

Adjudicators and Deadlines

Will the line of decisions where Adjudicators issue their decisions “late” ever end?

In the past two months we have seen another two such decisions – **Cubitt Building & Interiors v Fleetglade Limited** (Judge Coulson, TCC 21 December 2006) and **Epping Electrical Company v Briggs & Forrester (Plumbing Services) Limited** (Judge Havery TCC 19 January 2007). These join a long line of competing and sometimes conflicting authorities.

The question must be asked, what is all the fuss about? It is however a critical issue. If an Adjudicator’s decision is considered to be out of time and in turn a nullity, it can’t be enforced and parties must start again. This leads to duplication of costs and lengthy delay .

So, is the issue now put to rest once and for all? Must the decision be issued as well as reached within a 28 day or any agreed extended period? Are there circumstances where it can be issued slightly later without becoming a nullity? If so, what are these circumstances?

The lengthy line of authorities gave the following guidance

In the **Bloor Construction** case in 2000 the JCT Adjudication Clause, which requires the Adjudicator on reaching his decision, “to communicate it forthwith”, was considered (Clause 41A.5.3). There the decision was reached within the timescale but was issued two days late. Judge Toulmin considered obiter that the process of communicating forthwith had to **start immediately after the decision was reached**. If parties had not agreed otherwise in this case, a delay of two days, he thought, would have been too late.

In the **St Andrew’s Bay Development Limited and HBG Management Limited** case the Scottish version of the JCT Adjudication Clause applied, which is similar to Clause 41A.5.3. There the Adjudicator advised parties she had reached her decision but sought payment of her fees before issuing. This meant her decision was issued two days late. The court considered the Adjudicator had not reached her decision within the necessary timescale as the obligation to reach such a decision included a contemporaneous duty to communicate that decision to the parties.

In that case despite this, it was considered it did not render it a nullity. No referral had been made to another Adjudicator and it was only two days beyond the time limit.

This approach was followed by Judge Lloyd in **Barnes & Elliott Limited against Taylor Woodrow Holdings Limited and George Wimpey** (TCC 20 June 2003). There the Adjudicator had issued his decision one day late. Judge Lloyd considered both the steps of reaching and issuing the decision had to be done within the required timescale. He then went on to determine whether despite the decision being beyond the required timescale it was a nullity. He considered a delay of one or two days within “the tolerance and commercial practice one must afford to the Act and the contract” and that the decision was therefore enforceable. He proceeded on the basis that there was no challenge on the merits of the decision and that an error which resulted in a day or possibly two days was excusable.

In **Ritchie Brothers (TWC) Limited against David Philp (Commercials) Limited** (an Appeal Court decision in Scotland 24 March 2005), the Adjudicator was out of time in **reaching** his

decision by about 7 days. The Appeal Court had to consider whether in these circumstances the Adjudicator's decision was unenforceable. An argument was advanced that as the defendants had not sought to refer the matter to another Adjudicator the first Adjudicator remained within his jurisdiction. The Court dispensed with that argument and considered that certainty was what was required even if it did involve further delay and expense in starting again in adjudication. Here, it was the reaching of the decision which was out of time not just the issuing of it.

Finally, we have the two most recent decisions. In the **Cubitt Building** case one of the issues was whether the Adjudicator issuing his decision a day late rendered it a nullity. He first sought to exercise a lien(hold) over publication of his decision until payment of his fees. He was unsuccessful in insisting on his lien and issued his decision in electronic form at 12.20pm on the day after his decision was due having reached his decisions within the time limit.

Judge Coulson took the view that as the adjudicator had reached his decision in time and the decision had been issued forthwith– the requirement of the JCT rules– as it was sent out twelve and a half hours later, it was enforceable. Although this did not expressly deal with Scheme adjudications it is considered on the basis of the above authorities, the same principles apply. How long is “forthwith” is a matter of judgment.

The final case in the chain is **Epping** where Epping were sub-contractors for mechanical and electrical work and they sought to enforce the Adjudicator's decision for around £370,000. Briggs & Forrester challenged this on the basis that the Adjudicator had issued his decision out of time and it was therefore a nullity. In that case there was a twist. The adjudication rules were the CIC Adjudication rules which purported to allow the Adjudicator some leeway (Rule 25) by providing that if he did fail to reach his decision within the permitted time scale it would still be effective if reached **before** the dispute was referred to a replacement Adjudicator. The Judge determined that this rule was contrary to the Act as it was inconsistent with the requirement that a decision must be made within 28 days or an agreed extended period. As such the Scheme overwrote the CIC rules and the Adjudicator's decision was therefore out of time and unenforceable.

The principles that can be taken from these decisions are as follows;

- The reaching of a decision in adjudication and communicating it are two separate processes
- An adjudicator must reach his decision in 28 days or any agreed extended period
- If he does not it may be a nullity and parties will have to start again
- A decision reached in time but communicated late may still be valid provided it is communicated forthwith
- Any contractual adjudication rules which seek to relax the timescales will be contrary to the Act and the Scheme will apply to that contract

This article is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

If you would like any further information in respect of Construction & Engineering, please call the person at D&W with whom you normally liaise, or the following specialist:

| | | |
|-----------------|--|---------------|
| Lindy Patterson | lindy.patterson@dundas-wilson.com | 0141 304 6100 |
| Carl Asser | carl.asser@dundas-wilson.com | 0207 759 9923 |
| Alistair McLean | alistair.mclean@dundas-wilson.com | 0131 200 7475 |

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