



LEGAL BULLETIN



Hey Mr. Adjudicator – You’re late!

By
Kevin Roberts, Head of Legal Services (non-practising solicitor)

The subject matter of this Bulletin will be of interest to anyone who has been involved in adjudication proceedings or who might become so involved. This just about includes anyone who has entered, or will be entering into, a construction contract.

It will not surprise the majority of you that further confusion and ambiguity has been thrown into the adjudication arena by another court decision, namely that made by the Technology and Construction Court in the case of **Epping Electrical Company Limited v. Briggs & Forrester Plumbing Services Limited [2007]**.

The facts were briefly as follows. Epping served Notice of Adjudication upon B&F thereby giving notice of its intention to refer a dispute that had arisen between the parties under their contract to adjudication. They served the Referral Notice (which was essentially their Claim), on 4th October 2006.

The contract required the adjudication proceedings to be commenced and conducted in accordance with the Model Adjudication Procedure published by the Construction Industry Council (“MAP”). Like all contractual adjudication procedures, the Adjudicator was required to reach his Decision within 28 days of his receipt of the Referral Notice; in this case by 1st November 2006.

The Adjudicator requested further time to reach his Decision and, on 8th November 2006, both parties agreed to a “*further 7 day period in which to issue the decision*”. This meant that the Adjudicator was required to “issue” his decision on 21st November 2006. On 13th November 2006, the Adjudicator wrote to the parties to inform them of his intention to exercise a lien over his fees.

In other words, he would not issue his decision until his fees and expenses for acting as adjudicator had been paid. Neither party responded to the Adjudicator’s expression of intent.

The Adjudicator wrote again to the parties on 21st November 2006 to inform them that he had “reached” his Decision but would not “issue” it until his fees and expenses had been paid. It was at this point that B&F objected. The Adjudicator eventually relented and issued his Decision on 23rd November 2006, 2 days after the agreed deadline. B&F refused to comply with the Decision and Epping issued court proceedings for the enforcement of the Decision and its conversion into an enforceable court judgment.

B&F defended the court enforcement proceedings on the ground that the Decision had been “issued” out of time and, as a consequence, was invalid on jurisdictional grounds and therefore not a decision the court should enforce. It is, perhaps, surprising that this argument had not previously been argued before the courts.

The court agreed with B&F and refused to enforce the Adjudicator’s decision. The main reason for the court’s refusal to enforce the Decision was not because the Adjudicator had failed to “issue” the Decision on 21st November 2006 (the agreed deadline), but because he should have “reached” his decision on 15th November 2006. Section 108(2)(c) and (d) of the Housing Grants, Construction and Regeneration Act 1996 (“the Act”), makes it a mandatory requirement of every construction contract that the Adjudicator is required to “reach” a decision within 28 days of his receipt of the Referral Notice, subject to an extension of time of up to 14 days being given to him by the referring party or such other longer period as both parties may agree to give him.

Epping argued that both parties had agreed to give the Adjudicator a “longer period” on 8th November 2006. B&F argued that this agreement was conditional upon the Adjudicator issuing (as well as reaching) his decision on 21st November 2006. This was because, as referring party, only B&F could grant the Adjudicator an initial extension of up to 14 days. Any further extension required the consent of both parties.

The court decided that the letter the Adjudicator sent to the parties on 13th November 2006, after B&F had agreed the “longer period”, did not discharge the condition B&F had imposed upon him when they consented to him having an extension of time – the condition being that he issued his decision on 21st November 2006.

The court agreed with B&F. It was clear that the agreement reached on 8th November 2006 required the Adjudicator to reach and issue his decision on 21st November 2006. As a consequence, the court concluded that the Decision was out of time and therefore invalid and unenforceable.

So how did the court arrive at the date of 15th November 2006? Section 108(2)(d) of the Act allows the referring party to give the Adjudicator an extension of time for “reaching” his decision on top of the basic 28 day period of up to 14 days. This meant that B&F was only able to give the Adjudicator an extension of time (on top of the basic date of 1st November 2006), up until 15th November 2006. By reaching his decision on 21st November 2006, the Adjudicator “reached” his decision 7 days late. It was irrelevant that he did not then issue the Decision until 23rd November 2006 because, by that time, it had already been “reached” out of time.

In deciding not to enforce the Decision, the court followed the decision made in the earlier case of **Ritchie Brothes (PWC) Limited v. Daniel Philip (Commercials) Limited [2005]**, which, despite being a case in which the Statutory Scheme for Construction Contracts applied but where the time limit for reaching the decision had been similarly exceeded, the court concluded that:-

“it is not open to an adjudicator to purport to reach his decision after the expiry of the time limit.”

In the Epping v. B&F case, the court confirmed that “*on the true construction of the Act*” the time limit was mandatory.

In a last ditch attempt to enforce the Decision, Epping relied upon paragraph 25 of the MAP which states: “*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.*”. The court was unimpressed by this argument and concluded that because the effect of paragraph 25 was inconsistent with what it considered to be a statutory mandatory requirement, that paragraph could not survive.

So it would seem that the days when parties could assume that a decision made by an adjudicator out of time was still a valid decision are now no more. Or are they?

Some of you may have noticed a subtle distinction made in this Bulletin between “reaching” the decision on the one hand, and “issuing” the decision on the other. The importance of this distinction has arisen following the comments made by Mr. Justice Jackson in the case of **M Rhode Construction Limited v. Nicholas Markham David [2006]** wherein he stated that a “*slight delay is not fatal*”. However, that statement related to cases where a decision had been correctly “reached” but had simply not been communicated (or “issued”) to the parties in time. This is clear from the judgment of Coulson J in the case of **Cubitt Building & Interiors Limited v. Fleetgrade Limited [2006]**, in which he stated:-

“A decision which is reached within the 28 days or any agreed extension 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.”

Finally, and in recognition of the decision in the Epping v. B&F case, the Construction Industry Council has recently amended paragraph 25 of the MAP to bring it in line with the statutory mandatory requirement.

END

This Legal Bulletin should not be taken to be, or used as, a statement of law, or for the purposes of giving advice to any party on any legal or contractual matter or dispute. Haleys therefore do not accept any responsibility for any such use or purported use and in all cases parties should seek appropriate and specific legal advice for specific cases. If you would like to discuss the circumstances of any of your contracts or projects, or you require further information on the services provided by the Contracts & Legal Services Division, please contact either of the following:-

Kevin Roberts – Head of Legal Services (non-practising solicitor)/Associate Director
Peter Graham –Regional Director



Birmingham **Leeds** London **Nottingham** Purley **Milton Keynes**
Email: kevin.roberts@haleys-ltd.com: Website: www.haleys-ltd.com

15 Wheeler Gate, Nottingham, NG1 2NA
Tel: 0845 367 8820; Fax: 0845 367 8821