

**JUDGMENT : HIS HONOUR JUDGE PETER COULSON QC:** TCC. 31<sup>st</sup> May 2007

1. The process of compulsory adjudication was introduced into the UK Construction Industry by the **Housing Grants, Construction and Regeneration Act 1996** ('the 1996 Act') which came into force on 1st May 1998. The early reported cases, such as *Macob Civil Engineering Limited v Morrison Construction Limited* [1999] BLR 93 and *Bouygues UK Ltd v Dahl Jensen UK Ltd*. [2000] BLR 522 made plain that, provided the adjudicator had the necessary jurisdiction, the courts would enforce his decision by way of summary judgment. Initially, therefore, a party seeking to challenge the validity of an adjudicated decision often sought to do so on jurisdictional grounds. However, the Court of Appeal decision in *C&B Scene (Concept Design) Ltd. v Isobars Ltd* [2002] BLR 93 underlined the limited scope for such jurisdictional challenges, reiterating that, provided the adjudicator had answered the dispute referred to him, no matter how erroneous his subsequent decision might be, a jurisdictional challenge would almost certainly fail.
2. Following the decisions of the TCC in *Discaint Project Services Limited v Opecprime Limited (No 2)* [2001] BLR 287 and *Balfour Beatty Construction Limited v. The London Borough of Lambeth* [2002] EWHC 597 (TCC), which confirmed that, within the particular constraints of adjudication, the adjudicator was obliged to follow the rules of natural justice, those seeking to avoid the consequences of an adjudicator's decision began to regard an alleged breach of those rules as a more productive method of challenge. However, following the decision of the Court of Appeal in *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWCA (Civ) 1418, it became apparent that this line of attack too was of limited practical scope. As Chadwick LJ put it in *Carillion Construction v Devonport Royal Dockyard* [2006] BLR 15, summarizing these two common types of challenge to an adjudicator's decision:  
*"It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels 'excess of jurisdiction' or 'breach of natural justice' ... In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision is correct, whether on the facts or in law, he can take legal or arbitration proceedings in order to establish the true position to seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense ..."*
3. There is no doubt that, following *AMEC* and *Carillion*, the overall number of disputed applications to enforce the decisions of adjudicators has fallen. With challenges based on jurisdiction and natural justice difficult (although not of course impossible) to establish in practice, the resourceful losing party in adjudication has had to look elsewhere for a reason to argue that the adjudicator's decision should not be enforced. In recent times, as was discussed in argument this morning, it has become common for the losing party to allege that the adjudicator has failed to comply with the strict timetable required by the 1996 Act, and that, in consequence, his decision is a nullity. The present dispute is another example of this new type of challenge.
4. Here, Yule commenced adjudication proceedings against Speedwell on 20th February 2007 in accordance with the Scheme for Construction Contracts provided by the 1996 Act. The decision was therefore due by 20th March 2007. The adjudicator sought more time at an early stage and Yule, as the claiming party, granted him a 14-day extension of time, as they were entitled to do under paragraph 19(1)(b) of the scheme. This extended the adjudicator's time for completion of his decision to 3rd April 2007. The adjudicator's decision was in fact provided on 4th April 2007. In it, he decided that Yule were entitled to £191,661.42 plus interest together with his fees. Speedwell have not paid any part of these sums and contend that, because the decision was provided after the agreed extended period, it was a nullity.
5. There have been a number of decided cases on this topic, and it is unnecessary to set them all out again here. They were identified in the skeleton arguments, and I was also provided with a lengthy index covering them all. By way of summary, therefore, the authorities to which I have had particular regard are as follows.
  - (a) In *Barnes and Elliot Ltd. v Taylor Woodrow Holdings Ltd*. [2004] BLR 117, His Honour Judge Humphrey Lloyd QC differentiated between the completion of the decision itself, which he said had to be completed within the 28 days or the agreed extended period, and its subsequent communication to the parties which could, he said, occur a day or two days thereafter.
  - (b) In *Ritchie Brothers (PWC) Ltd v David Philp (Commercials)* [2005] BLR 384, the Court of Session in Scotland, the only appellate court to consider this point thus far, concluded by a majority that the adjudicator's jurisdiction expired at the end of the 28 days (or any agreed extended period) and that an adjudicator's failure to reach his decision within that time limit rendered any subsequent decision a nullity. Lord Nimmo Smith said, in an admirably succinct judgment:  
*"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 [of the Scheme] 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."*
  - (c) In reaching their decision in *Ritchie*, the court expressed the view that *Simons Construction Ltd v Aardvark Developments Ltd* [2004] BLR 117, in which His Honour Judge Richard Seymour QC concluded that a decision was valid whenever it was completed, provided that no further adjudication had been commenced in the meantime, was wrongly decided.

- (d) In *Hart Investments Ltd v Fidler and another* [2006] EWHC 2857 (TCC) and *Cubitt Building & Interiors Limited v Fleetglade Limited* [2006] EWHC 3413 (TCC), I concluded that the word "shall" in the 1996 Act and the Scheme was mandatory. In the latter case I held that the obligation at paragraph 19 of the Scheme, that the adjudicator "shall" reach his decision not later than 28 days, or any extended time, meant what it said, such that the adjudicator was obliged to complete his decision within the 28 days or any extended period, no more and no less. For what it is worth, I expressed the view that *Ritchie* was correctly decided.
- (e) In *Epping Electrical Company Ltd. v. Briggs and Forrester (Plumbing Services) Limited* [2007] BLR 1126, and *Aveat Heating Ltd. v Jerram Falkus Construction Ltd* [2007] EWHC 121 (TCC), His Honour Judge Havery QC also concluded that *Ritchie* was right, and that in any event, given that it was a decision of an appellate court, it was appropriate for him to follow it. He therefore concluded that the decision had to be completed within the 28 days or any agreed extended period.
6. I therefore conclude that the relevant obligation in paragraph 19 of the Scheme, that the adjudicator shall reach his decision within 28 days and/or any agreed extended period, means what it says and that, in order to be valid, an adjudicator's decision must be completed within this period. It seems to me that that is the only proper conclusion permitted by the mandatory requirements of the Scheme. It is also in line with the authorities noted above, particularly the decision of the Court of Session in *Ritchie*. Perhaps most importantly of all, I consider that it is a conclusion which is entirely consistent with the purpose of the 1996 Act. As Lord Nimmo Smith put it in *Ritchie*, the only way to ensure both speed and certainty is for the adjudicator and the parties to comply with the statutory time limits.
7. Returning to the facts of the present case, therefore, it would appear that, prima facie, the adjudicator's decision was completed out of time, and was therefore a nullity. However, as is so often the case with disputed enforcements, a closer scrutiny of the facts reveals a rather more complex picture.
8. On 27th March 2007, at a time when the decision was due on 3rd April, Yule, through their solicitors Dickinson Dees, provided a number of responses to queries raised by the adjudicator. Later that day, by an e-mail timed at 15.42 p.m., Speedwell requested the responses to be provided in electronic form. They also sought time to respond to the material provided, pointing out that some of the documents referred to in Yule's responses would not be provided by way of hard copy until the following day, 28th March 2007. They put their request in these terms:
- "In addition, hard copy of correspondence (and other documents) is only due to be received tomorrow 28th March 2007 and we request time to respond to these if you consider it appropriate".*
9. At 16.47 on the same day, Mr. Bunton, the adjudicator, e-mailed both parties in these terms:
- "Communication No. 30.  
Gentlemen.  
I agree that SR [Speedwell] require time to respond until Friday [30th March] at noon and I require the parties to agree that I have two more days to issue my Decision."*
- In his written statement provided for the purposes of these enforcement proceedings Mr. Bunton said of this e-mail:
- "10. I wrote to the parties on the same day, Tuesday, 27th March 2007 timed at 16.47 p.m. I agreed that Speedwell required time and I stated that 'I require the parties to agree that I have two more days to issue my decision'. This would mean that the date of my decision was now to be no later than 5th April 2007.*
- "11. I thought I was being clear in my directions, namely that Speedwell should be given time to respond and that I required more time to reach my decision. Both elements were inextricably linked and were not intended to be severable. On 28th March 2007 Dickinson Dees consented to extending the time for making my decision to 5th April 2007."*
10. As recorded by the adjudicator Dickinson Dees expressly consented to the request for a two-day extension of time for the completion of the decision, namely to 5th April 2007. Speedwell made no express response to that request at all.
11. Thereafter there were a number of exchanges between the parties and the adjudicator in respect of the substance of the adjudication. In particular:
- (a) On 29th March 2007 the adjudicator asked Speedwell to clarify various matters;
- (b) On 30th March 2007 at 9.14 a.m. the adjudicator said he had "concluded my audit trail of the information sent to me as part of Yule's response number 10". He said he expected Speedwell to comment on that material "today".
- (c) At 12.45 p.m. on the same day, Speedwell provided those comments. By 13.52 p.m. the adjudicator had read those responses and raised queries of both parties arising out of them. Although the adjudicator sought responses to those queries that afternoon, both Yule and Speedwell made clear to him that that would not be possible. Since 30th March was a Friday, this meant that the parties were saying that they could not respond to his latest request for information until Monday, 2nd April 2007 at the earliest.
- (d) On 2nd April at 11.02 a.m. the adjudicator asked Speedwell for copies of certain invoices. This request was a further reflection of his request for further information made on 30th March. Speedwell promised those copy invoices by that afternoon. In fact, they were not provided until 12.30 p.m. on the following day, 3rd

- April 2007. Moreover, they ran to about 65 pages. They were not provided to Yule until later in the afternoon of 3rd April. At 14.27 p.m. on 3<sup>rd</sup> April, Yule reserved their position with the adjudicator in respect of this late documentation. Yule also provided the information that had been requested by the adjudicator on 30th March.
- (e) At 8.55 a.m. on 4th April 2007, the adjudicator indicated that he would provide his decision that day. There was no response to that e-mail by either party. There was certainly no response from Speedwell to say that this was or might be out of time.
12. The adjudicator's decision was provided later on the 4th April 2007. Paragraph 4 of that decision recorded that *"the parties agreed to extend the date of the issue of my decision. My decision to be issued on 4th April 2007."* Following Speedwell's failure to pay the sum of £191,661.42 plus interest, Yule commenced these proceedings and issued their CPR Part 24 application. It appears that it was not until 14th May 2007 that it was indicated by Speedwell's solicitors, for the first time, that they were going to take the point that the decision was a nullity because it had not been provided until 4th April 2007, a day after the expressly agreed extension of time date of 3rd April 2007. Although it is hardly an argument awash with merits, it seems to me that it relies foursquare on the principles outlined in paragraphs 5 and 6 above.
13. However, for three separate reasons, I find myself unable to accept Speedwell's submissions on the facts of this case, ably though they have been argued this morning by Mr. Henderson. I set out those three reasons below.
14. First, it is important for the court to be acutely mindful of the particular difficulties imposed upon adjudicators by the tight timetable required by the 1996 Act. There will be times when, late on in the 28-day or extended period, new information will make it necessary for an adjudicator to ask for a little more time. If he wants to do the job properly, and allow the parties to comment on late information provided by one or other of them, the adjudicator may need to ask for a couple of extra days in order to take into account those comments. That appears to be exactly what happened here.
15. When the adjudicator asks for more time in circumstances like this, I consider that there is a clear obligation on the part of both parties to the adjudication to respond plainly and promptly to the request. If, in breach of that obligation, one party does not respond at all, there must be a very strong case for saying that they accepted, by their silence, the need for the required extension. The adjudicator can do no more than work out that he needs a short extension, and seek agreement from the parties to such an extension. Common sense, as well as common courtesy, requires a prompt response. If one party does not respond at all to the adjudicator's request, it seems to me that that party runs a very clear risk that his silence will be taken to amount to acquiescence to the requested extension. I consider that that is the only proper inference to be drawn from the information available to me here. From that evidence I consider that, by their silence, Speedwell accepted that the adjudicator's time for completion was extended to 5th April.
16. Secondly, it is only necessary to glance at the facts which I have summarised in paragraph 11 above, to conclude that, in reality, Speedwell did a good deal more than acquiesce to an extension by silence. In my judgment, they participated in a process which made it impossible for the adjudicator's decision to be provided by 3rd April 2007, and by that conduct they made it plain that they had in truth accepted the requested extension. In particular:
- (a) After the adjudicator's request they continued to participate in the adjudication.
- (b) On 30th March they failed to respond to the adjudicator's request for information, thus causing a delay (along with Yule) until at least 2nd April.
- (c) On 2nd April they promised further documentation that day, but caused delay by failing to provide that documentation until after noon on 3rd April 2007.
- (d) They did not say on 3rd April, whilst they were providing copies of the 65 pages of invoices, that in their view this was the last day that the adjudicator had for completing his decision.
- (e) They did not, on 4th April, challenge the adjudicator's stated intention to provide his decision that day.
17. In other words, it seems to me that Speedwell's conduct was only consistent with their having agreed to an extension of time to 5th April. It was wholly inconsistent with the suggestion, which they now make, that they had not agreed to any extension beyond 3rd April. Again, therefore, I consider that the only possible inference to be drawn from the facts is that Speedwell had agreed to the extension to 5th April.
18. Thirdly, let us now assume that I am wrong, and that Speedwell did not agree to the two-day extension sought by the adjudicator. In those circumstances, I consider that Speedwell's silence in response to the request for an extension, and their conduct as summarised in paragraphs 11 and 16 above, means that, at the very least, Speedwell are now estopped from denying that the adjudicator's decision of 4th April was a valid decision and/or was reached in time. Both by their failure to say in terms that they did not agree to the extension that had been requested, and their participation in the exchange of information all the way through to the latter part of 3rd April, they represented that the adjudicator had until 5th April to reach his decision. If they had made their position clear (which, on this assumption, was to the effect that they did not agree to any such extension), then both Yule and the adjudicator would plainly have acted differently so as to avoid the suggestion that the decision was out of time.
19. A brief consideration of the authorities dealing with estoppel, on which Mr. Leabeater relies, only serves to confirm my conclusion that, even if their silence and/or conduct did not amount to agreement to the requested

extension, Speedwell are estopped now from making that objection. In the *The Stolt Loyalty* [1993] 2 LLR 281 Clarke J (as he then was) approved of an earlier statement of principle in the following clear terms:

*"Nonetheless the dictum which I have cited seems to me to be most persuasive authority for the proposition that the duty necessary to found an estoppel by silence or acquiescence arises where 'a reasonable man would expect' the person against whom the estoppel is raised 'acting honestly and responsibly' to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations."*

20. In my judgment, there can be no question that a reasonable man would have expected Speedwell, acting honestly and reasonably, to be under a clear duty to make clear, if that was their position, that they objected to the extension requested by the adjudicator. In all the circumstances, I also find that, to the extent necessary, there was the required unconscionability in Speedwell's acquiescence and conduct, in order to found an estoppel. If they did not agree to the extension, they had to say so, and by acting in a way that was only consistent with their having agreed to such an extension, Speedwell must have known that both Yule and the adjudicator mistakenly believed that the relevant completion date had been extended to 5th April. On that basis, they were taking advantage of the mistaken belief that both the other party and the adjudicator plainly had. For all those reasons, therefore, it seems to me that the necessary ingredients of an equitable estoppel are in place. That view is, of course, confirmed by my earlier views as to Speedwell's actual conduct between 27th March 2007 and 4th April 2007.
21. In addition on this point, I should also note that the courts have in the past criticised the conduct of a party in adjudication who has failed to bring a fact or issue to the attention of the other side, or to the adjudicator, in circumstances where, much later in enforcement proceedings, that party has sought to rely on that fact or issue to argue that the decision was unenforceable. For example, in *Cowlin Construction Ltd v CFW Architects* [2003] BLR 241, Her Honour Judge Kirkham held that a party to adjudication who put in a counter-notice thereby accepted that the adjudicator had the necessary jurisdiction, and could not later object to his decision on the grounds that he lacked jurisdiction. Similar points can be found in a number of other TCC cases in which the judges have made it plain that, once a party has acknowledged the jurisdictional role of the adjudicator at an early stage, that party cannot seek to go behind that acceptance later on once the adjudicator has produced a decision which they do not like.
22. For all these reasons, therefore, I conclude that the decision was completed and communicated to the parties within the period agreed by them and/or that Speedwell are estopped from contending that the decision was completed out of time.
23. I should say that, on behalf of Yule, Mr. Leabeater had two alternative arguments in addition to his primary submission. The first was to the effect that the decision was actually completed on 3rd April, and was simply not communicated to the parties until the 4<sup>th</sup>, a delay in communication which, in accordance with *Barnes and Elliot* and *Cubitt* amongst others, was acceptable in all the circumstances. Although it is unnecessary for me to reach any concluded view on this point (because of my decision on his primary submission), it does not seem to me that this was a straightforward argument, given that on the 4th April, albeit early in the morning, there was an exchange between Yule's solicitor and the adjudicator, which indicated that the adjudicator considered that Yule could make further comments on a particular aspect of the dispute which, if he accepted them, might be reflected in his decision. That suggests that the decision was not complete on 3<sup>rd</sup> April.
24. Mr. Leabeater's second alternative argument was to the effect that, even if the decision was completed outside the extended period, it should still be enforced. Although I do not need to decide that issue either, I would wish to comment, however briefly, on the point of principle that arises out of that submission.
25. Mr. Leabeater suggested that there was a tension between the cases such as *Ritchie* (and a number of the others cited in paragraph 5 above) which emphasize the need for the adjudicator to comply with the mandatory timetable requirements required by the 1996 Act and the Scheme, and what he called 'the flexible approach' to statutory interpretation, which required the court to look, not at the language in which the requirement was expressed, but at the consequences of non-compliance. Following that flexible approach, he submitted that *Ritchie* and the subsequent cases noted in paragraph 5 above were wrongly decided. In support of his argument, he relied on Lord Steyn's speech in *R v. Soneji* [2006] 1 AC 340, and in particular paragraphs 15 to 23 thereof, in which, in respect of a failure to certify exceptional circumstances for postponing confiscation proceedings more than six months after the date of conviction, pursuant to the Criminal Justice Act 1993 and the Proceeds of Crime Act 1995, Lord Steyn concluded that distinctions between mandatory and directory requirements had outlived their usefulness and that "the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity". Relying on this approach, Mr. Leabeater argued that, even if I concluded that the adjudicator's decision was a day late, it was not a nullity.
26. I confine myself to making five points about this submission. First, whilst I can see that the flexible approach may well be applicable to 'one-chance only' applications created by statute, particularly in the realms of the criminal law such as the application at the heart of the debate in *R v. Soneji*, I am not so sure that the so-called flexible approach has such an obvious place in the fields of private dispute resolution, such as arbitration and adjudication. There, it seems to me, certainty is required at the outset, and throughout the process, not just at the end. Take arbitration as an example. The *Arbitration Act 1996* stipulates that an application to remit due to serious irregularity (section 68), or an application for permission to appeal (section 69), must be made within a certain time after the publication of the award. The word used in the Act is 'shall'. There are numerous decisions

of the Commercial Court and the Court of Appeal which make clear that the failure to comply with those mandatory time limits is almost always fatal to a belated application under either section. It would, it seems to me, bring chaos and complete uncertainty into the arbitration field if it was suggested that the mandatory time limits in the Act were simply there to act as a guide, and that what mattered was the prejudice, if any, that arose from non-compliance with those statutory time limits. That observation would, it seems to me, apply with even more force to the 1996 Act governing adjudication, which brings me to my second point.

27. In my judgment, the so-called flexible approach would ignore the particular constraints of adjudication in which a decision has to be provided fast and where, as Chadwick LJ noted in *Carillion*, accuracy has been sacrificed for speed. It would be odd, in my judgment, if the parties, having made that sacrifice, discovered that in practice speed was not the most important thing, and that the pace of the adjudication could, effectively, be dictated, not by the statutory requirements, but by a complex (and potentially ever-changing) kaleidoscope of factors comprised of the consequences of the adjudicator's failure to comply with those requirements. That would not provide certainty to the adjudication community and those who operate within it. It would instead be a recipe for confusion and uncertainty, and might encourage the adjudicator, or indeed one of the parties, to string out the process beyond the 28 days or the agreed extended period, on the basis that it would always be difficult for the other side to demonstrate that the delay had caused discernable prejudice.
28. Thirdly, the mere fact that an adjudicator's decision is a nullity, because it was provided outside the statutory timetable, is not of course an end to the process, unlike the confiscation order application at issue in *R v. Soneji*. The parties can have another adjudication, which would be very efficient, and quick, because all the work would already have been done. Indeed, they can start again in front of the same adjudicator when, for obvious reasons, a decision could be swiftly provided. If the party objecting to the original decision successfully insisted on the appointment of another adjudicator, then the first adjudicator (who had failed to provide his decision in time) would prima facie be liable for any wasted costs that had been incurred. In any event, those wasted costs might not be very great, since all the written work would already have been done in the first adjudication. That is, in my judgment, a clear and sensible allocation of responsibility and obligation on the part of the adjudicator and the parties. Nobody will have been irredeemably prejudiced by the ruling that the first decision was a nullity.
29. Fourthly, Mr. Leabeater relied on a decision of the Court of Appeal of New South Wales in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* (2004) 61 NSWLR 421. That was a case concerned with the New South Wales adjudication provisions, which are of more limited scope than those that apply in the UK. In that case, the court relied on Lord Steyn's words in *R v. Soneji* in holding that failures to meet statutory deadlines governing various aspects of adjudication were not necessarily fatal to the process. However, it appears that the adjudication provisions with which the court were there concerned were very different to those provided by the Scheme for Construction Contracts. There is, for example, no obligation that the adjudicator "shall" conclude his decision within a certain time. It therefore seems to me that the case is of limited assistance on this particular topic.
30. Finally, I am of the view that, in a speedy process like adjudication, the need for certainty is paramount. I consider that the 1996 Act reflects that in numerous ways. That certainty would be lost, it seems to me, if the 28 days was no longer regarded as a clear and mandatory requirement, but merely a guideline. Equally, certainty would also be lost if an adjudicator was given as long as he wanted to provide an enforceable decision, provided only that the parties could not show clear prejudice as a result of any delays beyond the 28 days, or the agreed extended period. In those circumstances, even if I was persuaded that there was the tension in the cases referred to by Mr. Leabeater, and if I was also persuaded to adopt Lord Steyn's approach in the construction of the 1996 Act as a whole (and paragraph 19 of the Scheme in particular), I would still come to the same conclusion: that, as set out in paragraph 6 above, the benefits of speed and certainty underpin the statutory requirement that the decision of the adjudicator **shall** be provided within 28 days (or any extended period that is agreed), and not thereafter. This makes it important that both the 1996 Act, and the Scheme, are construed purposively to ensure that those objectives are maintained.
31. Having made those points of principle as to Yule's second alternative argument, I do not deal with it further. For the reasons that I have set out in paragraphs 13 to 21 above, I have concluded that Mr. Leabeater's principal argument is correct, and that Speedwell's challenge to the validity of the decision must fail. I therefore enforce that decision and give judgment in favour of Yule for the principal sum sought pursuant CPR Part 24. As indicated at the outset of this morning's hearing, I will deal with all subsidiary matters (such as interest and VAT) only if they cannot be agreed by the parties.

MR. JAMES LEABEATER (instructed by Dickinson Dees) for the Claimant  
MR. SIMON HENDERSON (instructed by Weightmans) for the Defendant