Adjudication – Mr Referee!

The Appointment of an Adjudicator, The Reaching & Delivery of a Decision and Complex/Multiple Issues.

Presented to ICES

Date: 10 February 2009

By David Moss, Gregory Buckley and Claire Rawlinson of Hammonds
1 THE APPOINTMENT OF AN ADJUDICATOR

1.1 Notice of Adjudication

Section 108(2)(a) of the Housing Grants Construction and Regeneration Act ("HGCRA") 1996 states that a construction contract is to contain provisions that "enable a party to give notice at any time of his intention to refer a dispute to adjudication".

In addition, section 108(2)(b) also states that a timetable is to be provided with the objective of securing the appointment of the adjudicator and the referral of the dispute to him within 7 days of such a notice.

In accordance with paragraph 1 of the Scheme for Construction Contracts (the "Scheme") the Referring Party must serve a written notice (the "notice of adjudication") to every party to the contract setting out its intention to refer the dispute to adjudication.

This notice must contain:

(a) the nature and a brief description of the dispute and of the parties involved;
(b) details of where and when the dispute has arisen;
(c) the nature of the redress which is sought; and
(d) the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices).

Other adjudication rules impose different, albeit similar, requirements. For example the TeCSA rules states that the notice should identify in general terms the dispute in respect of which adjudication is required. (Rule 3)

On a practical point, it is important that the Notice of Adjudication provides sufficient information so that any nominating body can select the appropriate adjudicator, and that the adjudicator in question may decide whether there is a conflict of interest and whether he is competent and able to decide the matter referred to him.

In addition, it is good practice (whether required to do so or not) to set out the redress sought in full. This is because the adjudicator will normally look at the remedies when finalising his decision.

1.2 The Appointment of the Adjudicator

Once the Referring Party has given a Notice of Adjudication, the next step in the process is the appointment of the adjudicator. The courts generally take a common-sense approach to the appointment provisions within construction contracts, but if it
finds that an appointment is not valid under the contract then the adjudicator has no jurisdiction.

On a practical note, naming an adjudicator in the contract has the advantage that the parties can be satisfied that the adjudicator has the relevant skills and experience.

There are, however, some difficulties with this. It is not possible to know in advance when a dispute will arise and so the availability of the named adjudicator cannot be guaranteed. Also, the exact nature of the dispute will not be known, so it may be that the dispute falls outside the normal sphere of the named adjudicator’s expertise. An adjudicator of a different background/practice area may be required.

Best practice is to name the adjudicator to the contract, with a specified nominating body also identified to protect the parties’ interests in the event that the named adjudicator is unwilling or unable to act. At the very least, the contract should identify a specified nominating body.

1.3 The Referral Notice

Section 108(2)(b) of the HGCRA requires a contract to provide a timetable with the objective of securing the appointment of the adjudicator and the referral of the dispute to him within seven days of the notice of intention to refer.

Paragraph 7 of the Scheme provides a detailed procedure for complying with this seven-day requirement.

1.4 Case Law

(a) AMEC Capital Projects Limited v Whitefriars City Estates Limited (2004)

In this case, an adjudicator was named in the contract as a Mr George Ashworth of Davies Langdon & Everest or, in the event of his unavailability, a person nominated by the managing partner of Mr Ashworth’s firm.

This should have been a reference to Mr Geoffrey Ashworth.

Unfortunately, Mr Ashworth had died by the time the dispute was referred and Amec sought to refer the adjudication to an adjudicator (via RIBA) on the basis that there was no machinery under the contract as the named adjudicator had died. Whitefriars rejected this approach and argued that the parties should have requested the managing partner of Mr Ashworth’s firm to make a nomination. The adjudicator appointed by RIBA therefore had no jurisdiction.

The Court of Appeal rejected Whitefriar’s argument and held that the adjudicator did have jurisdiction. As Mr Ashworth had died before the matter was referred, the contractual machinery did not apply – the reference to the managing partner of Mr Ashworth’s firm was intended only to occur if, during an ongoing adjudication, the adjudicator becomes unavailable. As a result, the default machinery of the Scheme would apply and the adjudicator in
question had been rightly appointed in accordance with paragraph 2(1)(c) of Part 1 of the Scheme.

(b) IDE Contracting Limited v RG Carter Cambridge Limited (2004)

In this case, the person named in the adjudication clause in the contract informed the Referring Party that due to work commitments he could not act as adjudicator.

Accordingly, the Referring Party’s notice of adjudication made it clear that the CIArb would be requested to nominate an adjudicator and that the named person had declined to act. However, the responding party did not want an adjudicator selected at random and proposed various alternatives, but that offer was not taken up. The CIArb subsequently nominated an adjudicator and the responding party made it clear that they considered that the adjudicator nominated had no jurisdiction.

The Court held that the referring party had failed to comply with the contractual provisions dealing with the appointment of the adjudicator. A Notice of Adjudication had to be issued before a request to act could be made to an adjudicator. Any request had to be in writing and accompanied by a copy of the Notice of Adjudication and any refusal had to be communicated to all the parties. It was only after such a refusal had been given that a request could be made that another adjudicator be appointed. As the referring party had failed to comply with this procedure the adjudicator was deprived of jurisdiction.

(c) Makers UK Limited v Camden London Borough Council (2008)

In this case the contract incorporated the conditions of the JCT Intermediate Form of Building Contract. The contract gave the parties the option of either agreeing on a particular adjudicator or seeking, on the application of either party, a nomination by RIBA.

Makers took view that it was necessary to appoint an adjudicator with legal expertise. As RIBA’s panel of adjudicators comprised few architects with a dual qualification as a barrister or solicitor, Makers telephoned an adjudicator (H), who was a legally qualified member of RIBA, to check on his availability to act as adjudicator. H confirmed his availability to act.

Makers served its Notice of Adjudication on Camden and applied to RIBA to request the nomination of H. RIBA subsequently nominated H as adjudicator. Camden disputed the validity of the nomination.

The judge held that there was no suggestion that RIBA would be in breach of its own rules if it listened to, or acted upon, representations as to the attributes or identity of the person to be nominated by it. It was not necessarily wrong for a party to make representations - in fact it may be helpful if the dispute is especially technical. In addition, it is not uncommon for the parties seeking a nomination to request that the adjudicator should have particular attributes or experience.
In this instance, there was no apparent bias as the matters raised by Makers in its telephone call did not give rise to any suspicion. However, the judge considered that parties should exercise caution when contacting a potential adjudicator prior to their appointment. The following was provided as guide to factors that parties should keep in mind:

(i) It is better for all concerned if parties limit their unilateral contacts with adjudicators both before, during and after an adjudication; the same goes for adjudicators having unilateral contact with individual parties. Such contact, even if entirely innocent, can be misconstrued by the losing party.

(ii) If it is felt that any such contact has to be made, it is better if done in writing so that there is a full record of the communication.

(iii) Nominating institutions might sensibly consider their rules as to nominations and as to whether they do or do not welcome or accept suggestions from the parties. If suggestions are to be permitted, the institution might wish to consider whether notice of these must be given to the other party.

(d) Hart Investments Limited v Fidler & Anor (2006)

In this case, the referral notice was not served in accordance with the Scheme. It was provided 8 days (rather than 7) after the Notice of Adjudication.

The Judge initially considered that it was difficult, in the overall scheme of things, to say that a day’s delay in the provision of the referral notice would have great significance. However, the main purpose of adjudication was speed and if the timetable could be extended without consent (even at the beginning, let alone the end) there was danger of uncertainty. Accordingly, the word “shall” in the Scheme was mandatory and the referring party had to serve the referral within 7 days.

2 THE REACHING AND DELIVERY OF A DECISION

2.1 Introduction

Section 108 (2)(c) of the HGCRA provides that a contract shall “require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred”.

In addition, paragraph 19 of the Scheme provides that the adjudicator shall reach his decision “not later than 28 days after the date of the referral notice”.

Rather unhelpfully, neither the Act nor the Scheme provide unequivocal confirmation of what the obligation to “reach” a decision entails – in particular, whether it is the making of the decision alone or whether it also involves the communicating of the decision to the parties as well. However, it is also important to be clear on when the 28-day period actually starts to run.
With regard to whether an adjudicator is obliged to reach this decision within 28 days, the simple answer is YES. It is important to appreciate that the Courts have repeatedly held that the completion of the decision, and its subsequent communication, are separate events. Accordingly, as the case law shall demonstrate, the Courts will give come leeway to the time for communication – but this is only provided that the decision itself is completed within the 28 days or the agreed extended period.

However, as is clear from the case law, there is no definitive judgement on this point. The cases merely indicate that a delay in communication of, say, one of two days is acceptable. At what point a delay in communicating a decision ceases to be acceptable is unclear.

2.2 Case Law

(a) Ritchie Brothers (PWC) v David Philip (Commercials) Limited (2005)

In this case, the referring party had sent its referral to the adjudicator on 18 September. Although it was sent by special delivery, the adjudicator only collected the referral on 23 September. It was from this date that the adjudicator determined that the 28-day period commenced.

On 21 October, the defender wrote to the adjudicator challenging his jurisdiction on the grounds that his decision should have been reached by 16 October. On the same date, the adjudicator asked the pursuer to defer the date of this decision until 23 October. The pursuer agreed.

On 23 October, the adjudicator confirmed that his decision was ready, pending payment of his fees. His fees were paid and, on 27 October, the adjudicator delivered his decision.

The decision went against the defender who challenged it on enforcement and argued that the adjudicator was out of time in reaching his decision - it was the date of the notice which was the relevant date for the commencement of the 28-day period. The pursuers argued that it was date of receipt which was relevant. In any event, the pursuers considered this issue to be irrelevant as the adjudicator asked for an extension for the delivery of his decision – the pursuer could agree to extend the 28-day period by anything up to 14 days.

The Court found favour with the defenders argument that 18 September should be the relevant date in this instance. It also rejected the pursuer’s argument on extension – the adjudicator’s jurisdiction had lapsed on 16 October and any request for extension had to be made before this lapse. Any request later than this date was of no effect.

(b) In Aveat Heating v Jerram Falkus Construction (2007) the defendant also argued that the date of the referral was the relevant date. The referral notice was dated 11 October and the effect of a valid extension of time was that the date for delivery of the decision was 15 November 2006. As the adjudicator had not reached his decision until 17 November it was out of time.
The Judge disagreed. His position was that something could not be referred to another person unless that person actually received it. Whilst it might be sent with the intention of referring it, if it was never received it was never referred. Referral therefore takes place on the date of receipt of notice by the adjudicator. On the facts, the decision was therefore reached within the agreed extended period.

As to which of these decisions finds judicial favour, it is generally thought that, to the extent that there is a conflict in these approaches, the approach adopted in Aveat Heating would be preferred.

(c) In *Barnes & Elliot v Taylor Woodrow (2003)*, the adjudicator reached his decision and sent it out in draft form to the parties by email on 20 May 2003. He did this because he wanted the parties to check it over to see that all points had been dealt with. Following the making of some changes, the decision was signed on 22 May 2003, the date by which it had to be made. However, rather than sending it by email, the adjudicator sent it by DX and it only reached the parties on 23 May 2003. The defendant argued that the decision was out of time. The adjudicator was authorised to make a decision by 22 May - this included the communication of that decision.

Judge Lloyd observed that adjudicators ought to be well aware of the importance of complying with the time limits of the Act and in the Contracts which were, he said, crucial to the effectiveness of adjudication. Given today’s instantaneous methods of transmission, the use of first class post or DX was archaic and the contemporaneous duty to communicate the decision should be easily achieved. However, an error that resulted in a delay of one or two days was excusable and “within the tolerance and commercial practice that one must afford to the Act and to the contract”. The decision was valid and did not become invalid because of an error in its dispatch.

(d) The case of *Simons Construction v Aardvark Developments (2003)* followed the issue of proceedings by an adjudicator for payment of his fee. On the day of the decision was due, adjudicator informed the parties that his mother had died and, although he was in a position to provide a draft decision, he required an extension of time. Although Aardvark agreed to an extension of time, Simons objected to any decision being published which was not in its final form. However, Simons made no comment on the adjudicator’s extension request. On the same day, the adjudicator issued his decision marked ‘draft for the parties comment” and said that his final decision would be published in 7 days. When the final decision was delivered (7 days later) Simons argued that the decision was not binding as it was late. In defence of the adjudicator’s fee claim, Simon’s sought a declaration that the decision was not capable of enforcement.

Judge Seymour decided this case and found that the draft decision was not one which was capable of enforcement. However, he concluded that the final decision was always valid, provided that the adjudication agreement (if any) had not been terminated for the adjudicator’s failure to produce the decision, and a fresh notice of adjudication had not been given by one of the parties.
This decision has come under repeated criticism and has not been followed. The reason why is because the rationale leaves the adjudication process very open-ended and it could carry on indefinitely if neither of the parties acted. This wasn’t the intention of adjudication.

(e) It was in the case of Ritchie Brothers (PWC) v David Philip (Commercials) Limited (2005) (above) which brought an unequivocal ruling on this point. At first instance, even though the judge found that the relevant date for the referral was 18 September, he considered that the underlying intention of the Act and Scheme was that, once started, the adjudication process should be seen through, even if the decision is delivered late – the expiry of the 28 day period was not enough to bring the adjudicator’s jurisdiction to an end.

This was reversed on appeal to the Inner House of the Court of Session. It said that the 28-day period meant just that and rejected any question of the adjudicator being able to reach his decision at any time during an indefinite period after the expiry of the 28 days, so long as neither of the parties issued a fresh notice of adjudication. As this case is the first decision of an appellate court on this matter it has been followed by the TCC in London in a number of subsequent cases.

(f) One of those was Cubbitt Building & Interiors v Fleetglade (2006) which, in itself, provides a useful recapping of the law in this area and the cases referred to above. In this case, the adjudicator’s decision was due on 24 November 2006. Beforehand, however, he advised the parties that, by virtue of his conditions, he had a lien on the decision (which he had at that point reached) pending payment of his fees.

One of the parties pointed out that, as a result of the case of St Andrews Bay v HBG (2003), the adjudicator was not entitled to a lien on his fees (either at contract or law) as such could extend the time for his decision without the express consent of both parties. This was not envisaged by the Scheme or the Act. The adjudicator relented but, rather than send it out on 24 November 2006, he adjudicator decided to do some extra proof reading and sent it out on 25 November 2006 at about 12:30pm.

The Court held that there was no doubt the decision was late and the judge expressly warned adjudicators that if they failed to provide a decision in the relevant period, it may well be a nullity. However, in instances where a decision is not communicated in the timescale, it has to be done so forthwith.

On the facts this case, it was clear the decision was reached before the end of 24 November – the adjudicator had emphasised that, but for the lien, the decision would have been sent late on 24 November. The Court therefore thought it was wrong in principle to penalise Cubbitt for the adjudicator’s mistake. However, there was a further consideration, 25 November 2006 was a Saturday and although the evidence of both parties was that they were ready to study it, the Judge felt a practical businessman would not conclude that the decision being delivered at this time was a fundamental breach of the adjudication agreement.
The case of *Epping Electrical v Briggs and Forester* (2007) is another case which followed *Ritchie Brothers* and the Judge expressly noted that, as *Ritchie Brothers* was a decision of the Appeal Court and the Act applied in both England and Wales, he ought to follow it – it would be anomalous and undesirable if the 28 day provisions was interpreted in different ways in the two jurisdictions.

*A C Yule & Son v Speedwell Roofing & Cladding* (2007) is the most recent case in which the TCC emphasised the importance of compliance with the 28-day period. The facts of this case are that, as a result of Speedwell’s request for further time to make representations, the adjudicator sought a consequential extension of time. Yule agreed, but Speedwell did not respond. However, the manner in which Speedwell conducted themselves was consistent with an extension having been agreed. The adjudicator’s decision was provided within the extended period but Speedwell took the point that it was invalid because it had not expressly agreed to his request for an extension.

The Court rejected Speedwell’s position. Instead, it considered that there was a clear obligation on both parties to respond plainly and promptly to the adjudicator. If, in breach of that obligation one party failed to respond, there was a strong case for saying that the party had accepted, by their silence, the need for the required extension. As the Judge put it: “the adjudicator can do no more than work out that he needs a short extension, and seek agreement from the parties. Common sense, as well as common courtesy, requires a prompt response”.

### 3 COMPLEX/MULTIPLE ISSUES

#### 3.1 Section 108 of the HGCRA 1996 requires that the contract shall:

“(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred:”

“(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred:”

The 28-day period is designed to ensure a swift response to the dispute being referred to the adjudicator. However, in larger construction disputes the sums of money at stake can be very significant. The issue to be decided may also be very complex. In such circumstances, a responding party may be said to be at greater risk because it can easily be given very little time to respond to a case which is not only complex, but upon which millions of pounds may turn. In addition, given that the parties have to bear their own costs of the adjudication process, a party may lose (and spend) very considerable sums which it has no prospect of recovering for months, if not years.

In *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd* (2004) HHJ Toulmin commented on a point within the judgment of *Macob Civil Engineering Ltd v Morrison Construction Ltd* that noted that the decision of the adjudicator was “merely introduced [as] an intervening stage in the dispute resolution process. He said:
“The word “mere” was entirely appropriate to characterise the summary and inexpensive procedure that was envisaged by Parliament. It is a less appropriate description of a process, which has already cost over £1 million. The Court has to grapple with a procedure, which Parliament introduced to provide a quick, easy and cheap provisional answer so that, in particular, sub-contractors were not unjustly kept out of their money. It has developed into an elaborate and expensive procedure, which is wholly confrontational, a full-scale trial normally, on the documents, of the issues referred to the adjudicator (not necessarily the whole dispute) within a timetable of 42 days from notice of adjudication to decision by the adjudicator....

The claimant has the considerable advantage in a complex adjudication that it can chose when to start the adjudication, having taken the time it has needed to prepare. It will then impose a very tight timetable on the defendant and frequently on the adjudicator. It is with this in mind that I raise the possibility that there maybe disputes which are so complex and the advantages so weighted against a defendant that there is a conflict between the right to refer to adjudication and to obtain a decision under S108(2)(c) and (d) of the Act, and the adjudicator’s duty to act impartially under S108 (e) of the Act and that this maybe a conflict which it is impossible to resolve.”

The conclusion is that if an adjudicator cannot reach a fair decision between the parties in the time allowed, then he must decline the reference.

Complex disputes were also considered in the case of CIB Properties Ltd v Birse Construction Ltd (2005).

In this case, the first adjudicator had decided in August 2002 that CIB was entitled to terminate the contract. Nearly a year later, CIB claimed a consequential payment of over £16.6 million. The claim comprised of approximately 50 lever arch files and a further 150 files were disclosed during the adjudication. The adjudicator was granted a number of extensions and the adjudication took approximately 3 months. One of the grounds for the challenge to the adjudicator’s decision was that the size and complexity of the dispute made it impossible to resolve fairly.

HHJ Toulmin stated that the test was whether the adjudicator was able to reach a fair decision within the time limits allowed by the parties. The adjudicator had been careful to conduct the adjudication fairly, giving the parties a fair opportunity to set out their cases before him. He sought and obtained the agreement to extensions of time, which enabled him to reach a fair conclusion having given both parties a proper opportunity to put their case. HHJ Toulmin concluded that Birse was not prejudice because it had 15 weeks from the demand in which to make a substantive response and in the course of the extended adjudication it had a full opportunity to make further investigations and put its substantive case to the adjudicator within the time limits proposed by the adjudication process.

Interestingly HHJ Toulmin also states that:

“a defendant is not bound to agree to extend time beyond the time limits set down in the Act even if such a refusal renders the task of the adjudicator to be impossible”.

As to the situation with respect to multiple disputes:
• Paragraph 8(1) of the Scheme allows the adjudicator to adjudicate on more than one dispute under the same contract, if all the parties to the disputes consent.

• Similarly, paragraph 8(2) allows the adjudicator to adjudicate at the same time on related disputes under different contracts, whether or not one or more of those parties is a party to those disputes. The consent of all the parties to those disputes is required however.

• Sensibly, paragraph 8(3) provides that all the parties to the disputes may agree to extend the period for the adjudicator making his decision in relation to all or any of these disputes.

In Pring & St Hill Limited v CJ Hafner (t/a Souther Erecters) (2002), the adjudicator had originally been appointed to decide an adjudication between the Main Contractor and the Sub-contractor (PSH) in connection with some damaged glazing, the result of which was that the adjudicator found that PSH were obliged to pay money to the Main Contractor.

Subsequently, PSH started adjudication proceedings against SE who were one of four potential sub-sub-contractors who may have contributed towards the damaged glazing.

The same adjudicator who had been appointed to decide the dispute with the Main Contractor and PSH was appointed to adjudicate. In addition, the adjudicator had also been appointed to deal with a dispute between PSH and another sub-sub contractor.

SE objected to his appointment on the grounds that the adjudicator had dealt with the same underlying issues in his previous involvement with the dispute between the Main Contractor and PSH. They also objected to the proposal that their adjudication ran in parallel with PSH’s other adjudication.

This case turned on the scope of paragraph 8(2) and whether it applied, as submitted by PSH, solely to an adjudicator conducting two or more adjudications at the same time in a consolidated manner or whether it had a wider application, as submitted by SE. The judge decided it had a wider application and that the consent of the parties was a condition of the appointment. Accordingly, the judge held that the adjudication had proceeded without jurisdiction by the adjudicator failing to obtain the consent of the parties.
David Moss  
Partner  
Telephone No: 0161 830 5052  
Fax No: 0870 460 3506  
E-Mail: david.moss@Hammonds.com

Gregory Buckley  
Associate  
Telephone No: 0161 830 5025  
Fax No: 0870 443 4158  
E-Mail: gregory.buckley@Hammonds.com

Claire Rawlinson  
Solicitor  
Telephone No: 0161 830 5168  
Fax No: 0870 460 3029  
E-Mail: claire.rawlinson@Hammonds.com