

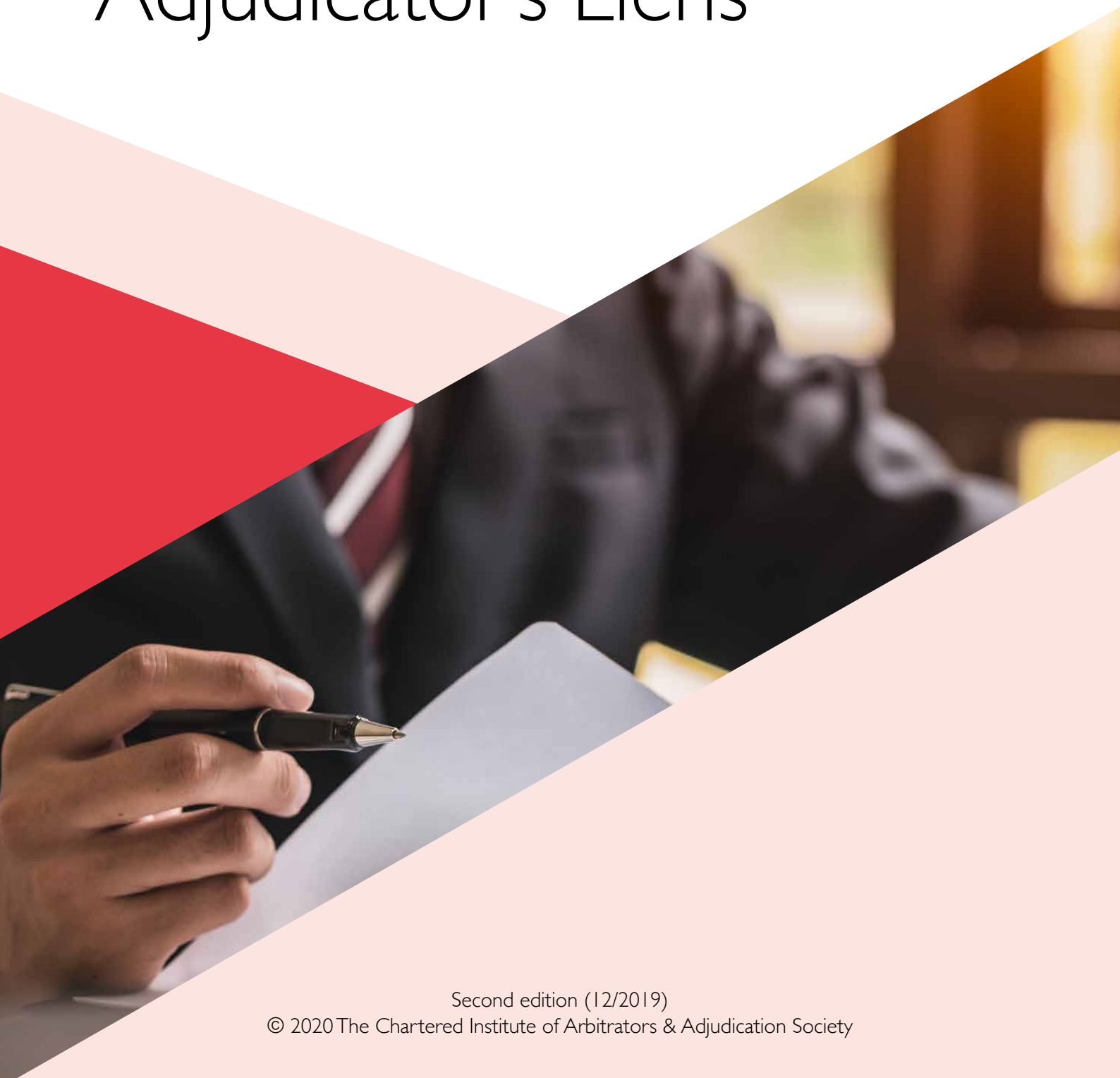


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Guidance Note: Adjudicator's Liens



Second edition (12/2019)

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Guidance Notes for Adjudication

The Adjudication Society and Chartered Institute of Arbitrators have worked jointly since 2010 to produce a series of Guidance Notes dealing with Adjudication in England, Wales and Scotland.

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.

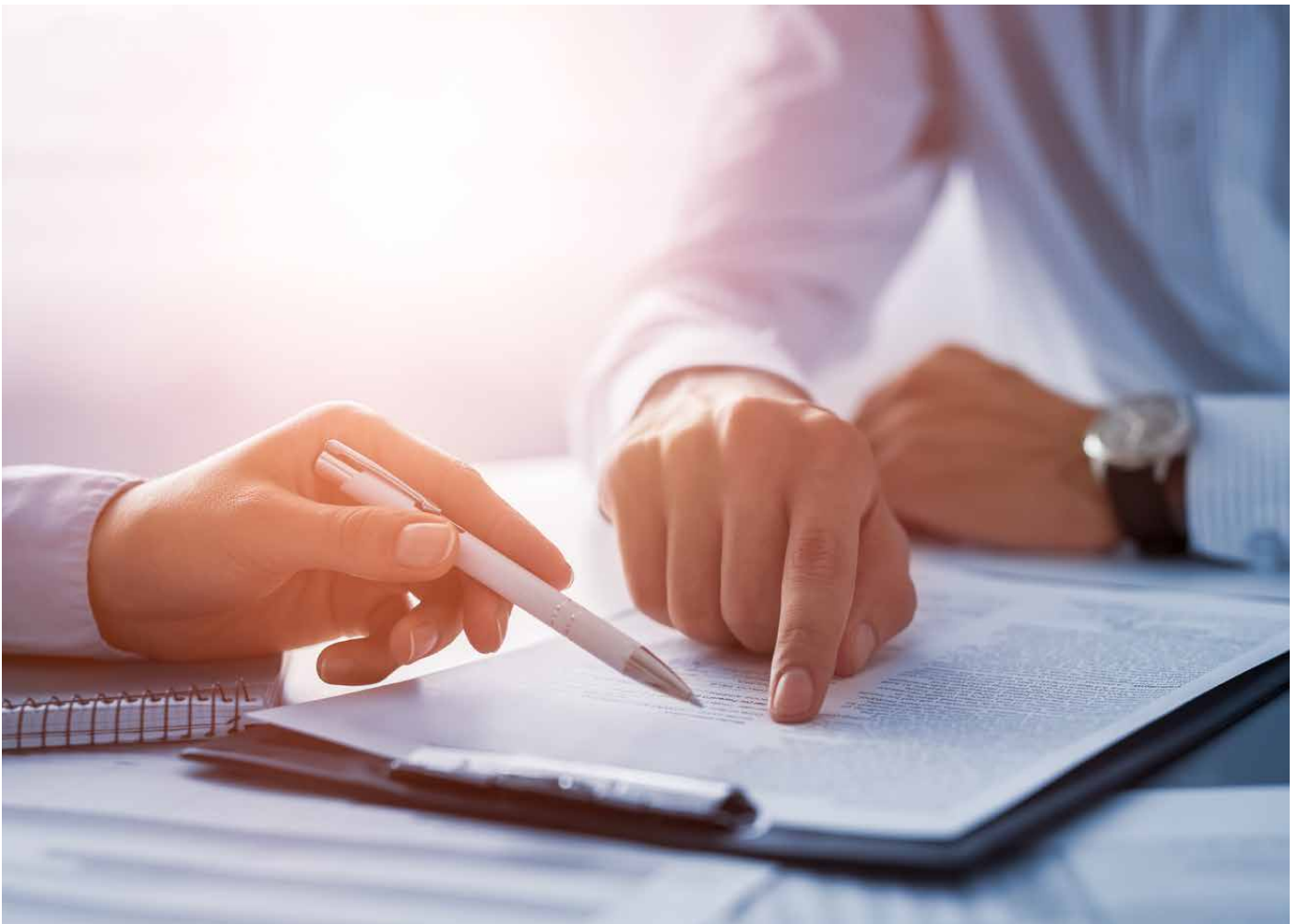
The Guidance Notes do not debate all of the legal issues in an attempt to find a philosophical answer to the many problems that could be encountered.

Instead, the Guidance Notes try to identify a sensible or practical approach to some of the everyday problems encountered in adjudication. It is an attempt to establish current best practice and, to that end, updated guidance notes will be provided from time to time.

The first edition of this Guidance was published on the websites of The Adjudication Society (www.adjudication.org) and the Chartered Institute of Arbitrators (www.ciarb.org) in April 2013. This current edition results from a review by a Working Group set up by the Practice and Standards Committee (PSC) of the Chartered Institute of Arbitrators with assistance from the Adjudication Society.

Ciaran Fahy

Chairman, Guidance Note Working Group



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 a 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 the arbitrator's fees and expenses has been made².

2. Adjudicator's Terms

2.1. Unless both parties expressly agree that the release of the decision may be delayed until full payment of the Adjudicator's fees has been 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 their 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 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. In *NAP Anglia Ltd*⁵ the judge refused to enforce the reimbursement of the Adjudicator's fees claimed by the Referring Party as required by the Adjudicator's Decision. This reimbursement was contingent on payment first being made by the Referring Party to the Adjudicator. That payment was not made until after the claim form was issued for the court proceedings. Further, in *Mott MacDonald*⁶ it was found that an Adjudicator requiring a particular party to pay their fees in the first instance suggested bias in favour of that paying party by the Adjudicator. Also of note in that case is that the requirement was accompanied by the attempt to impose a lien before publication of the Decision which was also found to be wrongful.

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 *Cubitt Building & Interiors Limited v Fleetglade Ltd* [2006] EWHC 3413 (TCC)

⁴ 4th Edition, 2018 paragraph 10.46

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

⁶ See footnotes 1 and 3

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 is to be noted that the bias point in **Mott MacDonald** has not since been followed. 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 on or before the day it is due to be reached. It should be noted that a day is to be taken as the full 24-hour period; this means a decision is validly delivered on a particular day provided it is done before midnight.



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



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