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Adjudication Society & Chartered Institute of Arbitrators

GUIDANCE NOTE: ADJUDICATOR'S LIENS

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GUIDANCE NOTES FOR ADJUDICATION

The Adjudication Society and Chartered Institute of Arbitrators established a joint working group in April 2010 in order to produce a series of Guidance Notes dealing with Adjudication. The purpose was to deal with Adjudication in England, Wales and Scotland. Nicholas Gould, Partner, Fenwick Elliott LLP chaired the joint working group, which was established under the policy sub-committee of the Chartered Institute of Arbitrators and the executive committee of the Adjudication Society.

The Guidance Notes are to assist not just adjudicators, but also parties and party representatives in respect of the key issues that they and adjudicators might encounter when dealing with adjudication under the Housing Grant, Construction and Regeneration 1996, and the subsequent Local Democracy Economic Development and Construction Act 2009. The Guidance will take into account the Scheme, amendments to it and also pertinent case law.

The Guidance Notes do not debate all of the legal issues in an attempt to find a philosophical answer to the many problems that could be encountered. Instead, the Guidance tries to identify a sensible or practical approach to some of the everyday problems encountered in adjudication. It is an attempt to establish best practice, so that guidance notes will be provided from time to time.

The first Guidance Note dealt with jurisdiction, and was published on the 25th May 2011.

Guidance Notes can be obtained from the website of The Adjudication Society (www.adjudication.org) or the Chartered Institute of Arbitrators (www.ciarb.org).

Nicholas Gould

Chairman, Guidance Note Joint Working Group, Comprising Guidance Note Sub-Committee, Adjudication Society and Guidance Note Sub-Committee, Chartered Institute of Arbitrators.

1. **LIENS**

- 1.1. In order to try and get around difficulties in collection of their fees, adjudicators have sought to exercise a lien on the release of the decision pending payment of their fees. However, the Courts have made it clear that an adjudicator has no power to exercise lien if to do so would result in any delay to the communication of the decision¹.
- 1.2. The position is in contrast to arbitration where an arbitrator is given an express statutory right to refuse to deliver an award to the parties until full payment of his fees and expenses is made².

2. **ADJUDICATOR'S TERMS**

- 2.1. Unless both parties expressly agree that the adjudicator may delay the release of his decision until full payment of his fees is made, it is thought that an adjudicator cannot exercise a lien. In *Cubitt*³, even though the adjudicator's terms of appointment stated that a lien may be exercised over publication of the decision, Judge Coulson held that such an open ended extension of the statutory period was contrary to the whole principle of adjudication. That was in circumstances where neither party had expressly objected to the adjudicator's terms of appointment.
- 2.2. The rationale in *Cubitt* was that the overriding obligation on the part of the adjudicator was to reach a decision within 28 days or an extended period agreed by the parties. Therefore, the exercising of a lien was contrary to that overriding obligation.
- 2.3. In *Coulson on Construction Adjudication*⁴ there is an inference that an adjudicator could require payment of his fees in advance of reaching a decision, providing it did not delay the completion or communication of the decision. However, if payment of the fees was not made prior to the date upon which the decision was due then the

¹ Mott Macdonald Ltd v London & Regional Properties Ltd [2007] EWHC 1055 (TCC), Cubitt Building & Interiors Limited v Fleetglade Ltd [2006] EWHC 3413 (TCC)

² Section 56 of the Arbitration Act 1996

³ Mott Macdonald Ltd v London & Regional Properties Ltd [2007] EWHC 1055 (TCC), Cubitt Building & Interiors Limited v Fleetglade Ltd [2006] EWHC 3413 (TCC)

⁴ 2nd Edition, 2011 paragraph 10.29

adjudicator would still be required to publish the decision in advance of being paid. Indeed there seems to be no difficulty in requiring payment ahead of publication of the Decision provided these criteria are met.

2.4. Further, in NAP Anglia Ltd⁵ the judge refused to enforce the reimbursement of the Adjudicator's fees by the Defenders to the Referrers as ultimately required by the Adjudicator's Decision because the Decision also required the Referrers to pay them at first instance and this had not occurred by the time of the claim form for the instant proceedings. Compare this with the view expressed in Mott MacDonald⁶ that Adjudicators requiring a particular party to pay their fees in the first instance suggested bias in favour of that paying party by the Adjudicator. Although in that case the requirement was accompanied by the attempted and wrongful imposition of a lien before publication of the Decision.

2.5. Despite many and various arguments in NAP Anglia Ltd for resisting enforcement of the substantive Decision the 'bias' point in Mott Macdonald was not deployed. It follows that Adjudicator's fees required at first instance in a Decision should be paid at the very latest by the time of the claim form in any enforcement proceedings; otherwise full enforcement of the Decision may not occur.

3. TIMING OF THE DECISION

3.1. The adjudicator is required to *reach* the decision within the statutory or contractual time limits. This is typically 28 days or an extended period. A failure to reach a decision on time will render it a nullity and/or unenforceable.

3.2. Whilst there is a distinction between the adjudicator *reaching* and *delivering* a decision, a decision reached in time but not delivered to the parties as soon as possible after it has been reached may make it unenforceable⁷. It is thought that in the days of modern communication a decision should be communicated by email or fax on or before the day is due to be reached.

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⁵ NAP Anglia Ltd v Sun-Land Development Co. Ltd [2011] EWHC 2846(TCC)

⁶ See footnotes 1 and 3

⁷ Lee v Chartered Properties (Building) Ltd [2010] EWHC 1540 (TCC)