in design and workmanship. In such situations, the responding party is faced with the prospect of diverting internal resources or retaining external resources (both at considerable expense) to compile a responding position.

The question is, what does this new process of interim dispute resolution mean for lawyers who are assisting their clients in preparing to commence an adjudication or to respond to a notice of adjudication? In this paper, we propose to highlight the various steps to take in preparation for an adjudication, including references to cases taken from other jurisdictions where adjudication has been in place for some time.

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[7] Andrew Agapiou, "UK Construction Participants' Experience of Adjudication" (June 2013) 166: MP3, Procurement & L.

[8] J L Milligan and L H Cattanach, "Report No. 16 of the Adjudication Society, Research analysis of the development of Adjudication based on returned questionnaires from Adjudicator Nominating Bodies (ANBs)" (April 2018), Construction Dispute Resolution, available online at <https://www.adjudication.org/sites/default/files/Report%20No.> [Report No. 16]

[9] Report. No. 16, supra note 8 at 8.

[10] Report. No. 16, supra note 8 at 8.

[11] Report. No. 16, supra note 8 at 12.

DO I HAVE THE RIGHT TO THE DETERMINATION OF A DISPUTE BY ADJUDICATION?

Is there an existing construction contract or subcontract?

Any party to a construction contract has the right to refer a dispute arising under the contract to adjudication in accordance with those matters enumerated in section 13.5 of the *Act*. A construction contract does not include, for example, a maintenance contract for the provision of maintenance services. It is important to note that adjudication does not apply with respect to any portion of a project agreement that provides for the operation or maintenance of the improvement by the special purpose entity, or to any portion of an agreement between the special purpose entity and the contractor or any other subcontract made under the project agreement that pertains to the operation or maintenance of the improvement by the special purpose entity.[12]

Similarly, in situations where the parties do not have a written construction contract or subcontract, a debate may ensue as to whether or not there is an existing construction contract or subcontract that is subject to a right to adjudication of payment disputes. Consider, for example, how a party requesting an adjudication with no written contract or subcontract gives a copy of the contract or subcontract to the adjudicator together with the notice of adjudication in accordance with the requirements set out in the *Act* and the *Regulations*? The lack of a written contract or subcontract will certainty complicate matters. In one UK case, the adjudicator accepted that the contract at issue was comprised of terms set out in e-mail correspondence.

Has the work or the services to be provided under the contract or subcontract been completed?

If the contract or subcontract work and/or services has been completed, then there is no right to adjudication unless the parties to the adjudication agree otherwise.[13] A party to a construction contract has the right to refer a payment dispute to an adjudicator (subject to the criteria set out at section 13.5 of the *Act*) by giving a notice of adjudication to the responding party and by delivery through electronic means to the Authorized Nominating Authority (the "Authority")[14] at any time, prior to the completion of the contract.

When was the contract or subcontract entered into?

Prompt payment and adjudication apply to contracts and subcontracts entered into on or after October 1, 2019, except where the procurement process for the improvement that was the subject of the contract or subcontract was commenced by the owner of the premises before October 1, 2019, in which case, prompt payment and adjudication will not apply.

Does the nature of the dispute fall within the criteria set out at section 13.5 of the *Act* or any other criteria agreed to by the parties, including any criteria set out in the contract or subcontract at issue?

1. The valuation of services or materials provided under the contract.

[12] *Act*, *supra* note 1 at s 1.1(2.1).

[13] *Act*, *supra* note 1 at s 13.3 (3).

[14] *Adjudications Reg*, *supra* note 1 at s 16.

2. Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order.

3. Disputes that are the subject of a notice of non-payment under Part I.1.

4. Amounts retained under section 12 (set-off by trustee) or under subsection 17 (3) (lien set-off).

5. Payment of a holdback under section 26.1 or 26.2.

6. Non-payment of holdback under section 27.1.

7. A person to whom payment is guaranteed under a labour and material payment bond required under subsection 85.1(4) of the *Act* may refer to adjudication any dispute with the principal and the surety in relation to the payment guaranteed under the bond[15] ;

8. Any other matter that the parties to the adjudication agree to, or that may be prescribed.

In this regard, the parties may provide in the contract or subcontract what types of disputes may be subject to adjudication, provided that the parties cannot contract out of the *Act.* As such, the parties can agree that disputes involving defects of design and workmanship or extensions of time may be determined by adjudication. Arguably such disputes are covered by the broad language set out in the *Act*, which includes the "valuation of services or materials provided under the contract" which would necessarily include such issues as the impact of delays and defects in design and workmanship on the value of the services or materials. On the other hand, it is not clear under the *Act*, whether an adjudicator has jurisdiction to determine disputes as to whether or not a construction contract has been properly terminated, or recovery of costs to complete a project following termination of a construction contract, absent the agreement of the parties. The question of whether the contract or subcontract was terminated for cause is a question of law, and is not at its core a payment dispute. While there may be ancillary payment issues that arise once the contract or subcontract has been terminated, such as what amounts are owing to the terminated contractor arising from the termination, the termination issue begins with a determination of whether a party, under the law, had cause to terminate the contract. The purpose of adjudication under the new regime is to facilitate the flow of funds during a project. The *Act* is clear that the adjudicator has no jurisdiction to determine disputes after the contract is completed, absent the agreement of the parties.[16] In addition, one of the grounds for judicial review of an adjudicator's decision arises from a situation where "the contract or subcontract is invalid or "has ceased to exist".[17] This language is similar to that found in section 46(1) of the *Arbitration Act, 1991*. Based on the jurisprudence under the *Arbitration Act*, it is possible that a contract will "cease to exist" in the case of a mistake or where parties have terminated the contract. Arguably, an adjudicator would have no jurisdiction to determine such disputes absent the agreement of the parties, as the jurisdiction of the adjudicator arises from the *Act*, and the existence of a contract pertaining to the construction of an improvement. In short, adjudication is rooted in privity of contract, but only time will tell how these provisions will be interpreted by the courts.

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[15] *Adjudications Reg*, *supra* note 1 at s 25.

[16] *Act*, *supra* note 1 at s13.5(3).

[17] *Act*, *supra* note 1 at s 13.18(5) 2.

Ensure that there is a dispute that has crystalized. In other words, ensure that any steps set out in the contract as a prerequisite to the right to commence a dispute have been satisfied. For example, if the parties are negotiating the subject of a dispute in accordance with the dispute resolution procedure and have not completed the negotiation stage set out in the contract, the party who receives a notice of adjudication may argue that the adjudicator does not have the requisite jurisdiction for determination of the dispute as the “dispute has not yet crystalized”. Such a requirement however, would not apply to issues arising from matters involving disputes that are the subject of a notice of non-payment under Part I.1. For example, in the UK case of *GPS Marine Contractors Limited v. Ringway Infrastructure Services Limited*[18], the responding party took the position that the adjudicator did not have jurisdiction to determine the dispute on the basis that there had been a compromise or withdrawal of the dispute by reason of an agreement that had been reached between the parties. Within three days of receiving the notice of adjudication, the responding party wrote to the adjudicator and the requesting party setting out seven grounds of challenge which commenced as follows:

> “Our client does not accept that this adjudication has been validly commenced or that you have jurisdiction in respect of the referring party’s claim for a number of reasons. These include the following….”

At the end of the submission, the responding party noted:

> “There may well be further jurisdiction issues which we have not yet had time or opportunity to investigate. Our client’s position in this respect is reserved and the above list should not be understood to be exhaustive.”[19]

The adjudicator considered the matters identified by the requesting party and concluded that he should proceed with the adjudication. The court also considered whether or not a general reservation of rights regarding jurisdiction was sufficient, noting that:

> “The question in this case is therefore, whether the words of general reservation were sufficiently clear to prevent Ringway’s subsequent participation in the adjudication from amounting to a waiver or an ad-hoc submission. In my judgement, the words used both in the letters of 3 and 10 July 2009 and in the Response were sufficient to prevent a waiver of any jurisdictional argument, including one based on the alleged agreement of compromise/withdrawal and, as a result, there was no ad-hoc submission”.[20]

Consider whether or not adjudication is the right method of dispute resolution.

If the responding party is insolvent or its financial status is such that any determination for payment in favour of the requesting party is likely to be unenforceable, adjudication is likely not the best means of dispute resolution. Similarly, if the dispute involves complex issues of delay, large dollar amounts or unusually complex technical design or construction issues, the “quick and dirty” method of adjudication may not be the best means of dispute resolution.

How can I commence an adjudication?

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[18] *GPS Marine Contractors Limited v. Ringway Infrastructure Services Limited,* [2010] EWHC 283 (TCC)

[19] Ibid, at paras 4 and 5

[20] Ibid, at para 42

Prepare a Notice of Adjudication

The *Act* provides that the party to the contract or subcontract who wishes to refer a dispute to adjudication shall provide[21] to the other party a written notice of adjudication that includes the nature and a brief description of the dispute including:

(a) the names and addresses of the parties;

(b) the nature and a brief description of the dispute, including details respecting how and when it arose;

(c) the nature of the redress sought; and

(d) the name of a proposed adjudicator to conduct the adjudication.[22]

Pursuant to section 13.5(4) of the *Act*, an adjudication may only address a single matter, unless the parties to the adjudication and the adjudicator agree otherwise. This issue was considered in the U.K. decision of *Deluxe Art & Theme Ltd v. Beck Interiors Ltd.* (the "*Deluxe Art* Decision").[23] In this decision, the Technology and Construction Court held that "[o]n its face, paragraph 8(1) [of the Scheme for Construction Contracts] allows the adjudicator to deal with more than one dispute at the same time, but only with the consent of all the parties."[24] The claimant, Deluxe Art & Theme Ltd. ("DATL"), sought by way of summary judgment to enforce two decisions made by an adjudicator, Mr. Matthew Bastone. Justice Coulson of the Technology and Construction Court while enforcing the decision in Adjudication 2 declined to enforce the decision in Adjudication 3 because it constituted a separate dispute, and Beck had not consented to the adjudicator dealing with more than one dispute at a time. The responding party, Beck had retained DATL as a subcontractor. There were three separate disputes between the same parties which were referred to adjudication with the same adjudicator being appointed in each case. In Adjudication 1, by a decision dated July 10, 2015, the adjudicator awarded DATL (the subcontractor) the sum of £72,888.95 plus VAT and interest for variation and acceleration costs. Adjudication 2 started on October 22, 2015, and concerned "the further extension of time due to [DATL] and the amount of loss and/or damage to be reimbursed by [Beck] to [DATL] as a consequence of the prolongation of the execution of the subcontract work on site". Adjudication 3 was commenced on November 9, 2015 during the currency of Adjudication 2 and prior to the adjudicator reaching a decision in Adjudication 2. As a result of the policy of the "Authority", RICS, of appointing the same adjudicator to deal with disputes under the same contract, RICS again appointed the same adjudicator for Adjudication 3. By letter dated November 24, 2015, Beck objected to the adjudicator dealing with two disputes at the same time. It was not suggested that this objection was made too late or that the delay in making the objection amounted to a waiver of the jurisdictional challenge or an acceptance by Beck of the adjudicator's jurisdiction in Adjudication 3. Adjudication 3 concerned "an alleged failure on the part of Beck to reduce the retention percentage from 5% to 2.5% at practical completion".

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[21] See draft commentary Amending O. Reg. 306/18 under heading Additional Questions and Proposals. "1. Provision of adjudication documents. Option 2: Add a provision to the adjudication regulation providing that unless otherwise directed by the adjudicator, the documents under section 13.11 of the *Act* and the response under section 13.11.1 of the Act may be served in any manner permitted under the rules of court."

[22] Act, *supra note 1 at* s 13.7.

[23] *Deluxe Art & Theme Ltd v. Beck Interiors Ltd.*, [2016] EWHC 238 (TCC) as cited in Expert Report, supra note 3, at p. 232

[24] Deluxe Art at para 26.

Counsel for the subcontractor, DATL argued that in determining whether or not there was more than one dispute that the principles set out in the decision of Akenhead J *in Witney Town Council v. Beam Construction (Cheltenham) Ltd.*[25] applied. On an application of the principles set out in Akenhead J's decision, counsel for the subcontractor argued that the delay claim and the retention claim were both part of the same dispute because they both related to what was due on June 30, 2015, the date of practical completion. The court in rejecting that contention made reference to the proper application of the "Akenhead J principles" as follows:

> "A useful if not invariable rule of thumb is that, if disputed claim No. 1 cannot be decided without deciding all or parts of disputed claim No. 2, that establishes such a clear link and points to there being only one dispute."

Justice Coulson noted that DATL's claim for an extension of time and loss of expense, could easily be decided without any reference to the claim for the failure to reduce retention, which was a separate and standalone claim. Justice Coulson went on to state that "there is no authority to support the proposition that two different disputes, deliberately raised by the claiming party in two separate adjudication notices, and described in very different terms, could still somehow be part of the same dispute. All of the authorities about the reference of more than one dispute, which culminate in *Witney Town*, were cases where the was one notice of adjudication, and the outcome depended on the nature of the issues that had been referred to the adjudicator under a single notice. "Thus while I accept that the mere fact that there were two notices may not necessarily be determinative, it might be thought that it would take a very unusual set of circumstances to conclude that the disputes referred to in the adjudication notices, started at different times, both formed part of the same dispute.

It is interesting to note that Justice Coulson also warned the parties about the number of documents filed for a purported "simple enforcement dispute", as follows:

> "I should say at the outset that I am extremely grateful to both counsel who dealt clearly and concisely with the issues. As practitioners experienced in this sort of work, I know they will have shared my consternation that a relatively simple enforcement dispute was the subject of no less than six full lever arch files. Four of these files were never referred to. It is exceedingly rare that any adjudication enforcement dispute requires more than one lever arch file of documents. The time is fast approaching when, unless the parties and their solicitors cooperate properly and comply with the TCC Guide, the court will simply refuse to hear cases with such promiscuous and unnecessary bundling."[26]

Under the new *Act*, if the same matter or related matters in respect of an improvement are the subject of disputes to be adjudicated in separate adjudications under subsections 13.5(1) and (2) of the *Act*, the parties to each of the adjudications may agree to the adjudication of the disputes together by a single adjudicator as a consolidated adjudication. If the parties to each of the adjudications do not agree to consolidate the adjudication, the contractor may, nevertheless require the consolidation of the adjudications, in accordance with the *Regulations*.[27] An example of a situation where a consolidation of related matters may be appropriate includes a claim made by the requesting party for a determination of

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[25] *Witney Town Council v. Beam Construction (Cheltenham) Ltd.* [2011] EWHC 2332 (TCC): [2011] BLR 707

[26] Deluxe Art at para 2

[27] Notice under subsection 18(1) of the Adjudications Reg in respect of an adjudication may not be given later than the fifth day after the adjudicator in the adjudication receives the documents required by section 13.11 of the *Act*, see *Adjudications Reg*, *supra* note 1 at s 18(3).

the “valuation of services or materials provided” with the responding party bringing its own notice of adjudication for “an extension of time and for valuation of services or materials” and for payment based on the valuation or the services or materials as determined by the adjudicator arising with respect to the same improvement.

Similar to the preparation of pleadings, the drafting of the notice of adjudication is extremely important as it frames the issues to be determined by the adjudicator. In short, “if the adjudicator has answered the right question in the wrong way, their decision will be binding, and if they answered the wrong question, the decision will be a nullity.”[28] By way of example, if the requesting party asks the adjudicator to “value the services or materials provided under the contract at $230,000” and does not add other qualifying language such as “or such other amount as the adjudicator determines”, then the adjudicator will not have the jurisdiction to determine any other amount in terms of the “value of the services or materials provided under the contract”. Similarly, if the requesting party only seeks the determination of the “value of the services or materials provided” without seeking a ruling for payment by the responding party to the requesting party of the amount determined by the adjudicator, then the adjudicator will not have the jurisdiction to make a finding that payment be made to the requesting party by the responding party.

With respect to adjudications of disputes wherein a notice of non-payment has been delivered, it is important to note that an owner who is refusing to pay all or a part of a proper invoice is required to provide a notice of non-payment specifying the amount of the proper invoice that is not being paid and detailing **all of the reasons for non-payment**.[29] [Emphasis added] The party to an adjudication responding to a notice of non-payment must be prepared to adjudicate the reasons for the non-payment. Arguably, the adjudicator is likely to reject a “defence” by an owner which provides reasons for non-payment in response to a notice of adjudication that are in addition to or different from the reasons for non-payment set out in the notice of non-payment, given the statutory requirement for the owner to specify “all of the reasons for non-payment” in its notice. In the case of a contractor who intends to withhold payment from its subcontractor by reason of receiving a notice of non-payment from the owner, the contractor must, in addition to giving a notice of non-payment to its subcontractor within the prescribed time, specifying the amount not being paid, include a copy of the notice of non-payment received from the owner and must provide an undertaking to refer the matter to adjudication under Part II.1 of the *Act* no later than 21 days after giving the notice of non-payment to the subcontractor.[30] Under this scenario, both the contractor delivering the notice of adjudication and the owner receiving the notice of adjudication would be “forewarned” that adjudication might occur, given that the owner delivered a notice of non-payment to its contractor, with the likely result that the “dispute” and the withholding of payment would flow down the construction pyramid.

Some insight may be drawn from the case law of other jurisdictions regarding the adjudication of payment disputes; however, careful consideration must be made of the local legislation which may distinguish the findings made in foreign jurisdictions. In *Multiplex Constructions Pty Ltd. v Luikens and Anor*[31], Justice Palmer of the New South Wales court, noted that payment schedules (similar to the notice of non-payment referenced in the *Act*) given and received by parties should set out ‘the reason’ for withholding payment in sufficient detail to enable the claimant to make a decision whether or not to pursue the claim:

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[28] *Hudson’s*, *supra* note 3 att 11-010, see also *Expert Report*, *supra* note 2 at 204-205.

[29] *Act*, *supra* note 1 at s 6.4(2).

[30] *Act, supra* note 1 at s 6.5(5).

[31] [2003] NSWSC 1140.

> ... **A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court**. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in dispute... section 14(3) of the , in requiring a respondent to 'indicate' its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. **The use of the word 'indicate' rather than 'state' or 'specify' or 'set out', conveys an impression that some want of precision and particularity is permissible as long as the essence of 'the reason' for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication.** [Emphasis added][32]

The reasoning in this case is arguably applicable to the new *Act*, given the requirement set out in the *Act*, for the owner who is refusing to pay all or a part of a proper invoice to provide a notice of non-payment specifying the amount of the proper invoice that is not being paid and detailing **all of the reasons for non-payment.[33]**

Identify an Adjudicator

Select an adjudicator with the expertise suitable for the nature of the dispute at issue who is free from conflicts of interest with the requesting party or the responding party, from the adjudicator registry available on the Authority's public website. As set out in the *Act,* the parties to the adjudication may agree on an adjudicator, or may request that the Authority appoint an adjudicator.[34]

On the other hand, a responding party who receives a notice of adjudication, has only three days from the date that the notice of adjudication was given to it, to object to the proposed adjudicator named by the requesting party, given that the adjudicator has four days within which to advise that it <u>does not</u> consent to conduct the adjudication.[35] If an adjudicator does not consent to conduct the adjudication within four days after the notice of adjudication is given, the party who gave the notice shall request the Authority appoint an adjudicator.[36] The Authority is required to appoint an adjudicator, subject to his or her prior consent, no later than 7 days following the request for an appointment.[37] No later than five days after an adjudicator agrees or is appointed to conduct the adjudication, the party who gave the notice of adjudication is required to deliver to the responding party and to the adjudicator, the documents upon which the requesting party intends to rely, together with a copy of the contract or subcontract at issue as well as a copy of the notice of adjudication.[38]

If the requesting party does not deliver an objection to the proposed adjudicator, the Authority and the requesting party who gave the notice of adjudication, the adjudicator (who does not object to the appointment by the requesting party within 4 days after the notice of adjudication was given) will be deemed to have consented to the appointment and the responding party <u>will not</u> have a right to object to the appointment, unless the responding party can demonstrate to the adjudicator that there is another

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[32] *Ibid* at paras 76 – 78.

[33] *Act*, *supra* note 1 at s 6.4(2).

[34] *Act*, *supra* note 1 at s.13.9(2).

[35] If an adjudicator does not consent to conduct the adjudication within four days after the notice of adjudication is given, the party who gave the notice shall request that the Authority appoint an adjudicator, *Act*, *supra* note 1 at s13.9(4).

[36] *Act*, *supra* note 1 at s. 13.9(4)

[37] *Act*, *supra* note 1 at s, 13.9(5)

[38] *Adjudications Reg*, supra note 1 at s. 16.1.

basis upon which to object to the appointment, such as a conflict of interest. (In such circumstances, the party objecting to the appointment on the basis of an alleged conflict of interest should consider notifying the Authority who is required to establish a complaints process for accepting and dealing with complaints against adjudicators.[39] A clear conflict of interest would arise where the adjudicator, for example, is a party to the construction contract in dispute. Another example may arise where the particular adjudicator derives much of his or her income from a particular client, who has sought the appointment of the same adjudicator. See, for example, the case of *Cofely Ltd. v Bingham et al*[40] which involved an arbitration but which sets out applicable principles, such as natural justice, and which cited several decisions pertaining to adjudications. In this case the court found that:

> I do, however, consider that Grounds (1) to (5) raise concerns of apparent bias.
>
> The starting point is the relationship between Mr Bingham and Knowles as now disclosed by the evidence. This is set out in detail in paragraph 91 above, but **of most significance it that it shows that over the last three years 18% of Mr Bingham's appointments and 25% of his income as arbitrator/adjudicator derives from cases involving Knowles.[41]**

In *Cofely*, the claimant, Cofely, succeeded in its application under s 24(1)(a) of the UK's *Arbitration Act 1996* for the removal of the first defendant as arbitrator from an arbitration between the claimant and the second defendant, a claims consultant, on the ground of apparent bias. The court considered evidence which demonstrated that the arbitrator had received 18% of his appointments and 25% of his income from cases involving the second defendants and it had been accepted in another decision, namely, *Eurocom Ltd. v. Siemens Plc* [2014] EWHC 3710 (TCC) [2015] BLR, that the second defendants manipulated the institutional appointments processes. The court found that Cofely reasonably sought to obtain further information about the relationship between the first and second defendants, that the first defendant conducting a hearing on the issue as arbitrator, had both avoided addressing the requests for information and had effectively 'cross-examined' Cofely's counsel "aggressively and in a hostile manner". The court found that in doing so, the arbitrator was "descending into the arena in an inappropriate manner" and ruled that the first defendant be removed as arbitrator. In a decision of UK's Technology and Construction Court, *Imperial Chemical Industries Limited v. Merit Merrell Technology Limited*[42], the court determined that when a party to an adjudication objects early and reserves its position of objecting to the adjudicator's jurisdiction, that party may participate in the adjudication without prejudice and may raise the issue of the adjudicator's lack of jurisdiction in subsequent enforcement proceedings.[43] On the other hand, where a party makes no objection to the jurisdiction of the adjudicator during the adjudication proceedings, that party will be taken to have "consented" to the adjudicator's decision.[44]

The principles set out in these decisions would likely be equally applicable in adjudications conducted in Ontario. As such, a party who fails to object to the jurisdiction of the adjudicator during the adjudication

[39] The Authority is required to establish a code of conduct for adjudications which shall address, among other matters, 'conflicts of interest and related procedural matters': Reg, supra note 1 s. 7(1) and 7(2); The Authority is also required to establish a complaints process for accepting and dealing with complaints against adjudicators, Reg, supra note 1 s. 10;

[40] *Cofely Ltd. v. Bingham et al.* [2016] EWHC 240 (Comm), at paras 103-104, [*Cofely*] available at <http://www.bailii.org/ew/cases/EWHC/Comm/2016/240.html>.

[41] *Ibid* at paras 103-104.

[42] Imperial Chemical Industries Limited v Merit Merrell Technology Limited, [2016] EWHC 2915 (TCC).

[43] Ibid, at paragraph 10.

[44] Ibid.

proceedings, is likely to be precluded from doing so in proceedings seeking to set aside the determination made by an adjudicator and be found to have "consented" to the jurisdiction of the adjudicator.

The "Delivery" of the Notice of Adjudication

The requesting party is also required to provide to the Authority, a copy of the notice of adjudication in electronic format on the same day that a copy of the notice of adjudication is provided to the responding party.[45] In accordance with the *Regulations*, the documents shall be provided by the requesting party to the adjudicator no later than five days after an adjudicator agrees or is appointed to conduct the adjudication, together with a copy of the notice of adjudication as well as to the responding party or in the case of a consolidated adjudication to every other party on the same day as they are provided to the adjudicator.[46]

The adjudicator may issue directions respecting the disclosure of documents on which a party intends to rely in an adjudication and has the power to issue directions to the extent and in a manner that ensures that each party to the adjudication has an opportunity to review any documents on which a party to the adjudication intends to rely, subject to the time limitations set out in the *Act* and regulations.[47] In this regard, the adjudicator is required to act fairly and impartially. The regulations provide that the adjudicator has the discretion to determine the time and manner of the delivery of the responding party's response.[48] As such, the responding party is likely to have a very limited time to prepare its response to a notice of adjudication.

The Adjudication Procedure

The process for an adjudication is intended to be simple and flexible. The adjudicator is required to act fairly and impartially. Given that there is no jurisprudence regarding adjudication in Ontario for the obvious reason that the prompt payment and adjudication provisions set out in the *Act* and *Regulations* are not yet in force, the courts may look for guidance from other jurisdictions with respect to disputes arising with respect to the process of adjudication. By way of example, absent a clear case of lack of jurisdiction, or the breach of the rules of natural justice, it will be a rare case where the courts will interfere with the decision of the adjudicator. First, an application for judicial review of a determination of an adjudicator may only be made with leave of the Divisional Court, in accordance with section 13.18 of the *Act*, and the rules of court, where, for example, the determination was made of a matter that may not be the subject of adjudication under the *Act*, or of a matter entirely unrelated to the subject of the adjudication.

In considering the circumstances in which a court would set aside the decision of an adjudicator, one can look for guidance to the UK. An oft cited case is the decision of *Carillion Construction Ltd. v Devonport Royal Dockyard Ltd.,*[49] wherein the UK Court of Appeal reviewed the circumstances in which a court may decline to enforce an adjudicator's decision. In *Carillion*, the court stated as follows:

> The objective which underlies the [U.K. Construction Act] and the [Scheme] requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has

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[45] *Adjudications Reg*, *supra* note 1 at s 16.
[46] *Adjudications Reg*, *supra* note 1 at s 16.
[47] *Adjudications Reg*, *supra* note 1 at s 20.
[48] *Adjudications Reg*, *supra* note 1 at s. 17.
[49] [2005] EWHC (Civ) 1358 [*Carillion*].

> decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It will only be in rare circumstances that the courts will interfere with the decision of an adjudicator.[50]

The principals set out in *Carillion* arguably apply to adjudications under the *Act*. An adjudicator is bound to adhere to the stringent principles of natural justice, namely, the avoidance of bias and the granting to each party of a fair hearing.

In *Cantillon Ltd v. Urvasco Ltd.*,[51] Justice Akenhead summarised the following principles in relation to breaches of natural justice in adjudication cases:

(a) It must first be established that the Adjudicator failed to apply the rules of natural justice;

(b) Any breach of the rules must be more than peripheral; they must be material breaches;

(c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.

(d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this.

(e) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of Balfour Beatty Construction Company Ltd v. The Camden Borough of Lambeth was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto."

In the case of *C&E Jacques Partnership v. Ensign Contractors Limited*[52] the court considered a claim by the contractor that the adjudicator had violated the principles of natural justice in failing to consider submissions made by the contractor. Jacques were two sisters who engaged Ensign Contractors to renovate a residential apartment block for investment purposes. The adjudication in question involved the value of the work performed by Ensign. Jacques (the “owner”) asserted the value was significantly lower than what it had paid, and accordingly they were owed £187,076.23 by the contractor. Jacques claimed that there were substantial outstanding defects that had not been rectified by the contractor. Ensign (the contractor) considered it was still owed £98,786.73 and submitted that the adjudicator should take Ensign’s submissions in, and the decision from, a previous adjudication into account that both parties had

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[50] *Ibid* at para 85.

[51] Cantillon Ltd v Urvasco Ltd, [2008] EWHC 282 (TCC), at para 100

[52] C&E Jacques Partnership v Ensign Contractors Limited [2009] EWHC 3383 (TCC)

agreed not to enforce and to treat as "void". Without inviting a submission from Ensign, after a request by Jacques to disregard the decision from the previous adjudication, the adjudicator confirmed he would ignore the documents from the previous adjudication. The adjudicator awarded Jacques (the owner) £96,868.18 plus tax. The court hearing the enforcement motion, ruled that an adjudicator must consider defences properly put forward by a respondent in adjudication, but that it is within an adjudicator's jurisdiction to decide what evidence is admissible and what evidence is helpful in the determination of the dispute referred to that adjudicator. If the adjudicator decides that certain evidence is inadmissible, such a determination will rarely (if ever) amount to a breach of the rules of natural justice.[53]

Another "practice" that has emerged and which has been strongly discouraged by the courts in the UK is to challenge the adjudicator's decision at the enforcement stage. In *Hutton Construction Ltd. v. Wilson Properties (London) Ltd.,* [54]Justice Coulson of the Technology and Construction Court clarified the circumstances in which a claim challenging the jurisdiction of the adjudicator will be considered by the Court regarding the enforcement of an adjudicator's decision. The facts of the Hutton case are as follows. Pursuant to a contract dated November 12, 2014, Wilson (the "owner") engaged Hutton (the "contractor") to carry out residential construction work at the owner's property. The contractor issued an application for payment to the owner and the matter was referred to adjudication after a dispute arose as to whether the owner had served a valid notice of non-payment. The adjudicator found that the owner had failed to serve a valid "pay less notice" and made an award of £491,944.73 in favour of the contractor. The owner did not comply with the decision and the contractor commenced enforcement proceedings. The owner did not serve a defence or counterclaim, and instead, in its evidence raised issues which had not been the subject of the adjudication. The owner also served a Part 8 Claim Form less than 3 weeks before the enforcement hearing contesting the adjudicator's decision. It did not include any specific declarations or clarify the basis of its defence. In refusing the owner's request, the court found that the owner did not clarify why enforcement was being resisted and instead attempted to 'shoehorn' a re-run of the adjudication issues into the enforcement hearing. Justice Coulson stated that to allow such an approach would lead to adjudication becoming the first part of a two-stage process, with everything coming back to court for review prior to enforcement.

How does one prepare for an adjudication?

Because a party can refer a matter to adjudication at any time during the term of a construction contract or subcontract[55], it is important to maintain sound project management practices in order to ensure that relevant documents can be quickly put together whether or not a party is responding to or commencing the adjudication process. Stories abound of adjudication by ambush wherein a requesting party has had months to prepare its case, including the notice of adjudication and supporting documentation leaving the responding party a short time of 7 to 14 days to respond to voluminous material which includes such disputes as disputed changes, assessments of extension of time impacts and any associated costs arising from that extension as well as defects in design and workmanship. In such situations, the responding party is faced with the prospect of diverting internal resources or retaining external resources (both at considerable expense) to compile a responding position. The short answer is that this is the new reality of adjudication.

[53] C&E Jacques Partnership v Ensign Contractors Limited [2009] EWHC 3383 (TCC)

[54] *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC),

[55] Subject to the requirements applicable to prompt payment set out at Part I.1 *Act*; the *Act*, supra note 1 at section 13.5

In the *Deluxe Art* Decision, counsel for Beck (the contractor) complained about late material being produced by the subcontractor, DATL, who in addition to producing applications for payment in response to a request made by the adjudicator, produced a witness statement and other material explaining how the payment applications had come about. Beck complained about the late material and asked for an extension of time to deliver their "rejoinder" to December 1, 2015 which was otherwise due on November 27. The adjudicator's reply did not rule on the application for an extension either way and Beck delivered its rejoinder on November 20. Beck still complained that they were rushed into producing the rejoinder and other documents claiming that the adjudicator failed to comply with the rules of natural justice because he did not afford Beck a proper opportunity of dealing with the late information about the applications and the accompanying documentation, and that the adjudicator's decision should be set aside by reason of the failure to adhere to the principles of natural justice. As noted by Justice Coulson in the *Deluxe Art* Decision, "the courts have always recognized that questions of timetabling are uniquely a matter for the adjudicator, who has to produce his [or her] decision in a very short space of time".[56] Justice Coulson further noted that the adjudicator allowed Beck to put in a rejoinder, even though there was plenty of authority in support of the proposition that a decision not to allow the responding party to put in a rejoinder is not a breach of natural justice, referring to the decisions in *Balfour Beatty Construction (Northern) Ltd. v. Modus Corovest (Blackpool) Ltd.* [2008] EWHC 3029 (TCC) and *GPS Marine Contractors Ltd. v. Ringway Infrastructure Services Ltd.* [2010] EWHC 283 (TCC); [2010] BLR 377. In was further noted by Justice Coulson that "even if there was a breach of natural justice" there was no evidence that "it had any material effect on the outcome" see *Kier Regional (Trading as Wallis) v. City in General (Holborn) Ltd.*[57] and *Cantillon Ltd. v. Urvasco Ltd.*[58].

In addition to the preparation of a notice of adjudication, counsel representing a party at an adjudication should submit a summary of their position, include key documents in support of their position and consider whether or not expert reports or witness statements would assist the adjudicator in its determination of the issue in dispute, taking into account the complexity of the issues and the amount at stake. In short, preparing for adjudication is similar to preparing for other forms of dispute resolution, albeit on a much shorter timeframe. Principles of proportionality in the conduct of adjudication are among the criteria to be reflected in the code of conduct of adjudicators to be established by the Authority. Such principles should be considered in putting together the materials in support of or in response to an adjudication.

What material may be helpful to the adjudicator depends on the nature of the dispute. If the dispute is entirely one pertaining to the quantity of a particular unit price item, the documentation may be limited to "delivery tickets" or such other documentation relevant to determining the quantity of work performed. Witness statements may be required in other cases where there is a dispute regarding whether or not there is a "settlement" of a dispute, depriving the adjudicator of having any jurisdiction to determine the dispute.

CONSIDERATIONS FOR THE RESPONDING PARTY

Although the determination made by the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement, or the setting aside of a determination through the process of judicial review, the consequences of failing to respond to a notice of adjudication in accordance with the timelines set out in the *Act* and the regulations could result in significant cost

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[56] *Deluxe Art,* Supra note 23, at para 40.

[57] *Kier Regional (Trading as Wallis) v. City in General (Holborn) Ltd.* [2006] EWHC 848 (TCC); [2006] BLR 315

[58] *Cantillon Ltd. v. Urvasco Ltd.* [2008] EWHC 282 (TCC); [2008] BLR 250

consequences for the responding party, including court sanctioned requirements to pay. Unlike what is often seen in the courts, a responding party should not expect to receive an extension of the short time frames set out in the *Act* and the *Regulations* to respond to a notice of adjudication. An adjudicator's power to determine a dispute will not be affected by the failure of the responding party to serve a response to the notice of adjudication or the failure of any of the parties to provide specified information within the time allotted; to comply with the adjudicator's call for a conference or to do any other thing the adjudicator requests or directs that is within the jurisdiction of the adjudicator, including calling on expert assistance or a site attendance with the consent of the owner.

As soon as the notice of adjudication is received, the responding party should consider whether or not the requesting party had a right to refer the dispute to adjudication and to promptly consider whether or not the proposed adjudicator is suitably qualified to determine the dispute. If the responding party does not agree to the proposed adjudicator, it must deliver a notice of objection to the requesting party and the adjudicator within three days of receiving the notice of adjudication setting out the proposed name of the adjudicator. The Authority will then be required to designate an adjudicator for the determination of the dispute, taking into account the nature of the dispute to be determined.[59]

In *Bovis Lend Lease Ltd v The Trustees of the London Clinic*[60], the Court considered a motion for summary judgement for the enforcement of an adjudicator's decision. The responding party claimed that the adjudicator lacked jurisdiction and violated the rules of natural justice in rendering his decision. So far as the natural justice contention is concerned, some emphasis was placed on the fact that Bovis had many months to prepare their claims as set out in the draft Referral dated 7 July 2008; (being a 16 month period) while the Clinic were initially given only two weeks to respond to the draft Referral (which was extended to six weeks). It was submitted that the way Bovis had behaved "was a clear case of adjudication by ambush" with the result that the Clinic did not have sufficient time to consider the new claims and evidence properly. In reviewing the history of the adjudication, the court noted that Bovis served their Referral Notice, on August 26, 2008, running to some 53 pages. It was in effect identical to a draft Referral Notice which had been served under cover of Bovis' letter of July 7, 2008 and delivered to the Clinic prior to the formal Referral Notice. The formal Referral Notice was accompanied, as was the draft, by the latest reports of Mr. Wort, Mr. Marshall and Mr. Sworder, together with five witness statements as before (slightly but immaterially amended). Also accompanying the Referral were 31 files of contemporaneous documentation supporting (purportedly) the claim made. The claim for loss and expense was expressly based upon the June 2008 report of Mr. Wort and was said to be supported by the witness statements. The claim for loss and expense was expressly "made under clauses 26.1 and 26.2 of the JCT Conditions of Contract (paragraph 109). The Court summarized the response delivered on behalf of the Clinic (being the responding party) delivered on 28 August 200, reacting to the suggestion made by the Adjudicator that the parties might consider first addressing the question of extension of time and repayment of liquidated damages and later dealing with loss and expense, as follows:

> "It is sensible to ignore the element of BLL's claim for loss and expense for the reasons that you say. However, more importantly, simply, BLL is not in any event entitled to loss and expense under the contract. Clause 30.1.1 (as amended) provides that "as a condition precedent to the issue of any such Interim Certificate, the Contractor shall have submitted to the Architect and to the Quantity Surveyor a claim for payment in respect of

[59] *Act*, *supra* note 1 at s. 13.9(4)
[60] *Bovis Lend Lease Ltd v The Trustees of the London Clinic* [2009] EWHC 64 (TCC)

> amounts eligible for inclusion in an Interim Certificate in accordance with the provisions of clause 30.2. Such claim should be supported by a detailed valuation".
>
> A quick review of the history of BLL's "loss and expense position", demonstrates that BLL haven't complied with these relevant provisions and therefore have not satisfied the condition precedent. Their interim applications have singularly failed to substantiate claims for loss and expense items by way of detailed valuation …
>
> The first that the Clinic knew of BLL's current claim for loss and expense and Mr. Wort's 10 June 2008 report on which the claim is based was when the Clinic received a draft referral notice under cover of the letter dated 7 July containing a "loss and expense" section. The nature of this claim was materially different to that which was the subject of the 2006 report from Mr. Wort. Indeed, the Mr. Wort's (sic) subsequent report is significantly larger than the November 2006 document.
>
> In short, the Clinic maintain that BLL has never submitted an application for payment pursuant to clause 30.1.1.1 for monies allegedly due as loss and expense and as set out in Mr. Wort's 2008 report. Further, by letter dated 22 July, BLL confirmed to the Clinic that Mr. Wort's report upon which they rely to support this element of the claim had not previously been submitted.
>
> Accordingly, the Clinic would agree that the loss and expense elements of the referral be disregarded entirely by the Adjudicator and the Clinic.
>
> Alternatively, if the loss and expense elements are not disregarded entirely, the Clinic submits that the dispute on loss and expense become the subject of a further adjudication in respect of which the contractual rules would of course apply …'[61]

The court in rejecting the assertion that the rules of natural justice had been breached noted that:

> "It will be a rare case, if ever, in which it can be said that there is a material breach of the rules of natural justice in adjudication proceedings (in relation to a party not being given a reasonable opportunity to present its case, defence, evidence or other submissions) that the party complaining of such a breach has not raised the issue during the course of the adjudication. Of course, there may be cases where the complaining party does not know of the unfairness. That could arise, for instance, when an adjudicator receives evidence or argument from one party which has simply not been communicated at all to the other party."[62]

It remains to be seen how the participants in the construction industry will regard the new world of adjudication. One thing is for certain, however, while the old way of resolving disputes through the courts or by way of arbitration will remain, none of the participants in the construction industry will be free from the new reality of the "pay now, argue later" regime known as adjudication. The question will be – are we up for that task?

September 27, 2019

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[61] *Bovis Lend Lease* at para 23

[62] *Bovis Lend Lease* at para 67