JUDGMENT : HIS HONOUR JUDGE RICHARD HAVERY Q.C. : TCC. 19th January 2007.

1. This is an application on the part of the claimant for summary judgment under Part 24 of the Civil Procedure Rules. The claim is to enforce the decision of an adjudicator, Mr. Roger Gibson. The defendant resists the claim on the ground that the decision was made out of time, and accordingly the adjudicator had no jurisdiction to make it.

2. The claimant was a sub-sub-contractor to the defendant, which was the mechanical and electrical sub-contractor to Bouygues (UK) Limited for a residential development on land owned by the Home Office on the corner of Marsham Street and Monck Street in Westminster.

3. The sub-sub contract ("the contract") required adjudication to be in accordance with the Construction Industry Council ("CIC") procedure current at the time of appointment of an adjudicator (in this case, the third edition). A dispute arose between the parties in relation to variations in the work required under the contract; whether the contract sum was a fixed or fluctuating price; the length of the defects liability period; and the agreed daywork rates for labour. In his decision, as amended, the adjudicator directed the defendant to pay the claimant the following sums by 5th December 2006:

Amount due from defendant to claimant	£365,015.96
Interest to date of decision	£7,853.50
Total	£372,869.46

4. The chronology is as follows.
   (1) The notice of intention to refer the dispute to adjudication was served on 28th September 2006.
   (2) On 2nd October 2006, CIC nominated Mr. Gibson as adjudicator.
   (3) The claimant served its referral notice on 4th October 2006. Thus the decision was then required to be reached by 1st November 2006.
   (4) On 10th October 2006 the time for making his decision was extended by the adjudicator to 14th November 2006 with the consent of the claimant.
   (5) On 8th November 2006 the adjudicator asked the parties for an extension of a further 7 days, *"which means my decision will be reached on Tuesday, 21 November 2006".*
   (6) On the same day the defendant agreed to ***"a further 7 day period in which to issue your decision"*** subject to confirmation from the claimant. [Emphasis added].
   (7) On the same day the claimant notified the adjudicator of its consent to an extension of time to 21st November 2006 for reaching his decision.
   (8) The adjudicator completed his decision on 21st November 2006, but initially declined to send it to the parties until he had been paid.
   (9) On 23rd November 2006 the adjudicator, having relented, sent his decision to the parties.

5. Mr. Thomas contended on behalf of the defendant that its consent to the extension of time for the adjudicator to reach his decision was conditional upon his issuing the decision on that day. Since he did not issue his decision on that day, there was no effective consent to the extension, and so the decision was out of time and in consequence beyond the jurisdiction of the adjudicator. Mr. Thomas relied in particular on the decision of the Inner House of the Court of Session in ***Ritchie Brothers (PWC) Ltd. v. David Philp (Commercials) Ltd.*** [2005] BLR 384. Mr. Leabeater on behalf of the claimant contended that in its context the defendant's consent to the extension of time to 21st November was not conditional upon the issue of the decision on that day. He also invited me not to follow ***Ritchie's*** case. Further submissions were also made. Before I consider the submissions, I shall set out extracts from the correspondence so far as they are relevant.

6. Correspondence was conducted by email, and accordingly there were exchanges that took place within a single day. Having received some directions which they submitted were unreasonably stringent, the defendant's solicitors wrote to the adjudicator on 5th October 2006. That letter included the following passages:

   .....you are quite entitled to ask the referring party to extend the time for delivering your decision by 14 days.....In summary, we request that you.....invite Epping's solicitors to agree to a more realistic timescale..... to afford you more time in which to issue your decision.

   In response, the adjudicator wrote to the claimant's solicitors saying

   .....I request from the Referring Party a 7 day extension for making my decision, i.e. the date now to be 8 November 2006.

   The claimant's solicitors replied on 6th October saying

   We would of course be happy to extend your time for making a decision by seven days.....

   On 10th October they wrote

   We confirm that we are happy to grant you a further six day extension for making your decision, which will mean your decision will be reached by close of business on Tuesday 14 November 2006.

   On 8th November the adjudicator wrote to the parties' solicitors saying

.....in accordance with paragraph 16 of the CIC Model Adjudication procedure: Third Edition, I request from the Parties a further extension of time of 7 days, which means my decision will be reached on Tuesday, 21 November 2006.

On the same day, there followed at 3.43 p.m. the letter from the defendant's solicitors mentioned in paragraph 4(6) above and, at 5.24 p.m., a letter from the claimant's solicitors from which I have quoted in paragraph 4(7) above. In addition, the latter contained the following passage:

Also, we have not yet made any arrangements with the HKP [sc., the defendant's solicitors] in relation to paying the invoice for your fees and expenses in relation to this adjudication. In previous adjudications, prior to the decision being issued, some adjudicators issue two invoices in equal proportions to each party and, this is to be normally payable before the decision is issued. We confirm that we are happy to proceed on this basis and should you decide that one party is liable for more or less than 50% of your invoice, this payment can be arranged between the parties. Can you kindly confirm that you are happy for us to proceed on this basis.

On 13th November the adjudicator wrote his 11th letter to the parties' solicitors:

.....With regard to my fees in relation to this Adjudication, immediately I complete my decision I will issue an invoice to each party in equal proportions. As soon as I receive payment I will issue my decision. As suggested, if I consider that either party is liable for more than 50% of my fees then I trust that this payment will be arranged between the parties.

Finally, I thank the parties for their consent for further extension of time to 21 November 2006 to reach my decision.

On 21st November the adjudicator wrote to the parties' solicitors

.....I have completed my decision.

I enclose a copy of our invoice for my fees, in equal proportions.....The arrangement, as detailed in my 11th letter, is for each party to forward payment to me.....and immediately I receive the full payment I will issue my decision.

On the same day, the defendant's solicitors replied (at 5.5 p.m.) thanking the adjudicator for that letter and stating

Whilst we note you refer back to your 11th letter with regard to each party paying half of your fees, our view is that since your terms of engagement as Adjudicator did not stipulate any provision with regard to payment of your fees before releasing your Decision, you are not able to subsequently request payment of your fees in advance of releasing the Decision; certainly you did not adopt this practice in the first adjudication, and it appears you have only done so now following a request by Epping's solicitors.

Our view is that you should immediately release your Decision without insisting beforehand on full payment of your fees by either party, alternatively if you require full payment of your fees then these fees must be discharged entirely by Epping.

On 22nd November, the adjudicator wrote to both solicitors acknowledging that letter and, with reference to his 11th letter, insisting on payment of his fees before releasing his decision. The defendant's solicitors replied the same day:

.....We do not consider you can impose any subsequent requirement on the part of both parties for your invoices to be paid before releasing your Decision notwithstanding the suggestion put forward [by] Epping's solicitors in their letter of 8 November 2006, unless B&F consented and it never did. We therefore request that you issue your decision by return to both parties, alternatively it is a matter entirely for Epping and its solicitors whether it wishes to discharge your fees in full at this stage.

In the meantime B&F reserves its position entirely regarding the late delivery of the decision.

Later the same day, 22nd November, the claimant's solicitors sent a letter which, after an introductory passage, read as follows:

We wish to put on record that, by our letter dated 8 November 2006, we did not envisage that you would make payment of your fees a condition precedent to issuing your decision to the parties. We were simply trying to facilitate payment arrangements between the parties prior to the decision being issued. Whether or not your fees are paid prior to the decision being issued should not affect the releasing of your decision.

*Although we accept that you stated in your letter dated 13 November 2006 that, "**as soon as I receive payment I will issue my decision**", this was never agreed nor envisaged by us. Certainly, in circumstances where your invoice was only issued at 16:43 on 21 November 2006, less than 15 minutes away from the time in which the decision was to be reached and when the parties envisaged that you would communicate your decision to them, it is unreasonable for you to expect the parties to be able to make payment of your invoice within this time frame and then to withhold the decision until such payment is made.*

We refer to the HKP's letter dated 22 November 2006 and reiterate that your terms of engagement do not stipulate any requirement for your fees to be paid in advance of releasing your decision. We also reiterate the request that you issue your decision by return to both parties as soon as possible. Any further delay of releasing your decision will put both parties at risk of your decision being "timed out". For the avoidance of doubt, we reserve our client's position in this regard.

We confirm that our client will pay 50% of your fees as per your invoice and in accordance with your terms and conditions. Can you please therefore release your decision.

7. The adjudicator sent his decision to the parties by email at 8.8 a.m. on 23rd November 2006 and forwarded the full document to them by first class post on that day. There was some slip or error in the decision which was soon amended. Neither that amendment nor the circumstances of it are relevant to the questions that I have to decide.

8. Section 108(2) of the Housing Grants, Construction and Regeneration Act 1996 ("the Act") provides, so far as material, as follows:
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.

Paragraph 16 of the CIC procedure reflects those two provisions. Paragraphs 24, 25 and 28 provide—
(24) The Adjudicator shall reach his decision within the time limits in paragraph 16. He shall be required to give reasons unless both parties agree at any time that he shall not be required to give reasons.

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

(28) The Adjudicator may, within 5 days of delivery of the decision to the Parties, correct any decision so as to remove any error arising from an accidental error or omission or to clarify or remove any ambiguity.

9. Mr. Leabeater submitted that the decision should be enforced because:
(a) it was reached within the time period agreed between the parties;
(b) even if it was not, it should in any event be enforced.

10. The first matter in issue between counsel was whether the reaching of a decision was to be distinguished from its delivery. Mr. Thomas submitted that there was no distinction between the time for reaching and the time for delivery of a decision in the Act or in the CIC procedure. So far as the parties were concerned it was only meaningful to speak of a decision once it had been delivered to them. He referred me to several paragraphs of the CIC procedure, of which an example is rule 31, which says

(31) The parties shall be entitled to the redress set out in the decision and to seek summary enforcement,.....

It made little sense, he submitted, to talk of being entitled to redress in respect of a decision which had not been delivered. Mr. Thomas relied on the decision of Lord Wheatley in ***St. Andrew's Bay Development Ltd. v. HBG Management Ltd. and Anor.*** [2003] Scot CS 103. I was referred to extracts from that judgment quoted by HHJ Humphrey LLoyd Q.C. in ***Barnes & Elliot Ltd. v. Taylor Woodrow Holdings Ltd. and Anor.*** [2004] BLR 111, 113. In that case the contract included clause 39A.6.3 of the Scottish standard JCT form which provided: *The adjudicator shall within 28 days of the referral.....reach a decision and forthwith send that decision in writing to the parties.*

Lord Wheatley's judgment included the following passages:

15. In the context of these submissions, I am satisfied that it cannot be said that the second respondent has reached her decision within the time limits set in accordance with either the statutory provisions or the standard contract.....

16. There are therefore two sets of provisions which apply to the present situation. Dealing first with the statutory provision, it is clear that the only obligation upon the adjudicator in this matter described in the Act is that a decision should be reached within 28 days. The Act is totally silent on the question of intimation or communication of that decision. In these circumstances it must therefore follow that the obligation to reach a decision must include a contemporaneous duty to communicate that decision to the interested parties. Not to require such an interpretation of the obligation to reach a decision would render the whole purpose of the legislation meaningless.....

18. I therefore consider that it is appropriate to conclude that in terms of both the contractual and the statutory provisions, a decision of this sort cannot be said to be made until it is intimated. If the only obligation incumbent upon the adjudicator was to reach a decision, then that decision need never be intimated. Between the time when the decision was made and the time it was intimated, the decision could be changed. As indicated above, to take any other view would frustrate the entire purpose of these various arrangements.....

21. However, the question remains as to what remedy should be available to the petitioner in these circumstances. The petitioner has not taken advantage of the opportunity of submitting the referral to another adjudicator in terms of the scheme. I do not consider that the failure by the adjudicator to observe the time limits in the circumstances must invariably allow the petitioner not to comply with the adjudicator's decision when it is eventually issued.

The reference to the scheme is a reference to the Scottish equivalent of the Scheme for Construction Contracts ("the Scheme") which, as applied in England and Wales, is set out in Statutory Instrument SI 1998/649. It has not

been suggested before me that there is any material difference between the scheme provided in that statutory instrument and the Scottish scheme.

11. Judge LLoyd agreed with those passages from the judgment of Lord Wheatley. He concluded (ib., p.116):

> *26.....Clearly time remains very important, but an error which results in a day or possibly, in the view if Lord Wheatley, of two days, seems to me to be excusable.....A decision arrived at in time is in principle authorised and valid and in my judgment does not become unauthorised and invalid [where,] because of an error by the adjudicator in dispatching 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.*

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

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

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

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

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

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

19(1) The adjudicator shall reach his decision not later than—
(a) twenty eight days after the date of the referral notice mentioned in paragraph 7(1), or
(b) forty two days after the date of the referral notice if the referring party so consents, or
(c) such period exceeding twenty eight days after the referral notice as the parties to the dispute may, after the giving of that notice, agree.

(2) Where the adjudicator fails, for any reason, to reach his decision in accordance with paragraph (1)
(a) any of the parties to the dispute may serve a fresh notice under paragraph 1 and shall request an adjudicator to act in accordance with paragraphs 2 to 7; and
(b) if requested by the new adjudicator and insofar as it is reasonably practicable, the parties shall supply him with copies of all documents which they had made available to the previous adjudicator.

(3) As soon as possible after he has reached a decision, the adjudicator shall deliver a copy of that decision to each of the parties to the contract.

In ***Ritchie's*** case at first instance the Lord Ordinary had held that the expiry of the time limit did not bring the jurisdiction of the adjudicator to an end. The provisions relating to the times in which the adjudicator should reach his decision were directory, rather than mandatory (see the report of the case on appeal in the Inner House at [2005] BLR 387, paragraph 5, referring to paragraph 23 of the Lord Ordinary's judgment). On appeal, the Lord Justice Clerk said (page 388, paragraph 11 et seq.):

11. This case.....raises the.....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-day time limit, the adjudicator retained his jurisdiction. In my view, the interpretation of paragraph 19 [of the Scheme] 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 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 (s. 108(2)(c),(d)). 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) (para 19(1)(a)), again subject to possibilities of extension (para 19(1)(b),(c)). 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.

15. The interpretation proposed on behalf of the pursuer necessitates the reading into paragraph 10(1)(a) of a qualification to the effect that, while the adjudicator "shall reach his decision" within 28 days, he is nonetheless entitled to reach it at any time during an indefinite period thereafter, so long as none of the parties has served a fresh notice of adjudication. .....

21. Counsel for the pursuer submitted that, even if the court were to reject his primary submission, nevertheless the adjudicator's failure to reach his decision within the time limit in this case was not so serious as to make the decision a nullity. It was a technical failure rather than a fundamental error or impropriety. This was the reasoning of Lord Wheatley in St. Andrew's Bay Development Ltd v. HBG Management Ltd (2003 SLT 740, at p 744F-G). I do not accept it. It provides no hard and fast criterion by which a court could determine for how long after the time limit a failure to reach a decision can be considered to be merely technical, or in what circumstances the jurisdiction can be said to come to an end.

Lord Nimmo Smith said:

46. I am in entire agreement with the Opinion of your Lordship in the chair. I would only add that we are agreed that the issue before us depends on the proper construction of paragraph 19 of the scheme. If a speedy outcome is an objective, it is best achieved by adherence to strict time limits. Likewise, 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. These considerations reinforce the view that paragraph 19 means exactly what it says, so that it is not open to an adjudicator to purport to reach his decision after the expiry of the time limit.

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

19. I now come to consider the effect of paragraph 25 of the CIC procedure. On its face, that unambiguously renders the adjudicator's decision enforceable. For convenience, I repeat it here:

> *(25) If the Adjudicator fails to reach his decision within the time permitted by this procedure, his decision shall nonetheless be effective if reached before the referral of the dispute to any replacement adjudicator under paragraph 11 but not otherwise. If he fails to reach such an effective decision, he shall not be entitled to any fees and expenses (save for the cost of any legal or technical advice subject to the Parties having received such advice).*

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

20. I conclude:
    (1) That by its letter of 8th November 2006 the defendant consented to an extension of time from 14th November to 21st November for the adjudicator to reach his decision, conditionally upon the decision being issued by 21st November.
    (2) That condition was not fulfilled, since the decision was not issued until 23rd November.
    (3) In consequence, time for the adjudicator to reach his decision was not validly extended.
    (4) The adjudicator reached his decision on 21st November, 7 days out of time.
    (5) In consequence, the adjudicator's decision is not enforceable.

21. The claimant's application is dismissed.

Mr. James Leabeater (instructed by Berwin Leighton Paisner) for the Claimant
Mr. David Thomas Q.C. (instructed by Hawkswell Kilvington Partnership) for the Defendant