Fenwick Elliott

RECENT DEVELOPMENTS AND FUTURE PROSPECTS

Dr Julian Critchlow

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13TH ADJUDICATION UPDATE SEMINAR

Introduction

It has been said that the essence of giving legal advice is to predict how Judges will decide cases. Thus, the outcome of cases cannot always be wholly anticipated by understanding the principles from the cases: it is also necessary to understand trends in judicial attitudes. Such fluctuations in judicial attitudes are discernible in the realm of adjudication. Thus, in respect of natural justice the tide has turned and turned again from Decisions suggesting that natural justice has only a small relevance to how adjudications must be conducted through to fairly strict compliance with natural justice principles. The balance appears currently to rest at a point which suggests that natural justice must be applied in adjudications but in a way that is more "rough and ready" than in, for example, arbitration. The competing requirements are, on the one hand, the requirement to uphold adjudicators' decisions wherever possible and, on the other, to ensure that decisions are made with an underlying degree of fairness.

Similar tension can be observed with regard to the timetable for adjudication between, on the one hand, the same need to uphold adjudicators' decisions and, on the other hand, the need to ensure that decisions are reached swiftly. The present position is illuminated in a recent case in which Fenwick Elliott acted, being *Cubitt Building and Interiors Limited v Fleetglade Limited* [2006] EWHC 3413 (TCC). That case also assists in understanding the underlying nature of adjudication, i.e. the extent to which it is statutorily based and the extent to which it is contractual, and how the contractual relationship between the parties and the adjudicator interrelates with the provisions of the Housing Grants Construction and Regeneration Act 1996.

The facts of the case are as follows:

The facts

Cubitt were engaged as main contractors by Fleetglade to carry out superstructure works at Fleetglade's site at Hampton Wick Riverside. The Contract incorporated the JCT Standard Form, 1988 Edition with amendments 1-4 and certain bespoke amendments.

On 24 August 2006 the Contract Administrator, PSP, issued a Final Certificate. Claims had already been asserted by each party and on 20 September 2006 Fleetglade issued an arbitration notice. On the same day, Cubitt issued an Adjudication Notice which, among other things, sought a declaration as to the value of the Final Certificate.

On 21 September 2006 Cubitt applied to the RICS for the nomination of an adjudicator. The RICS failed to make a nomination until 27 September 2006, Cubitt's solicitors receiving notification at 5.06pm. The Adjudicator confirmed his acceptance of the appointment at 5.35pm. Late on 27 September 2006 Cubitt's solicitors offered Fleetglade's solicitors a copy of the Referral Notice itself, but without the accompanying documents, which were elsewhere. The offer was refused. Cubitt's solicitors served the referral notice on 28 September 2006, which was accompanied by 12 lever-arch files of supporting documentation.

The JCT adjudication provisions stipulated, *inter alia*, that, by clause 41A.4.1:

> When pursuant to article 5 a Party requires a dispute or difference to be referred to adjudication then that party shall give notice to the other party of his intention to refer the dispute or difference briefly identified in the notice, to adjudication. If an Adjudicator is agreed or appointed within 7 days of the notice then the party giving the notice shall refer the dispute or difference to the Adjudicator ("the referral") within 7 days of the notice. If the Adjudicator is not agreed or appointed within 7 days of the notice the referral shall be made immediately on such agreement or appointment. The said party shall include with the referral particulars of the dispute or difference together with a summary of the contentions on which he relies, a statement of the relief or remedy which is sought and any material he wishes the Adjudicator to consider. The referral and its accompanying documentation shall be copied simultaneously to the other Party…

Fleetglade contended that the referral notice was served out of time and, therefore, that the Adjudicator had no jurisdiction.

In respect of the final certificate, the JCT provisions provided:

> 30.9.1 Except as provided in clauses 30.9.2 and 30.9.3 (and save in respect of fraud) the Final Certificate shall have effect in any proceedings under or arising out of or in connection with this contract whether by adjudication under article 5 or by arbitration under article 7a or by legal proceedings under article 7b as…..
>
> .1.2 conclusive evidence that any necessary effect has been given to all the terms of this contract which require that an amount is to be added to or deducted from the Contract Sum or an adjustment is to be made of the Contract Sum save where there has been any accidental inclusion or exclusion of any work, materials, goods or figure in any computation in which event the Final Certificate shall have effect as conclusive evidence as to all other computations…
>
> 30.9.3 If any adjudication, arbitration or other proceedings have been commenced by either party within 28 days after the Final Certificate has been issued the Final Certificate shall

have effect as conclusive evidence as provided in clause 30.9.1 save only in respect of all matters to which those proceedings relate.

Accordingly, Cubitt was out of time for commencing a fresh adjudication. Therefore, unless Fleetglade's own arbitration were wide enough to encompass Cubitt's arguments (which was open to doubt), Cubitt stood to lose the entitlement to have the Final Certificate reviewed at all: so they had no option other than to continue its existing adjudication. They did so and commenced proceedings in the TCC for a Declaration that the Adjudicator was validly appointed.

Notwithstanding Fleetglade's objections, the Adjudicator continued with the reference, and his time for issuing his Decision was extended to 24 November 2006. Having initially argued that, by virtue of his terms of appointment, he had a lien on his decision pending payment of his fees, he sent his decision to the parties the following day – 25 November 2006, some 12 hours late.

Therefore, Fleetglade argued that the decision was made out of time and was invalid.

Cubitt commenced enforcement proceedings and sought Summary Judgment. Its application for a Declaration was heard at the same time.

Extracts from the Judgment

The Judge held as follows:

F. Issue 1 – The relevant principles

(b) The 1996 Act and the Adjudication Provisions in the Contract.

24. In the course of both her helpful written and oral submissions, Ms McCredie contended that the juridical nature of this adjudication was contractual, and not statutory. She said that the 1996 Act required that every construction contract had to contain adjudication provisions which complied with s.108. If they did not, then the statutory scheme for construction contracts would be implied. If they did, then what mattered were the express terms of those contractual adjudication provisions. The 1996 Act only mattered if the contractual provisions were not compliant. Mr Steynor agreed with that proposition, submitting that whilst the parties could not contract out of the Act, if the contractual provisions were in accordance with the Act, then it was those provisions which had to be construed and operated.

25. I agree with those submissions. It seems to me that if the contractual adjudication provisions comply with the Act, then they must be at the forefront of the court's consideration of the parties' respective rights and liabilities. I would respectfully venture the opinion that, in some of the reported cases, the focus has been too much on the 1996 Act (and s.108 in particular) and not enough on the relevant terms of the parties' contract.

(c) The Importance of the Timetable

26. The essence of adjudication is speed.[(1)] What matters most is the production of a temporarily binding decision within the timetable provided by the 1996 Act or the terms

[(1)] In the debate on the Bill, Lord Howie said: "The essence of an adjudication is that it should be quick. As the Minister knows, and as clause 106 allows, adjudication produces rough justice, but it is rough justice which can be put right at a later stage."

of the applicable construction contract. Accordingly the ultimate correctness or otherwise of the decision matters less, because the decision is not binding and it can be challenged in court or in arbitration. As Buxton LJ put it in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCH (Civ) 1358: "The need to have the right answer has been subordinated to the need to have an answer quickly".

27. Accordingly, so it seems to me, compliance by the parties and the adjudicator with the relevant timetable is a key ingredient of the adjudication process. I agree with the comment of Lord Nimmo Smith in *Ritchie Brothers (PWC) Ltd v David Philp (Commercials) Ltd* [2005] 1 BLR 384: "If a speedy outcome is an objective, it is best achieved by adherence to strict time limits". If the timetable is not kept to, there is a clear risk that, instead of giving rise to a quick decision, the adjudication will instead become a long drawn-out and necessarily expensive process, much more akin to arbitration. That was a situation which the 1996 Act was designed to avoid. On the other hand, parties to adjudication would know that, if the necessary timetable has been kept to, the TCC will generally enforce the decisions of adjudicators, unless it is a rare case where the adjudicator decided something in respect of which he had no jurisdiction, or there has been a breach of natural justice.

28. In my judgment, a necessary ingredient of the swift adjudication process is certainty. Parties need to know where they stand, who must do what, and by when. Once the process is up and running, it should run like clockwork.

…

G. Issue 1 - Analysis

(a) The CPR point

34. The first matter for me to resolve is the effective date of the service of the notice of adjudication. There is no dispute that, if CPR 6.7 applies and is relevant, the effective date of service would be deemed to be 21st September, because service by fax of a document after 4 p.m. gives rise to a deemed date for service on the following business day. The question is whether the CPR applies at all. Mr Steynor maintains that there is nothing in the 1996 Act to indicate that it does, so that a document faxed on 20th September, no matter how late into the evening, must be deemed to have been served on 20th September.

35. I am unattracted to the notion that the provisions of the CPR should be incorporated into the timetable and mechanisms of the adjudication process. There is no mention of such wholesale incorporation in the 1996 Act. Indeed, s.115, which contains a number of rules relating to the service of adjudication documents, makes no reference to the CPR save to say, at sub-section 115.5, that the rules of court do apply, following the production of an adjudicator's decision, to the service of enforcement proceedings and the like. This could therefore be said to be inconsistent with the suggestion that the CPR should be incorporated wholesale into the adjudication process: if that was the intention, s.115 would have said so. In addition, I am aware of no authority in which the point has been successfully argued. I agree with Mr Steynor that complications could abound if the CPR was imported wholesale into the adjudication process. Take for example the present case, where the adjudicator's decision was e-mailed on 25th November. If the CPR provisions apply, then the relevant date for the service of that decision would be 27th November, which is not a result for which either party contends.

36. Of course, I recognise that the CPR is a set of commonsense, practical rules that govern the service of court documents, and there may be exceptional adjudications in which it

might be appropriate to have regard to its terms. But in the present case there are a number of reasons why I am unable to accept Ms McCredie's submission that I should decide that the date of the notice of adjudication was 21st September.

37. First, such a finding would (so it seems to me) be contrary to what Cubitt wanted, and contrary to the effective date as it was perceived by both parties. Cubitt served their notice of adjudication on 20th September. That was their decision. It was the date upon which they wanted to commence the adjudication process. Doubtless they were influenced by the notice of arbitration that they had received earlier the same day. Thereafter the solicitors on both sides took the 20th September as the effective date of the notice of adjudication. I would be very reluctant to rewrite history by deeming the date of the document to be 21st September because of the operation of the CPR.

38. Secondly, if I acceded to this request, I would effectively be giving Cubitt relief from their own decision to serve the document at the time that they did. That seems to me to be wrong in principle. If a party chooses to take a specific step on a particular day, then it is not usually appropriate to allow that party to argue that that was not, in fact, the effective date of that step.

39. Thirdly, it is not as if the document was served late at night. It was served at 4.42 p.m. There is no reason to believe that it was not and could not have been read and considered that afternoon by Fleetglade and/or Fleetglade's solicitor. There is therefore no practical reason to impose any sort of deeming provision.

40. For all those reasons I reject Cubitt's first point. They chose to serve the notice of adjudication in the afternoon of 20th September. That was therefore the effective date of the notice.

(b) The operation of clause 41A

41. The second point that arises under Issue 1 concerns the events on 27th/28th September. I have held that the words in clause 41A.4.1 are mandatory. Does that finding mean that the referral notice was not served in accordance with its provisions, and is therefore a nullity? My answer to that question is "No", for a number of reasons of principle, and a number of other reasons specific to the facts of this particular case.

42. First, clause 41A has to be operated in a sensible and commercial way. It endeavours to cover the two alternative scenarios that will arise, namely the appointment of an adjudicator within the seven days and the appointment of the adjudicator beyond the seven days. But it does not - it cannot - expressly provide for everything that might happen. It does not therefore expressly provide for what should happen if (as occurred here) through no fault of the referring party, the appointment does not occur until very late on the seventh day. Plainly, a sensible interpretation of clause 41A is that, if the appointment happens late on Day 7, the referral notice must be served as soon as possible thereafter; and if that means that it is served on Day 8, then service on Day 8 would be in accordance with clause 41A. I consider that that is what happened here. In my judgment, it would be contrary to business commonsense to rule that the provision of the referral notice in this case was out of time.

43. Secondly, if I took Fleetglade's argument to its logical conclusion, it would mean that, if the adjudicator was appointed at 11.55 p.m. on Day 7 and the referral notice was not provided within five minutes in the middle of the night, it would be out of time and a nullity. I respectfully suggest that such a proposition only has to be expressed in such terms to be rejected out of hand.

44. Thirdly, given clause 41A.4.1 expressly envisages the appointment of an adjudicator outside the seven days, a ruling that, no matter how late on Day 7 the appointment was made, the referral notice must be served the same day, would mean that a referring party would be better off if the appointment came on Day 8 or later. That would lead to referring parties anxiously contacting their nominating bodies late on Day 7 and telling them to do nothing until at least the following day, so as to avoid any difficulties in the production of the referral notice. That, of course, would slow down the adjudication process rather than speed it up, and that cannot be something that this court should encourage.

45. Therefore, for those reasons of principle, I consider that there is plainly an implied element of clause 41A to the effect that, if the appointment of the adjudicator happens late on Day 7, the referral notice should be served immediately, but that good service may well comprise service on the following day.

46. On the particular facts of the present case, I have independently concluded that it would be wrong to decide that service of the referral notice on Day 8 was a nullity. That is particularly so given that:

- The vast bulk of the delay between 20th and 27th September was caused by the RICS. The application for a nomination was sent on 21st September, but the appointment happened six days later. In my view, that delay was unacceptable. Bodies like the RICS have generated considerable revenue from their nominating function, and some of their members derive the majority of their income from their practice as adjudicators. In such circumstances the parties are entitled to expect the nominating body to act promptly to nominate an adjudicator. In this case I consider that the RICS failed to act promptly.

- The appointment was confirmed at 5.35 p.m. That is right at the end (if not beyond the end) of the normal business day. If the referral notice and the accompanying documents (in this case twelve lever arch files) could not be couriered to Fleetglade's solicitors until the following day, then that was an inevitable consequence of the delay on the part of the RICS. It would be wrong to penalise Cubitt in consequence.

- On the evidence I find that, within an hour of the appointment, Cubitt's solicitors offered to fax Fleetglade's solicitors a copy of the document that they had drafted (i.e., the referral notice) making it clear that the accompanying files were with Cubitt's claims consultant and would therefore be sent to Fleetglade's solicitors the following day. There is no dispute that Fleetglade's solicitor refused this offer and sought service of all of the documents together. That may very well have been sensible; it is not usually a good thing for documents to be served piecemeal. However, given the fact of that offer, in all the circumstances, it seems to me that I could not possibly find that service of a document on Day 8, which had been offered on Day 7, should lead to a finding that there had been a failure to comply with clause 41A.

47. For all those reasons therefore, I find that, although clause 41A sets out a mandatory timetable, it is a timetable that needs to be operated in a sensible and businesslike way. In the vast majority of cases the referral notice will be served not later than Day 7, if the adjudicator has been appointed in the seven days, or immediately on appointment if the adjudicator has been appointed outside that period; but in those

rare cases (such as this one) where the adjudicator is appointed late on Day 7 and the referral notice cannot conveniently be served with all the supporting documents until the following day, such service will constitute compliance with clause 41A. The referral notice provided in these circumstances will not be a nullity. Thus I conclude that the referral notice in the present case was validly provided in accordance with the contract, and that the adjudicator therefore had the necessary jurisdiction.

H. Issue 2 - The Arguments

53. Cubitt contend that, pursuant to clause 41A.5.3, the adjudicator had two separate obligations. First, he had to reach his decision on 24th November, the agreed extended date. Second, he had to send that decision forthwith to the parties. Cubitt submit that the decision was reached on 23rd November, and certainly finalised the following day. It was available for transmission at 10.45 p.m. on 24th November, and was transmitted electronically at 12.21 a.m. on 25th November, which, so it is said, was "forthwith" for the purposes of the contractual provision.

54. Fleetglade say that the decision had not been reached by midnight on 24 November, and that the decision that was provided on 25 November (and corrected on the 29th) was therefore out of time. A proper analysis of Issue 2 therefore involves, first, a careful consideration of the facts (paragraphs 55 to 67 below), and then the relevant authorities (paragraphs 68 to 81 below).

…

75. For what it is worth, I expressed the view in *Hart* (which I now repeat) that the decision in *Ritchie* seemed to me to be right. Adjudicators do not have the jurisdiction to grant themselves extensions of time without the express consent of both parties. If their time management is so poor that they fail to provide a decision in the relevant period and they have not sought an extension, their decision may well be a nullity, as in *Ritchie*. And the significance of the adjudicator's default in such circumstances should not be underestimated. For example, as demonstrated by the terms of the contract in this case, an adjudicator's failure to comply with a timetable might irredeemably deprive one party from its right to challenge a Final Certificate. I regard certainty in adjudication as vital. I respectfully agree with what Lord Nimmo Smith said in his concurring judgment in *Ritchie*:

> If certainty is an objective, it is not achieved by leaving the parties in doubt as to where they stand after the expiry of the 28-day period.

76. Accordingly, on the basis of these reported decisions I derive the following principles.

(a) There is a two-stage process involved in an adjudicator's decision, which is expressly identified in clause 41A. Stage 1 is the completion of the decision. Stage 2 is the communication of that decision to the parties, which must be done forthwith (see *Bloor* and *Barnes & Elliott*). Thus I reject Mr Steynor's argument that a decision is not a decision until it is communicated: that seems to me to be contrary to clause 41A, and also contrary to the authorities cited above.

(b) An adjudicator is bound to reach his decision within 28 days or any agreed extended date (see *Barnes & Elliott* and *Ritchie*).

(c) A decision which is not reached within 28 days or any agreed extended date is probably a nullity (see *Ritchie*).

(d) A decision which is reached within the 28 days or an agreed extended period, but which is not communicated until after the expiry of that period will be valid, provided always that it can be shown that the decision was communicated forthwith: see *Bloor* and *Barnes & Elliott*.

(c) Lien

77. As the summary of the facts above makes plain, the adjudicator considered that he was entitled to a lien on his fees as a result of clauses 4 and 5 of his specific terms of appointment. On behalf of Fleetglade Mr Steynor submitted that he had no such entitlement, either as a matter of contract or as a matter of principle.

78. Mr Steynor argued that clauses 4 and 5 were ineffective, because the adjudicator's overriding obligation was to comply with clause 41A of the contract and/or the terms of the 1996 Act, and they both make clear that the decision had to be reached within 28 days or an agreed extended period, but not beyond that. Mr Steynor said that, to the extent that clauses 4 and 5 suggested that the periods could be further extended until the adjudicator's fees were paid, that was inconsistent with clause 41A and the 1996 Act and therefore inoperative.

79. I consider that there is considerable force in this submission. Clause 41A, which formed part of the adjudicator's obligations, as well as setting out the rights and liabilities of both Cubitt and Fleetglade in respect of adjudication, provides that a decision must be reached within 28 days or an agreed extended period. The adjudicator's clause 4 is entirely consistent with that. However, clause 41A also says that the decision, once reached, must be communicated forthwith. The adjudicator's clause 5 is not consistent with that: it envisages a potential delay, which could be lengthy, between the completion of the decision and its communication to the parties whilst arrangements are made in respect of the payment of his fees. It seems to me that this is contrary to clause 41A. It is also contrary to s.108 of the 1996 Act, which envisages both completion and communication within the 28 day period. I venture to suggest that an open-ended extension of the kind envisaged by the adjudicator is contrary to the whole principle of adjudication as described in the 1996 Act.

80. It is also contrary to authority. In *St Andrew's Bay Development Ltd v. HBG Management Ltd* [2003] Scot CS 103 the adjudicator's terms and conditions indicated that she might exercise a lien on the decision until payment of her fees. The underlying contract was in similar terms to clause 41A. Lord Wheatley said at paragraph 19 of his judgment:

> Neither can it be said that the adjudicator is entitled to delay communication or intimation of a decision until her fees are paid. There is nothing in the scheme or contract which allows this. It is of course perfectly permissible for the adjudicator to require parties to come to a separate arrangement about the payment of her fees. However, it is not permissible in my view for such an arrangement to frustrate or impede the progress of the statutory arrangements for resolving these contractual disputes. If the adjudicator wishes to impose such an arrangement upon parties, then it is her responsibility to see that that arrangement is accommodated within the statutory or contractual time limits. I can find no reason why the payment of the second respondent's fees should be allowed to impede the statutory process, or justify a failure to observe its requirements. It is noteworthy that in fact the second respondent does not

> appear to have received her fees before issuing her decision. Rather, she appears to have been prepared to issue her decision following an undertaking given by the first respondent to pay all her fees in order to secure communication of that decision.

I respectfully agree with this conclusion and the reasoning behind it.

81. Accordingly as a matter of principle I do not accept that this adjudicator was entitled to exercise a lien in relation to the decision, either as a matter of contract or as a matter of law. I note that this was precisely the point that was made to the adjudicator by the solicitors acting for both parties at the relevant time, namely 23rd to 25th November 2006.

K. Issue 2 – Analysis

82. The critical question, which is principally one of fact, is whether the decision was completed before the end of 24th November 2006. I have concluded, taking into account all the relevant evidence, that it was. There are a number of particular factors that seem to me to point inexorably to that conclusion.

83. First, I note that the decision itself was dated 24th November, just as the decision in *Barnes & Elliott* bore the date of the last day of the agreed extended period. Thus on the face of the documents the decision was reached within the agreed period. The fact that it was sent out just twelve and a half hours later, so it was actually received by the parties at the same sort of time as the decision in *Barnes & Elliott*, also suggests that it was completed on 24 November.

84. Secondly, the adjudicator's evidence was that he had completed his findings on the previous day, 23 November, and then completed the entirety of the decision itself by late on 24 November. He emphasizes that but for the lien, he would have sent out the decision late on the 24th. On the basis of that evidence too it seems to me that I am obliged to find that the decision was complete on 24 November.

85. Thirdly (and following on from this last point), I am conscious that, but for his view that he was entitled to a lien, the evidence was clear that the decision would have been e-mailed by the adjudicator late on 24 November. If that had happened of course, the point that arises under Issue 2 would simply never have arisen. The adjudicator was mistaken. He was not entitled to exercise a lien in these circumstances. But it seems to me that it would be wrong in principle to penalise Cubitt for the adjudicator's mistaken view as to his legal entitlement to a lien, particularly since he changed his mind and correctly decided to publish the decision within a few hours of his original incorrect decision to withhold the document.

86. Fourthly, I consider that it is appropriate to look at the events of 23rd to 25th November in the round. The decision was communicated to the parties at half past twelve on the Saturday morning - the very day on which, according to the evidence, both sides were keen to study its contents because of the other steps which needed to be taken both in these proceedings and, more importantly, in the arbitration. A practical businessman would conclude that the completion and communication of the decision within this timescale was not a fundamental breach of the adjudication agreement. He would, I think, be surprised at the suggestion that the decision reached on the 24th and communicated just after noon on the 25th was in some way a nullity.

87. For all these reasons I have concluded that the decision was reached within the agreed extended period, and its communication was "forthwith" and in accordance with clause 41A. I therefore decide that the decision should be upheld.

88. Notwithstanding that conclusion, I should add that Issue 2 has given me considerable pause for thought, and I have been very concerned that in order for me to decide it, it has been necessary to consider in detail the evidence of the adjudicator's thinking on an almost hour-by-hour basis. I consider that Mr Steynor was right to warn of the danger that adjudicators might endeavour to abuse the system by claiming (wrongly) that a decision was complete by the deadline date, and then using a longer period to finish the decision, thereafter claiming that the longer period was just the time that it took to communicate the decision to the parties.

89. It seems to me that in the days of e-mail and fax, the time for the communication of the decision should be very short - a matter of a few hours at most. I struggle to see how any decision not communicated at the latest by the middle of the day after the final deadline, as here, could be said to have been communicated "forthwith".

90. More importantly, it should not be necessary for the parties and the court to have to work through a mass of evidence to see whether or not the decision was completed by the deadline. Adjudicators have an obligation to complete their decisions within the time allowed by the parties. The safest thing for an adjudicator to do, if the decision has reached the final extended date, is to e-mail that decision during that final day. I find that that is what would have happened here but for the adjudicator's error in relation to his entitlement to a lien. If an adjudicator fails to follow this simple advice, he automatically creates precisely the sorts of arguments that have arisen here under Issue 2.

91. In addition, I should point out that the events on 23rd to 25th November nearly caused a serious problem for the adjudicator himself. Had I concluded that he had not completed his decision in time, the decision would probably have been a nullity, as per *Ritchie*. Cubitt may then have found themselves without a remedy in relation to the Final Certificate. *Prima facie* that would have been the adjudicator's fault. Moreover, it is plainly arguable that clause 41A.8, which gives the adjudicator protection in respect of anything done in the discharge of his functions, would not have protected him in such circumstances, because the failure to complete within the agreed period would have represented a complete failure on his part to discharge those functions at all.

92. The message I hope is clear. Adjudicators can only accept nomination and appointment if they can complete the task within 28 days or an agreed extended period. To be on the safe side, although completion is a two-stage process (completion of the decision and then communication of it to the parties), the adjudicator must aim to do both no later than the 28th day or the agreed extended day. Only in exceptional circumstances will the court consider decisions which were not communicated until after that period, and in no circumstances would the court consider a decision that was not even concluded during that period. That was what HHJ Humphrey Lloyd QC made plain in *Barnes & Elliott*, and it is a view which I respectfully echo.

This case is important for a number of reasons. As noted above, an important point of principle enunciated by Judge Coulson is that the juridical nature of adjudication is contractual rather than statutory so the starting point for considering any issues that arise respecting the conduct for the adjudication should be the parties' agreement. However, that agreement must not infringe the provisions of the Housing Grants, Construction and

Regeneration Act 1996. Nevertheless, in his Judgment, Judge Coulson made some decisions that do not appear to accord with that principle. Thus, the JCT Adjudication Rules formed a part of the parties' Agreement. Those Rules provided that failure by either party to comply with any requirement of the Rules should not invalidate the decision of the adjudicator. That provision did not obviously transgress the requirements of the HGCRA 1996 which merely requires the contract to provide a timetable "with the object" of securing referral of the dispute to the adjudicator within seven days of the Adjudication Notice. "With the object" suggests something less than a strict obligation.

Further, the HGCRA 1996 allows the parties to extend the 28-day period for reaching a decision by agreement. It is arguable that by agreeing with the Adjudicator that he could retain his Decision until payment of his fees, the parties were merely extending that period. Either party could have paid the fees at any time, so there may be comparatively little merit in the counter-argument that the extension of time was open-ended rather than specific and, therefore, contravened the Act.

Accordingly, it is suggested that the principles which were applied in this case were informed by policy; and that policy was to ensure that adjudicators reach decisions swiftly. However, it is uncertain whether or not this policy will be welcomed by parties who have freely agreed different priorities.

Other important points that arise from the case are:

- an adjudicator who decides late may lose his immunity from suit;
- reaching a decision and publishing it are separate events. Subject to the parties' agreement, a decision reached in time will be valid if published out of time provided that publication is "forthwith". But "forthwith" means within a few hours at most;
- time periods in adjudication will normally encompass full days, and not merely business-length days. The CPR does not provide a useful analogy in this regard;
- those who framed the HGCRA 1996 may be surprised that adjudication is applied in extremely complex cases;
- adjudicators cannot hold a lien over their decisions even where they make provision in their terms of acting;
- it is incumbent upon nominating bodies such as the RICS (which have generated considerable revenue from nominating) to act promptly when fulfilling that function;
- there is no reason in principle why adjudications should not proceed concurrently with curial or arbitral proceedings.

In the event, Judge Coulson did allow the adjudication to be enforced but made it clear that he only did so on the very specific and unusual circumstances of this case.

Similar issues arose in the case of *Epping Electrical Company Limited v Briggs and Forrester (Plumbing Services) Limited* [2007] EWHC 4 (TCC). The facts were as follows.

Epping Electrical Company Limited ("EEC") brought an application for Summary Judgment to enforce the Decision of an Adjudicator. Briggs and Forrester ("B&F") resisted that claim on the ground that the Decision was made out of time, and accordingly the Adjudicator had no jurisdiction to make it.

The Contract between the parties required that any adjudication was in accordance with the Construction Industry Council ("CIC") procedure current at the time of appointment of an Adjudicator, which in this case was the third edition.

The relevant chronology of events was as follows:

(i) EEC served its referral notice on 4 October 2006. Thus the Decision would be due 1 November 2006;

(ii) On 10 October 2006 the time for making his Decision was extended by the Adjudicator to 14 November 2006 with the consent of EEC;

(iii) On 8 November 2006 the Adjudicator asked the parties for an extension of a further 7 days, "which means my Decision will be reached on Tuesday, 21 November 2006";

(iv) On the same day B&F agreed to "a further 7 day period in which to issue your Decision" subject to confirmation from EEC;

(v) On the same day B&F notified the Adjudicator of its consent to an extension of time to 21 November 2006 for reaching his decision;

(vi) The Adjudicator completed his decision on 21 November 2006, but initially declined to send it to the parties until he had been paid;

(vii) On 23 November 2006 the Adjudicator, having relented, sent his decision to the parties.

B&F contended that its consent to the extension of time for the Adjudicator to reach his Decision was conditional upon his issuing the Decision on that day. Since he did not issue his Decision on that day, there was no effective consent to the extension, and so it was out of time and in consequence beyond the jurisdiction of the Adjudicator. B&F further relied in particular on the decision of the Inner House of the Court of Session in *Ritchie Brothers (PWC) Ltd v David Philp* (CILL June 2004 2113). EEC contended the consent to the extension of time to 21 November was not conditional upon the issue of the decision on that day. EEC also relied on paragraph 25 of the CIC Conditions which stated that:

> If the Adjudicator fails to reach his decision within the time permitted by this procedure, his decision shall nonetheless be effective if reached before the referral of the dispute to any replacement adjudicator under paragraph 11 but not otherwise. If he fails to reach such an effective decision, he shall not be entitled to any fees and expenses (save for the cost of any legal or technical advice subject to the Parties having received such advice).

The Judge decided as follows:

Extracts from the Judgment

12. In my judgment, both having regard to the foregoing citations and generally, on the true construction of the agreement and of the Act there is a distinction between reaching a decision and its despatch or delivery to the parties. That particular issue I decide in favour of the claimant.

13. On the basis that there is a distinction between reaching a decision and its despatch, there is no dispute that the adjudicator's decision was reached on 21 November. The next question I must decide is whether the time for reaching that decision had been effectively extended to that date. Mr. Thomas submitted that the consent of the defendant to the extension of time for reaching a decision to 21 November was conditional upon the issuing of the decision on that day. He relied on the terms of the defendant's solicitor's letter of 8th November mentioned in paragraph 4(6) above. Mr. Leabeater submitted that there was no such condition. He pointed to the fact that the adjudicator's letter seeking the extension of time and his letter acknowledging the extension referred to the time for reaching his decision. Though they used the word "issue" the defendants did not make it plain that it was to be distinguished from "reach". If the defendants wished to draw the distinction on which they rely, they ought to have made that clear to the adjudicator in their letter of 8 November. In any event, they should have corrected the adjudicator's reference to reaching his decision in his letter of 13 November. In my judgment, there is some force in that last submission, since the adjudicator stated that he would issue his decision as soon as he received payment. The implication of that is that although he would reach his decision on 21st November, he would not issue it until he had received payment. In the circumstances, submitted Mr. Leabeater, it was inequitable that the defendant should allow the adjudicator to proceed on what it now said was a misunderstanding of the defendant's own letter and then turn round at the enforcement stage and say that it was a misunderstanding which renders the decision unenforceable.

14. Mr. Leabeater submitted that on a true construction, and in the relevant factual matrix, the defendant's letter of 8 November was reasonably to be interpreted as an unconditional agreement to extend the time limit by which the adjudicator had to reach his decision. I reject that submission. The defendant's letter of 8 November was not ambiguous. Moreover, before close of business on 21 November the defendant made it perfectly clear by its solicitors' letter of that date to the adjudicator that their view was that the adjudicator should immediately release his decision. And on the following day the claimant's solicitors stated that they had not envisaged that the adjudicator would make payment of his fees a condition precedent to the issue of the decision. Such a condition precedent "was never agreed nor envisaged by us", they said. It is clear from the totality of the correspondence that both parties envisaged that issue of the decision would follow immediately upon the reaching of the decision. That no doubt explains why the word "issue" in the defendant's letter of 8th November was not highlighted. It was taken for granted that the decision would be issued without delay when it was reached. In my judgment, the adjudicator's letter of 13 November does not affect the construction of the defendant's letter of 8th November. Nor, especially having regard to the attitude of both parties as indicated above, does it affect the equity of the position. Both parties expressly reserved their positions regarding the late delivery of the decision.

15. Mr. Leabeater submitted in the alternative that because the defendant failed to correct the adjudicator's misunderstanding of the effect of its consent to an extension of time, the defendant was estopped from asserting that it did not intend to extend unconditionally the time in which he was entitled to reach his decision; or had otherwise

acquiesced in the adjudicator's understanding; or had waived any right to object to the jurisdiction of the adjudicator. I reject that submission. It is true that the defendant did not respond to the adjudicator's letter of 13 November, whether by explaining that the defendant's consent was consent to an extension of time to the issue of the decision by 21 November, or otherwise. But neither party responded to that letter, although both parties disagreed with the adjudicator's view that he was entitled to withhold his decision until his fees had been paid. It was indeed the defendants who first disabused the adjudicator of that view, and did so while the adjudicator still had an opportunity to issue his decision within the time limit. There is no evidence of the extent, if any, by which the adjudicator was influenced by any misunderstanding of the defendant's letter of 8 November in reaching his initial decision to withhold the adjudication decision until he was paid. He may have misunderstood the claimant's letter of 8 November, and thought that the parties agreed to the course he intended to adopt. That is pure speculation, but in my judgment there is no sufficient basis for an estoppel or any relief on the basis of acquiescence or waiver.

16. Mr. Leabeater submitted that in any event the decision was still enforceable. He did so on two bases: first, a contractual basis, with reference to paragraph 25 of the CIC procedure; and secondly, pursuant to the proper construction of the Act. I shall consider the second point first.

17. Mr. Thomas submitted that the decision was not enforceable because it was out of time. He relied on Ritchie's case. That was a case where the Scheme applied. It has not been suggested, rightly in my judgment, that that renders the judgment inapplicable to the present case…

18. Mr. Leabeater submitted that Ritchie's case was wrongly decided and that I ought not to follow it. Mr. Thomas told me that Ritchie's case is the only decision on the point by an appellate court. Since the Act applies not only in this jurisdiction but also in Scotland, it would be anomalous and, in my judgment, undesirable that it should be interpreted in different ways in the two jurisdictions. For that reason, whilst strictly I am not bound by the decision, I consider that I ought to follow it. Thus I reject Mr. Leabeater's submission that on the true construction of the Act the time limit is not mandatory.

19. I now come to consider the effect of paragraph 25 of the CIC procedure. On its face, that unambiguously renders the adjudicator's decision enforceable … That provision is not in the Scheme and is not a factor that was present in Ritchie's case. However, it cannot affect the construction of section 108(2) of the Act, which provides for a mandatory time limit. Section 108(5) provides, among other things, that if the contract does not comply with section 108(2), the adjudication provisions of the Scheme shall apply. Paragraphs 16 and 24 of the CIC procedure are apparently mandatory and apparently comply with section 108(2). The apparent effect of paragraph 25 of the CIC procedure is inconsistent with the mandatory nature of section 108(2) and the apparently mandatory nature of paragraphs 16 and 24. If paragraph 25 is valid, then paragraphs 16 and 24 are effectively not mandatory, and the contract does not comply with section 108(2) of the Act, so the Scheme applies. In my judgment, paragraph 25 cannot then survive. The Scheme applies in place of the adjudication provisions of the contract. If it were otherwise, two competing sets of adjudication provisions would simultaneously apply to the contract and many other contracts. That is a recipe for confusion and uncertainty and in my judgment cannot have been the intention of Parliament in passing section 108(5) of the Act.

20. I conclude:

(1) That by its letter of 8 November 2006 the defendant consented to an extension of time from 14 November to 21 November for the adjudicator to reach his decision, conditionally upon the decision being issued by 21 November.

(2) That condition was not fulfilled, since the decision was not issued until 23 November.

(3) In consequence, time for the adjudicator to reach his decision was not validly extended.

(4) The adjudicator reached his decision on 21 November, 7 days out of time.

(5) In consequence, the adjudicator's decision is not enforceable.

This decision is readily reconciled with Cubitt. The decision was not enforced, however, because the special circumstances that arose in Cubitt, notably the very short delay between reaching the Decision and publishing it to the parties, were not present.

However, again, whilst the Courts might consider that the relationship between the parties in respect of adjudication is essentially contractual, Judge Havery in this case allowed his interpretation of the statute to override the parties' agreement as set out in the Rules of the CIC. It is suggested that it would have been open to the Judge to decide that the CIC Rules simply constituted an agreement between the parties to extend the Adjudicator's time for deciding as is allowed by Section 108(2)(c) of the HGCRA 1996.

23 April 2007

Dr Julian Critchlow

Fenwick Elliott LLP