HIS HONOUR JUDGE PETER COULSON Q.C.

Approved Judgment

Cubitt v Fleetglade

Neutral Citation Number: [2006] EWHC 3413 (TCC)

Case No: HT-06-328

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 21/12/2006

Before :

HIS HONOUR JUDGE PETER COULSON QC

- -

Between :

CUBITT BUILDING & INTERIORS LTD **Cla**

- and -

FLEETGLADE LTD **Defe**

- -

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Ms Fionnula McCredie (instructed by **Fenwick Elliott, WC2**) for the **Claimant**

Mr Alan Steynor (instructed by **Charles Brown, Sutton**) for the **Defendant**

Hearing date: 14.12.06

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Judgment

HIS HONOUR JUDGE PETER COULSON QC :

A. Introduction

1.
This is an application, issued on the 9th November 2006, by the Claimant, Cubitt Building & Interiors Ltd (“Cubitt”), for summary judgment on their claim for a declaration that the adjudicator, Mr

Matthew Malloy, was properly and validly appointed and had the necessary jurisdiction to decide the dispute between Cubitt and Fleetglade Ltd ("Fleetglade") that was purportedly referred to him. At the time of the application there was no adjudicator's decision. Subsequent to that application, on the 25th November 2006, the adjudicator provided to the parties a decision which concluded that a further net sum of around £600,000-odd was due to Cubitt. The timing of the adjudicator's decision has given rise to an entirely separate issue as to its status and validity. Fleetglade contend that the decision was reached out of time and was therefore a nullity. Cubitt submit that the decision was valid. If Cubitt is successful on each of the two disputes referred to above, I am invited to enforce the adjudicator's decision.

2.
These two issues have led to a detailed investigation of what might fairly be described as technical points on both sides. I make no complaint about that. The law and the contractual provisions relating to adjudication are complex, and parties are often driven to argue points that, on the face of it, look unattractively narrow, but which on closer analysis are difficult to answer satisfactorily. In this case, quite properly, both parties were obliged to take such points and I am extremely grateful to both Ms McCredie and Mr Steynor for their helpful submissions on the particulars points that have arisen in this case.

B. The Contract

3.
By a contract made in writing on about the 7th April 2003, Cubitt were engaged as contractors to carry out the superstructure works at the Defendant's site at Hampton Wick Riverside. The contract sum was £10,126,061.81. The architects and quantity surveyors named in the contract were PSP Consultants. The contract incorporated the JCT standard form 1998 with amendments 1 – 4 and certain other bespoke amendments.

4.
Two different parts of the JCT provisions are relevant to the disputes which have subsequently occurred. The first arises out of the issue by PSP of a Final Certificate. Clause 30.9 provided as follows:

"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 or any arithmetical error 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."

5.
The second element of the JCT provisions which is relevant to this case concerns adjudication. The adjudication provisions are set out in clause 41A. The relevant provisions are as follows:

“41A(1) Clause 41A applies where pursuant to Article 5 either party refers any dispute or difference arising under this contract to adjudication.

41A.2 The adjudicator to decide the dispute or difference shall be either an individual agreed by the parties or, on the application of either party, an individual to be nominated as the adjudicator by the person named in the appendix (“the nominator”). Provided that

41A.2.1 no adjudicator shall be agreed or nominated under clause 41A(2) or clause 41A(3) who will not execute the standard agreement for the appointment of an adjudicator issued by the JCT with the parties and

41A.2.2 where either party has given notice of his intention to refer a dispute or difference to adjudication then

- any agreement by the parties on the appointment of an adjudicator must be reached with the object of securing the appointment of and the referral of the dispute or difference to the adjudicator within 7 days of the date of the notice of intention to refer

- any application to the nominator must be made with the object of securing the appointment of and the referral of the dispute or difference to the adjudicator within 7 days of the notice of intention to refer.

Upon agreement by the parties of the appointment of the adjudicator or upon receipt by the parties from the nominator of the name of the nominated adjudicator the parties shall thereupon execute with the adjudicator the JCT adjudication agreement…

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 an 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 that 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...

41A.5.3 The Adjudicator shall within 28 days of the referral under clause 41A.4.1 and acting as an adjudicator for the purposes of s.108 of the Housing Grants Construction and Regeneration Act 1996 and not as an expert or an arbitrator reach his decision and forthwith send that decision in writing to the Parties. Provided that the Party who has made the referral may consent to allowing the Adjudicator to extend the period of 28 days by up to 14 days and that by agreement between the parties after the referral has been made a longer period than 28 days may be notified jointly by the Parties to the Adjudicator within which to reach his decision…

41A.5.6 Any failure by either Party to enter into the JCT adjudication agreement or to comply with any requirement of the Adjudicator under clause 41A.5.5 or with any provision in or requirement under clause 41A shall not invalidate the decision of the Adjudicator...

41A.8 The Adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith and this protection from liability shall similarly extend to any employee or agent of the Adjudicator."

6.
The adjudication provisions at clause 41A are designed to comply with s.108 of the Housing Grants Construction and Regeneration Act 1996 ("the 1996 Act"). Subsections 1 and 2 of the 1996 Act provide as follows:

"108(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose "dispute" includes any difference.

2 The contract shall –

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

(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;

(e) impose a duty on the adjudicator to act impartially; and

(f) enable the adjudicator to take the initiative in ascertaining the facts and the law."

C. Outline Chronology

7.
On the 24th August 2006, PSP issued a Final Certificate under the contract in the gross sum of £11,240,212.03p. It was received by both parties on the following day, the 25th August, and it appears that neither party were happy with its contents. Pursuant to clause 30.9.3 therefore they had until Friday 22nd September to challenge the Certificate.

8.
On Wednesday the 20th September Fleetglade issued a notice of arbitration which identified a number of disputes on which Fleetglade wished to arbitrate. Later that same day, at 4.42 p.m., Cubitt faxed to Fleetglade a notice of intention to refer a dispute or difference to adjudication ("the adjudication notice"). Amongst other things the adjudication notice sought a declaration that the gross value of the Final Certificate should have been £12,901,052.59p. Thus the dispute being referred to adjudication was worth to Cubitt a gross sum of about £1.65 million.

9.

On Thursday 21st September 2006 Cubitt's solicitors wrote to the RICS, the nominating body identified in the appendix to the contract, seeking the nomination of an adjudicator. Unfortunately, it was not until Tuesday the 26th September that the RICS notified Cubitt's solicitor that they were processing the application and would shortly inform them of the identity of the adjudicator. It was not, in fact, until late on the following day, Wednesday 27th September, that the RICS nominated Mr Malloy. The document from the RICS setting out its nomination was received by Cubitt's solicitor at 5.06 p.m. Mr Malloy then wrote to confirm his acceptance of that appointment. His fax was received by Cubitt's solicitor at 5.35 p.m. That, so it seems to me, was the operative time of the adjudicator's appointment.

10.
Late on Wednesday 27th September, the solicitors spoke on the telephone and Cubitt's solicitor offered Fleetglade's solicitor the document that he had drafted, namely the referral notice, but without the accompanying documents, which were elsewhere. This offer was refused by Fleetglade's solicitor. Thus Cubitt referred the dispute to the adjudicator, by service of the referral notice on the adjudicator and on Fleetglade's solicitor, on the following day, Thursday 28th September 2006. The referral notice was accompanied by 12 lever arch files of supporting documentation. [1] The following day the adjudicator said that he could produce his decision by the 26th October.

11.
On the 3rd October Fleetglade's solicitor took the point in writing that the referral notice was not served within 7 days of the notice of adjudication and that, therefore, the adjudicator had no jurisdiction. It is I think important to note that, by the time this objection was first taken, the 28 day period identified in clause 30.9.3 of the contract had expired. Thus Cubitt's solicitors had no realistic alternative but to continue with the adjudication.

12.
It is also right to note that, although Fleetglade's objection was a purely technical point in the legal sense, it is possible to discern two more substantive complaints that lay behind it. First, there was a significant history of disputes on this project. This was the fifth adjudication and two of the previous adjudications had been decided by Mr Malloy. Fleetglade had been unhappy with his previous decisions. They had asked Cubitt's solicitors and the RICS not to nominate Mr Malloy as the adjudicator on this occasion, but as so often happens to those sorts of points, it appears that their request fell on deaf ears. Indeed, it is not clear whether the RICS even read their letter before nominating Mr Malloy.

13.
Secondly, because of the existence of their own notice of arbitration it is possible that Fleetglade considered that there was considerable overlap between the matters covered by their notice of arbitration and Cubitt's notice of adjudication. Although the authorities make clear that it is perfectly permissible to have concurrent arbitration and adjudication proceedings (see **Herschel Engineering Ltd v Breen Property Ltd** [2000] BLR 272), it may be that Fleetglade were keen to avoid the inevitable duplication of costs.

14.
However, this point would have had much more force if Fleetglade had said clearly and without qualification that they accepted that their own notice of arbitration was wide enough to encompass all of Cubitt's arguments under the final account. They did not do so then and they expressly declined to offer such comfort when Ms McCredie asked for it during the hearing before me. Thus it seems to me

that there is at least a risk that the issues in the arbitration and the dispute in the adjudication do not entirely overlap, so that if for whatever reason the adjudicator's decision is a nullity, Cubitt's only opportunity to challenge the Final Certificate under clause 30.9.3 has been lost.

15.
By 4th October the adjudicator was already changing his mind about whether he could reach a decision in 28 days. In the event the parties agreed that the adjudicator's time for providing his decision would be extended to 16th November. Later it was extended again, this time to 24th November. This process of 'creep' in the timetable is a common but regrettable feature of adjudication. Again, I venture to suggest it is not what the 1996 Act was designed to produce. The decision was, in fact, sent out by e-mail to the parties the day after the extended date, on Saturday 25th November. Following the receipt of letters from both solicitors, the adjudicator corrected an arithmetical error in the decision worth about £5,000 and provided the necessary replacement pages of his decision on Wednesday 29th November 2006.

D. The Issues

16.
The first Issue, and the one that gave rise to Cubitt's original claim for a declaration, concerns the referral notice. As we have seen, Fleetglade's solicitors took the point that, in breach of clause 41A. 4.1 of the contract, the referral notice was not served within 7 days of the notice of adjudication and therefore the adjudicator did not have any jurisdiction to consider the dispute. Cubitt say that it was served within 7 days and that in any event they complied with the terms of the contract. I have called this Issue 1 and it is dealt with below in paragraphs 18 – 51.

17.
The second Issue, which did not exist at the time of the original application, but which plainly arises out of Fleetglade's Defence and Counterclaim, concerns the timing of the adjudicator's decision. It is said by Fleetglade that the adjudicator failed to produce the decision by the agreed extended date of 24th November and that the decision that he did provide was, therefore, a nullity. I call this Issue 2 and it is dealt with in paragraphs 52 – 92 below. Depending on the outcome of Issues 1 and 2 Cubitt seek to enforce the decision of the adjudicator. If I am against them on Issues 1 and 2 then Fleetglade accept that there would be no other reason for the Court not to have enforced the adjudicator's decision.

E. Issue 1- The Arguments

18.
On the face of it, the problem for Cubitt on Issue 1 is that the notice of adjudication was dated 20th September and the appointment of the adjudicator took place on 27th September. Thus, pursuant to clause 41A.4.1, the referral notice should also have been provided on 27th September. It was not, in fact, provided until the following day.

19.
Cubitt take three points in response to this. First, they contend that the effective date of the notice of adjudication was actually 21st September. They argue that in accordance with CPR 6.7 a document served by fax after 4 p.m. must be deemed to have been served on the following business day. Thus they say that service of the notice of adjudication at 4.42 p.m. on 20th September must be deemed to have occurred on 21st September. Because the referral notice was served on 28th September, Cubitt maintain that the 7 day period was complied with.

20.
Cubitt's second point is that, if they were wrong on the first, the contract did not prohibit the provision of a referral notice outside the 7 day period. This point was put in two ways. First it was said that the words of clause 41A.2.2 and 41A.4.1 of the contract do not make the 7 day period mandatory, and/or that there should at least be a certain amount of flexibility in its operation. Secondly, and in any event, Cubitt say that the appointment of the adjudicator did not effectively occur until 28th September. Thus, they say, the service of the referral notice on that day was made immediately after the appointment and, therefore, complied with the contract.

21.
Cubitt's third and final point on Issue 1 is that if, contrary to their second argument, the referral notice was not served immediately, clause 41A.5.6 meant that this delay did not invalidate the adjudicator's later decision. In particular they rely on the words "any failure...to comply with the (inaudible) provision in or requirement under clause 41A shall not invalidate the decision of the adjudicator".

22.
Fleetglade respond to the first point by contending that the deemed service provisions in the CPR are inapplicable to adjudication, and that the relevant date of the notice of adjudication was 20th not 21st September, thus making the provision of the referral notice on 28th September outside the 7 day period. As to the second point, they say that the contract stipulates a 7 day period and that the referral notice should have been served on 27th September when the adjudicator was appointed. As to the third point, Fleetglade say that the saving provision does not bite because it only relates to the directions of an adjudicator properly appointed and in receipt of a valid referral notice, and not otherwise.

F. Issue 1 - The Relevant Principles

(a) Introduction

23.
During the course of counsel's oral submissions it became clear that there were three important matters of principle that arose in respect of Issue 1. They were the comparative importance of the 1996 Act on the one hand and the contractual adjudication provisions on the other; the importance of adherence to the strict timetable provided by adjudication; and the proper operation of the 7 day period between the notice of adjudication and the referral notice. I deal with each of those matters of principle in turn below.

(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. [2] What matters most is the production of a temporarily binding decision within the timetable provided by the 1996 Act or the terms 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 **Carrillion 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. Clause 41A is plainly designed to achieve that. Take for example its provisions in respect of the referral notice. The clause envisages two very common situations. The first is when the adjudicator has been appointed within seven days of the adjudication notice. If that has happened, the referral notice, which triggers the adjudicator's power to issue directions and so on, must be served within that period. But, unlike the Scheme for Construction Contracts, Clause 41A expressly recognises that sometimes, because of the involvement of a nominating body and the delays that that can bring, the adjudicator may not be appointed until after the seven day period has expired. Under Clause 41A that does not invalidate the adjudication; it simply means that the referral notice must be served immediately on the appointment of the adjudicator. That then brings me to the seven day period.

(d) The Seven Day Period

29.
The specific point of principle raised by Issue 1 is, of course, whether the words in clause 41A.4.1 are mandatory or discretionary; and, if mandatory, how they are to be interpreted. I am in no doubt that the words are mandatory. The language admits of no other conclusion. The word that is used repeatedly is the word "shall". It is not "may"; it is not a provision allowing the referring party to use

his best endeavours to take these steps within the specified period. The requirement is that these events shall happen within a certain time frame. I consider therefore that the provisions are mandatory.

30.
That conclusion is consistent with the view I reached in **Hart Investments Ltd v Fidler & Another**[2006] EWHC 2857 TCC. That was a case under the Scheme for Construction Contracts. I concluded that the words in Part 1, paragraph 7 "shall…not later than seven days…" meant exactly what they said. Accordingly, I found that they were not discretionary, but mandatory. The failure to comply with this requirement, in circumstances where no excuse was offered and the point was taken by the other side immediately, amounted to one of three separate reasons why, in that case, I declined to enforce the decision of the adjudicator. [3]

31.
I note that the provisions in clause 41A with which we are concerned were considered by HHJ Thornton QC in **William Verry v. North West London Communal Mikva** (2004) BLR 3008. That was a decision which was not cited to me in **Hart**. In that case an adjudicator (who had been appointed promptly) gave directions in which he required the referring party to serve the referral notice eight days after the adjudication notice. This order was complied with, and the judge rejected the suggestion that the referral notice was invalid. At Emden section V, 37, footnote 1 the learned Editor notes that the point was not taken in **Verry** that an adjudicator has no power to proceed until he has received the referral notice: see the decision of HHJ Bowsher QC in **Carter v Nuttall** [2004] BLR 308) The learned editor goes on to say (in my view rightly) that in **Verry**, since the matter had not been referred to the adjudicator when he gave directions, it was difficult to see how he had the jurisdiction to provide such binding directions at all.

32.
Two other points need to be made about the decision in **Verry**. First, it is clear from paragraph 30 of his judgment that Judge Thornton based his decision on the fact that Verry had complied with the adjudicator's procedural directions, and (particularly since no point was taken on the validity of the directions themselves) it could not therefore be said that the referral notice served in accordance with those directions was invalid. That seems to me to be an entirely reasonable and sensible result. But it does mean that **Verry** is a case on its own particular facts, and is not perhaps authority for any wider proposition.

33.
Secondly, to the extent that Judge Thornton suggests that the seven day period is directory, not mandatory, this view is apparently based on his careful analysis of s. 108, and not the words of clause 41A. For the reasons which I have given at paragraphs 24 and 25 above, I consider that it is the words in the contract that matter. If a contractual adjudication scheme complies with the 1996 Act, the precise words of the Act itself become irrelevant. Accordingly I remain of the view that clause 41A is mandatory, although of course it needs to be sensibly operated.

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:

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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.

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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.

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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.

(c) Clause 41A.5.6

48.

In the light of my conclusion that the referral notice in this case was valid, it is probably unnecessary for me to decide whether clause 41A.5. (the "any failure" proviso) would have rescued an otherwise late referral notice. However, I should say that, in my judgment, it would not have done, and it is therefore most unwise for a party who is endeavouring to comply with clause 41A to allow itself the comfort of thinking that any failure on its part can be got over by clause 41A.5.6.

49.

In **Palmac Contracting Ltd v Park Lane Estates Ltd** [2005] BLR 30, HHJ Kirkham said of an earlier version of the same provision:

“I accept Mr Evans’s submission that the effect of that clause is not such as to validate the appointment of an adjudicator invalidly appointed. Its scope is limited to procedural steps within a validly constituted adjudication. That clause would not assist the Claimant”.

Whilst I accept Ms McCredie’s points that, first, those remarks were obiter, and second, on the unusual facts of that case, the appointment of the adjudicator had occurred before the notice of adjudication, so that the learned Judge was talking in that paragraph about the notice of adjudication, I do not consider that that ultimately makes any difference to the point that she was making.

50.
In my view, clause 41A.5.6 is concerned with procedural relief. It cannot confer jurisdiction to an adjudicator who does not have any jurisdiction in the first place. An adjudicator, in order to have the power to make directions, must be in receipt of a valid referral notice. If that has not happened, then clause 41A.5.6 cannot rescue the situation. Take as an example an adjudicator who is appointed in a situation where there is then no referral notice for three months. In such circumstances the responding party is entitled to say, if and when the belated referral notice turns up, that the adjudicator has no power to make any directions at all. Under clause 41A the referral notice would be a nullity. It would make a nonsense of the whole adjudication process if the referring party could then rely on clause 41A.5.6 to argue that the much-delayed referral notice had not invalidated the decision of the adjudicator.

51.
Accordingly, had it been necessary to do so, I would have found that any invalidity of the referral notice was not cured by clause 41A.5.6. However, given that I concluded that the referral notice was valid, the point does not directly arise. I therefore grant Cubitt the declaration sought in their original application.

52.
I then turn to Issue 2 and the question of whether or not the adjudicator’s decision itself was a nullity.

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 24th November, and that the decision that was provided on 25th 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).

I. Issue 2 - The Facts

55.
The parties agreed the adjudicator’s specific terms of appointment. Those included these provisions -

“4. The decision shall be reached within 28 days of the referral, or such longer period as is agreed by either the party referring the dispute or both parties in accordance with the provisions of the Housing Grants, Construction and Regeneration Act 1996.

5. A lien may be exercised over the publication of the decision. If so, then following the decision being reached the parties will be notified, and an invoice for the fees and expenses incurred will be issued. Upon receipt of payment by either party the decision will be published and, where appropriate, the decision shall provide for adjustment in respect of any fees and expenses paid by either party which are directed to have been paid by the other party”.

In addition, the adjudicator expressly agreed to be bound by the JCT adjudication agreement and the adjudication provisions of the building contract, namely clause 41A. Of course, clause 41A included the obligation to reach the decision within 28 days, as extended by agreement, and the obligation to communicate that decision to the parties forthwith.

56.
The adjudicator originally intended to produce his decision by 26th October. As I have pointed out, that was extended by consent to 16th November, and then again to Friday, 24th November. On 23rd November the adjudicator faxed and e-mailed the parties in these terms:

“I acknowledge receipt of Fenwick Elliott’s fax dated 23rd November 2006 at 10.44 hours today. I confirm that it was my intention to provide reasons, and my decision will contain reasons as requested.

Although my decision is well progressed, I have yet to write up my reasons in full, and my decision will need to be proofed. I therefore ask the parties to note that, whilst I anticipate that my decision will be ready for taking up tomorrow, Friday 24th November 2006, on payment of my fees, it is likely that this will be after close of business.

To assist the parties in making arrangements for the payment of my fees I enclose an invoice in respect of my estimated fees and expenses in this matter for the parties’ attention”.

The attached invoice was in the sum of £34,138.74p and indicated that the adjudicator had spent 148.75 hours in dealing with the adjudication up to that point. It is right to say that the invoice said that this was an estimate.

57.
The adjudicator has helpfully provided me with a witness statement. At paragraph 7 of that statement he addresses the position as it stood on 23rd November. The terms of the statement are slightly different to the letter to the parties. He says at paragraph 7:

“I confirm that I concluded my findings in relation to the matter referred at approximately 1700 hours on 23rd November 2006. What I mean by this is that I had completed my findings and calculations in relation to all of the issues referred, which enabled me to reach my decision on the true gross value of the Final Certificate, the revised amount due and interest. However, my reasons had not been fully written up or subjected to edit by me to enable my decision to be proofed by my practice manager Mrs Helena Brown”.

58.
Later on 23rd November Cubitt’s solicitors e-mailed the arbitrator to point out that “the cases are clear that, unlike an arbitrator, an adjudicator is not entitled to a lien on his decision pending payment

of his fees". An hour or so later Fleetglade's solicitors sent an e-mail expressly agreeing with that proposition. That e-mail went on to say:

"We note your advice concerning the time of publication, and are confident Fenwick Elliott will agree that it is important to both parties that they are able to start to consider your decision over the weekend. May we suggest that you publish the decision as an e-mail attachment to both solicitors, so that we can forward it to our clients and consultants etc. tomorrow evening. The hard copy version can of course follow later. If you are able to give an approximate time you anticipate publication tomorrow, this would be a great help to the parties".

59.
The adjudicator did not accept that he did not have the right to exercise a lien over the publication of the decision, and made that plain to the parties in an e-mail sent at 9.06 a.m. on the morning of 24th November. He also said that the best estimate that he could give of the likely time of publication was between 8 p.m. and midnight that evening.

60.
Cubitt's solicitors wrote again on the afternoon of 24th November on the question of a lien, citing authority for the proposition that, whilst it was perfectly permissible for the adjudicator to require parties to come to a separate arrangement about the payment of his or her fees, it was not permissible for such an arrangement to frustrate or impede the progress of the adjudication itself.

61.
According to paragraph 12 of the adjudicator's statement, he sent his decision to Helena Brown for the first proof at 7.39 p.m. on 24th November. He goes on to say in his statement:

"At that stage my decision was 131 pages long. I sent my decision (the second proof) to Helena at 10.26 p.m. on 24th November 2006. At that stage my decision was 129 pages long, and still required a final proof and an arithmetical check. I therefore advised the parties by e-mail at 10.44 p.m. on 24th November 2006 that I had completed my decision subject to a final proof and an arithmetical check. I also asked the parties' solicitors to advise when their clients would be in a position to settle the invoice which had been issued on 23rd November 2006".

62.
The adjudicator's e-mail on 24th November was sent at 10.45 p.m. It was in the following terms:

"I have now completed my decision, although it still needs to be subjected to final proofing and an arithmetical check. In order to consider the question of whether or not to exercise a lien on my decision it would assist me if you are able to advise me when your respective clients would be in a position to settle the invoice, which has been issued yesterday".

63.
There then follows a potentially important event, which was not communicated to the parties at the time but which is set out clearly in the adjudicator's statement. At paragraph 13 of that statement he says this:

"I discussed the issue of publication of my decision with Helena on 24th November 2006 at approximately 11 p.m. I decided that if confirmation was received from either party that the invoice would be paid during the week commencing 26th November 2006, I would release an electronic copy of my decision before midnight on 24th November 2006 irrespective of whether the reasons had been subjected to final proof. As I had heard nothing from the parties before midnight on 24th November

2006 I told Helena at approximately midnight that I would carry out a final edit to enable her to carry out a final proof on Saturday morning".

64.
On the morning of Saturday, 25th November Fleetglade's solicitor e-mailed the adjudicator about the failure to provide the decision within the time scale. The e-mail was sent in the very early hours of the Saturday morning. It said:

"We note that you have not published your decision on 24th November as required. We reserve our position generally regarding the validity of any decision you subsequently purport to publish.

Without prejudice to the previous paragraph, we feel we must observe that your failure to publish your decision within the time limit as extended and to ignore the clear advice provided by Messrs Fenwick Elliott earlier today [in respect of the lien] has created an issue which on any view is extremely serious and has profound implications for both parties in this reference, the arbitration and the court proceedings relating to the existing challenge to your jurisdiction".

65.
At 12.21 p.m., i.e. just after mid-day on Saturday, 25th November, the adjudicator responded in these terms:

"I acknowledge receipt of Charles Brown's e-mails timed at 0053 hours, 0111 hours and 0944 hours today regarding the release of my decision, the contents of which are noted. Notwithstanding the fact that (i) my terms were known to you from the outset of this adjudication, and (ii) the fact that I notified you in advance of the decision date that my decision would be ready for taking up on payment of my fees, I record that I have not received payment from either party. In the surrounding circumstances I have decided to waive my right to continue to exercise a lien over the publication of my decision. I therefore attach an unsigned electronic copy of my decision. I trust that this will assist the parties. As the document has been written from the original Word file to a PDF file, some of the formatting may differ from the hard signed copies".

The e-mail to both parties' solicitors included as an attachment the decision itself, which numbered 112 pages.

66.
In his statement the adjudicator explains that he had discussed Fleetglade's solicitors' earlier e-mails with his practice manager and had decided:

"…in light of their contents, it would be best to publish an electronic copy of my decision once it had been finally proofed. At 0950 hours on 25th November 2006, having completed my final edit I sent the decision to Helena for final proof. At that stage my decision was 113 pages long, and in essence reflected the decision which was published later that day.

15. At 1220 hours on 25th November 2006 I published an unsigned electronic copy of my decision to the parties. I recorded in my e-mail that, notwithstanding the fact that my terms were known at the outset of the adjudication and the fact that I notified the parties in advance of the decision date that it would be ready for taking up on payment of my fees, I had not received payment from either party".

67.
As previously noted, this was not quite the end of the matter. An arithmetical error was pointed out to the adjudicator, and on 29th November he corrected that error and sent the parties the relevant

replacement pages. No point was taken before me as to the alleged relevance or validity of the correction process.

J. Issue 2 - The Principles

(a) Introduction

68.
Counsel's helpful oral submissions on Issue 2 identified four main issues of principle. The first two, that is to say the comparative significance of the contractual provisions and the 1996 Act and the importance of adhering to the timetable in adjudication, have already been addressed above. The other two concern the adjudicator's obligation to produce a decision within 28 days (or any agreed extended time), and whether or not an adjudicator is entitled to exercise a lien on his decision. I deal with each of those two points below.

(b) The Timing of an Adjudicator's Decision

69.
There are a number of cases concerned with the timing of an adjudicator's decision. I deal with those in chronological order.

70.
In **Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd**[2000] TCC 764 it was agreed that the adjudicator would publish his decision on 11th February. He did so, but made an obvious error, which he corrected some three hours later the same day. HHJ Toumlin CMG, QC held that there was an implied term allowing the adjudicator to correct such an error within an acceptable time limit, and that the three hours was, in the circumstances, within the leeway provided by that term.

71.
Of greater significance to the present case (albeit by way of remarks that were obiter), Judge Toumlin also commented on an argument that the decision was in fact made on 9th February and had not been communicated until 11th February. He said:

"If this case had been persisted in, I should have concluded that the word 'forthwith' in clause 41A.5.3 meant what it said and required that the process of communication of the decision should have started immediately after the decision had been reached, i.e. that the decision has two elements: first, reaching the decision and secondly, sending that decision to the parties. Clearly, if the decision was sent only by post, it would not be received immediately. In this case it was sent by fax on 11th February 2000. In the absence of consent to an extension of time by the party referring the dispute, the decision was rendered out of time. This issue and its consequences have not been decided by a court, but the Scheme lays down in paragraph 19(2) that, where the adjudicator fails for any reason to reach his decision, any party to the dispute may serve a fresh notice for a new adjudicator to act, i.e. a new adjudicator must be appointed (in the absence of agreement between the parties) and the adjudication starts again".

This passage was cited with approval by Lord Wheatley in **St Andrew's Bay Development Ltd v. HBG Management Ltd** [2003] Scot CS 103.

72.

In **Barnes & Elliott Ltd v. Taylor Woodrow Holdings Ltd**[2004] 1 BLR 111, HHJ Humphrey Lloyd QC had to deal with a situation where the decision was signed on the agreed date but was put into the Document Exchange, so that it was not received until at least the following day. The judge agreed with the proposition that there was a two-stage process, i.e. completion of the decision, followed by its communication, and then considered what the right approach should be if there was a delay in that second stage. He also referred to **St Andrew's Bay**. He concluded:

"25. Accordingly, as Lord Wheatley says, how would you characterise a departure of this nature? Can it be characterised in terms of something which went beyond the adjudicator's authority, so as to render the decision not what the parties contracted for and thus null and void? Mr Lofthouse says yes, since there is an easy remedy: you just start another adjudication. You would then soon be back in the same position as we are today, though, as I pointed out in argument, possibly to the contrary effect. That in itself shows why it would have been unsatisfactory to have two successive adjudications simply because the first had been ineffective as a result of an error by the first adjudicator in not communicating the decision within the time limit. Is that what Parliament intended? Is that what the parties to this contract really intended? Is that the intention to be imputed to them? Is the decision unenforceable because as a result of the adjudicator's mistake about its delivery it becomes unauthorised?

26. I do not consider that to answer the last question in the affirmative would be the result of a sensible interpretation of the contract or of s.108 of the Act. Clearly time remains very important, but an error which results in a day (or possibly, in the view of Lord Wheatley, of two days) seems to me to be excusable. It seems to me within the tolerance in commercial practice that one must afford to the Act and to the contract. Whilst an adjudicator is not authorised to make mistakes, a decision arrived at in time is in principle authorised and valid, and in my judgment does not become unauthorised and invalid because by an error by the adjudicator in despatching the decision it does not reach the parties within the time limit. However, I should emphasise that this tolerance does not extend to any longer period (unless perhaps the parties had agreed to a very long duration), nor does it entitle an adjudicator not to complete the decision within the time allowed. If the adjudicator cannot arrive at a decision on all aspects of the dispute within the period required, then, before time runs out, further time must be obtained as provided by the contract or otherwise by the parties' agreement. As Mr McCall pointed out, the Claimant, if asked by the adjudicator, may have been able unilaterally to extend the time to 23rd May 2003. This contract, like the Act, only confers authority to make a decision within the 28 day period, or such other period as it provides".

73.
In **Simons Construction Ltd v. Aardvaark Developments Ltd**[2004] 1 BLR 117 the adjudicator's decision had to be reached by 17th June, but it was not in fact provided until 25th June. HHJ Seymour QC held that the decision was binding, provided only that the adjudication agreement had not already been terminated for failure to produce a decision in the relevant time, and that a fresh notice of referral had not already been given by one of the parties. He appeared to base his decision on various provisions within the Scheme. On the face of it, it is difficult to see how a decision that was not reached within 28 days could be valid, given the emphasis in the 1996 Act on the necessity of the adjudicator's decision being reached within that time scale.

74.
The decision in **Simons Construction** was the subject of criticism by The Lord Justice Clerk in **Ritchie Bros (PWC) Ltd v. David Philp (Commercials) Ltd**. In that case the decision was due on 16th October, but the adjudicator had requested the contractors to consent to an extension until 23rd

October. However, in the event the decision was not delivered to the parties until 27th October. The Court held, by a majority, that the decision was not within the adjudicator's jurisdiction because it was a decision reached out of time. The Court rejected the suggestion that the adjudicator was entitled to reach his decision at any time during an indefinite period after the expiry of the 28 days so long as none of the parties had served a fresh notice of adjudication. The Lord Justice Clerk said:

"11. This case, however, raises the prior question whether the decision complained of appears, on the face of it, to be within the adjudicator's jurisdiction at all. In my view, it does not. On the face of it, it is a decision reached out of time and after a purported extension consented to out of time.

12. The question then is whether, despite the expiry of the 28 days time limit, the adjudicator retained his jurisdiction. In my view, the true interpretation of paragraph 19 is that the adjudicator's jurisdiction ceases on the expiry of that time limit if it has not already been extended in accordance with paragraph 19(1).

13. If this contract had complied with section 108 of the 1996 Act, it would have contained a provision that 'required' the adjudicator to reach a decision within 28 days of the referral, subject to certain possibilities of extension … Paragraph 19, which applies to a non-compliant contract such as this …, provides that the adjudicator 'shall reach his decision' not later than 28 days after the date of the referral notice provided for in paragraph 7(1) … again subject to possibilities of extension … These provisions suggest to me that the time limit is mandatory.

14. In my opinion, this interpretation reflects the natural meaning of paragraph 19(1)(a). It is simple and straightforward. It provides a clear time limit that leaves all parties knowing where they stand. It has the sensible result that paragraph 19(2) comes into operation only after the original adjudicator's jurisdiction has expired".

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 **StAndrew'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 24th November.

84.
Secondly, the adjudicator's evidence was that he had completed his findings on the previous day, 23rd November, and then completed the entirety of the decision itself by late on 24th 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 24th 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 24th 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 time scale 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.

L. Summary

93.
I find that, although the contractual provisions of clause 41A.4.1 are mandatory, the service of the referral notice in this case on 28th November following the appointment of the adjudicator at 5.35 p.m. the previous day, was in accordance with a common sense interpretation of the clause. The referral notice was therefore valid, and the adjudicator had the necessary jurisdiction.

94.
I find that, although the adjudicator had no right to delay the completion of his decision in relation to his fees, in this case the decision was in fact completed within the agreed period. I find that communication twelve and a half hours later was in accordance with clause 41.A(5)3. The adjudicator's decision was therefore valid.

95.
For those reasons I therefore enforce the adjudicator's decision and will make the necessary orders accordingly.

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[1] I do not comment on whether such a claim was readily appropriate for adjudication since there is no reported case in which the underlying claim has been regarded as too complex or too large for the adjudication process. Whether that is the result envisaged by those who framed the 1996 Act is perhaps open to doubt.

[2] 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".

[3] I should note that, although it was not cited to me in **Hart**, I am now aware that the learned Editor of Emden at section V, at 87-92 suggests that the words in the Scheme are directory. For the reasons set out in my judgment in**Hart** I very respectfully disagree.