Chapter 11
The Decision

Section 108 of the Act includes the word 'decision' four times. In none of these instances is there any indication of the form that the decision is to take. The Arbitration Act 1996, by comparison, does set out certain requirements relating to an arbitrator's award, but even these are very limited. By the Arbitration Act 1996 an arbitrator's award must be in writing, be signed and contain reasons unless agreed otherwise by the parties. It must also state the seat of the arbitration and the date that the award is made. You will look in vain for even such limited provisions in the Act regarding the adjudicator's decision.

The references to the decision of the adjudicator in the Act are as follows:

108(2)(c)	'require the adjudicator to reach a decision within 28 days …'
108(3)	'The contract shall provide that the decision of the adjudicator is binding until … The parties may agree to accept the decision of the adjudicator as finally determining the dispute.'
108(6)	'For Scotland, the Scheme may include provision conferring powers … relating to the enforcement of the adjudicator's decision.'

There is absolutely nothing there that requires or guides the adjudicator as to the way he should formalise the decision. All that is required of the adjudicator is that he reaches a decision. The Act does not even require that the adjudicator puts his decision in writing or that he delivers his decision to the parties at all, although this must be implied for the process to have any effect. This situation reinforces the point that any procedures relating to the adjudication arise out of the contract between the parties and not directly from the Act itself.

The requirements of the various adjudication rules applying to construction contracts are dealt with in detail in Chapter 6. It is, however, worth noting here that there is little, if any, guidance as to the form that the adjudicator's decision should take in any of the published rules or in the Scheme.

As with all other aspects of the adjudication process, the adjudicator must make himself fully aware of the requirements of the contract in this regard. These requirements will obviously include any applicable rules. He must follow the required procedures to the letter. If he does not, he is likely to be in breach of his own contract with the parties. Not that he will necessarily suffer as a result, due to the immunity provisions that the contract is required to contain, but, if an adjudicator fails to fulfil any express or implied duty that he has under his own contract with the parties, the result may not be the quick efficient resolution of the dispute that ought to be the desired end to the adjudication process.

If, however, the contract, any applicable adjudication rules or any adjudicator's agreement entered into upon appointment are silent as to the form that the decision must take, it is for the adjudicator alone to decide how he wishes to convey his decision to the parties.

These points apart it is apparent that the adjudicator is, in most circumstances, very much on his own when he reaches the point of having, in the words of the Act, to reach his

decision, and as a consequence, to draw the adjudication process to a close in respect of that particular dispute.

It is essential, first, to consider what it is that the adjudicator is trying to achieve with his decision.

In the broadest of terms the purpose of the decision is to acquaint the parties of the adjudicator's decisions on the various issues that have been put to him, both clearly and in a form that is enforceable by the court if necessary. A supplementary purpose that has, in our opinion, clearly developed from the success of the adjudication process in producing decisions that generally mean that the dispute goes no further, is an endeavour to put the parties in the position of being able to resolve the dispute. It must of course always be remembered that, as distinct from arbitration, the adjudication process is not a dispute resolution process in itself, either party being able subsequently to take the dispute on to arbitration or litigation if desired. The most the adjudicator can do is to produce a decision that enables the parties to accept it and thus resolve the dispute.

It is self-evident that there is no point in the adjudicator just reaching a decision and then doing nothing with it. He must convey that decision to the parties. He may even consider the possibility of doing this orally. If the dispute relates to a clearly defined argument concerning a specific matter, there is nothing to stop the adjudicator meeting the parties on site, hearing what they each have to say and telling them there and then what his conclusions are. The parties may not even want a written record of that decision, but this is very unlikely.

This approach is of limited application. However desirable the 'referee' approach is in keeping the project moving, in the majority of disputes that require the services of an adjudicator the parties will want to see his decision in written form. Even in the case of the instant decision on site it is likely that some written confirmation of that decision will be required by at least one of the parties.

The majority of adjudicator's decisions, if not all, will therefore be conveyed to the parties in written form and, as discussed above in this respect, the adjudicator will be very much on his own unless a specific form of decision is required by either the contract or by his agreement.

Before considering the form that the decision should take, it is necessary to consider in a little more detail what it is that the adjudicator is trying to communicate to the parties through his written decision.

His first purpose, as has already been noted, must be to convey the nature of his conclusions to the parties. He must do this in a manner which ensures that each party knows exactly what that decision is, how it affects them individually, what they have to do and what they can expect the other party to do as a result. It must be clear as to its effect. In order to achieve this it should be set out in such a way that it is readily understandable. It should deal with all the issues that the parties require to be decided. Each issue that is readily separable should be dealt with individually; this is particularly important where there may be some dispute as to the adjudicator's jurisdiction to deal with some aspects of the claim. It should fulfil any specific requirements that relate to the decision, for example, if the contract or applicable rules require that reasons be given, this should be done.

In addition, the adjudicator should always be mindful of the fact that the unsuccessful party in the adjudication, who is likely as a result of the decision to be required to pay money or to carry out some specific act, may well be unwilling to do so. The successful party will then have to take steps to enforce the decision and it is therefore vital that the written decision does not put any obstacles in his way.

Enforcement has little to do with the adjudicator and much to do with the court or, if there is an arbitration agreement in the contract that does not exclude enforcement of an

adjudicator's decision as an arbitral matter, the arbitrator. The adjudicator's decision should clearly state the details of the decision reached, and clearly identify such things as what it is, how it came to be made and the contract to which it relates, and what has to be done by whom and when. If it does not it could, at worst, be nothing more than a worthless piece of paper. At best, it may be something that will require the adjudicator himself to be called as a witness to verify the nature of the document and possibly what it means.

Adjudication is, after initial negotiation between the parties themselves, save for the possibility of mediation or conciliation, likely to be the first formal stage of the process to resolve the dispute. If it can also be the last stage, the adjudicator will have rendered the disputing parties a great service. The adjudicator should therefore always bear in mind that he might, by the way in which he carries out his duties, prevent the dispute from going any further. Much of this will of course be done in the stages of the adjudication prior to him sitting down to write out his conclusions, but the way in which he imparts his decision to the parties may well have a significant effect.

The process of making the decision

Decision-making is a process that we all go through on an infinite number of occasions every day of our lives. Nine times out of ten this process is a very simple one. For instance, we decide that we want a cup of coffee. This is purely instinctive and we don't have to think about it very much. We know that we want a cup of coffee and we have one. On the tenth occasion we have alternatives to consider and these can range from simple choices between two alternatives, to complex matters involving a great number of permutations.

Decisions do, however, all boil down to a simple process. That process is as follows:

- we sort out the facts that have a bearing upon the decision we have to make;
- we consider any influences that will also have a bearing;
- we look at the alternatives; and
- we choose the appropriate one in the light of all the circumstances applying at that particular time.

Decision-making as an adjudicator in respect of a dispute, however complex it may be, is little different from that.

The adjudicator has to ascertain the facts. Where facts are disputed he has to decide which version is correct. Once those facts are ascertained, the adjudicator has to find out whether any constraints apply to the parties that may have a bearing on those facts. For example, those facts may show either that the terms of the contract have been complied with or they may show the reverse. The common law, that is statute and case law, may also have a bearing upon the issues. The adjudicator makes his decision by applying his findings in respect of compliance with the contract and/or the common law to the facts he has ascertained.

There is only one occasion where this process can be varied and that is where there is an agreement between the parties that the adjudicator can diverge from ascertaining the legal (contractual) entitlements of the parties. Then his decision can be formulated upon another basis, for example so that his decision represents his fair and reasonable view, as is the case in Rule 17 of the TeCSA Adjudication Rules.

This provision at first glance appears eminently practical. What could be better than sorting out a dispute on a fair and reasonable basis? The problem is that unless the parties have agreed that precisely the same provision is a term of their contract, or they agree that

the adjudicator's decision settles the dispute, a subsequent arbitration or litigation brought by a dissatisfied party would most probably come up with a different answer after a proper and detailed examination of the evidence.

Save in this last instance, where there is some leeway, the adjudicator has to decide the disputed facts and also the disputed law. He has then to apply the decided law to the decided facts and the decision follows. However complex the dispute, this must be the process followed. There is no other way of ascertaining the rights and obligations of the parties under the contract that they have entered into.

While an adjudicator should always endeavour to reach his decision fairly, he must always be wary of making a decision simply in the interests of apparent 'fairness'. We looked at this in Chapter 10 but it is worth repeating here. Contracting parties have, or should have, entered into their contract with a pretty good idea regarding their rights and obligations. A construction contract is, after all, an allocation of risk. Take, for example, a term of a contract that appears to be to the great disadvantage of one of the parties and one of the major planks of that party's submission is the unreasonable effect of the term. Unless the situation is caught by the unfair contract terms legislation, it will be presumed that the apparently disadvantaged party will have taken the item into account when reaching the original agreement. Any attempt to be 'fair' in this situation by shading or modifying the effect of the agreement between the parties will not cause problems in enforcement but will almost certainly result in dissatisfaction on the part of the party whose contractual rights have been affected, and will mean that the dispute may well be taken further.

Deciding the facts

This process can be analysed as follows:

- What facts are alleged by the applicant?
- Which of these facts is disputed by the non-applicant?
- Of each disputed fact which party has the burden of proof?
- In respect of each fact that is disputed what evidence is adduced by the party who has the burden of proof?
- Is the evidence in respect of any of the disputed facts incontrovertible?
- For those alleged facts not supported by incontrovertible evidence, what evidence does the party without the burden of proof have to rebut the allegation?
- Which party's evidence does the adjudicator prefer?
- The adjudicator has then made his decision as to the facts.

The words 'burden of proof' are mentioned above. This may, in the eyes of some, appear to be unnecessarily legalistic in the context of construction adjudication. There is, however, no doubt that in the process of ascertaining the rights and obligations of the parties, it is a vital aspect. 'He who asserts must prove' is almost a truism but, if a party's assertion is upheld without being properly proved, the result must be unfair, wrong and should, if possible, be reversed. The party that makes the assertion must prove his assertions, and thus bears the burden of proof.

The burden of proof encompasses some established legal principles and it is vital that the adjudicator in establishing the rights and obligations of the parties has some understanding of these principles. We examine these below.

The burden of proof

The legal or ultimate burden of proof is the obligation imposed by law to prove a fact that is in issue between the parties. It is necessary to be careful in the situation where several facts are in issue as the legal burden is often distributed between the parties. For example, the applicant may allege that the other party has delayed him but the other party says that the applicant has contributed partly or entirely to the delay by his own actions. Who then has the burden of proof?

A useful starting point (but only a starting point) is, as noted above, 'he who asserts must prove'.

The legal burden of proving a contract, its breach and consequential loss, lies with the applicant. The legal burden of proving a defence that goes beyond a simple denial of the applicant's assertions lies with the other party.

An allegation that is in negative terms has to be considered carefully. An allegation by the party in receipt of a claim for payment to the effect that 'the other party did not carry out the work properly, so I am not going to pay him' might be thought by the lay recipient of such an allegation to place upon him the burden of proving that he did carry out the work properly. It does not. The other party has to prove that he did not carry out the work properly. The adjudicator must look at the words, rather than the substance and effect.

There are certain facts which may automatically be in a party's favour in legal proceedings. These are called 'presumptions'. An example in the construction industry is where the applicant is an architect seeking fees for services rendered. The architect enjoys a presumption that he will be paid. The non-applicant says that the architect operated on the basis that if planning permission was not obtained, he would not be paid. In this instance, if no planning permission is granted, the non-applicant has the burden of proving that no fees should be paid for the services in preparing the planning application.

The procedure that the adjudicator should adopt in such a case is to ask, 'against whom does the presumption operate?' It operates against the person who bears the tactical burden of proving that the presumption is wrong.

Some basic presumptions are as follows:

- that the work will meet the 'usual' standard for that type of work
- a material will do the job expected
- when no programme is agreed, the performance will be within a reasonable time.

Matters that are in the general knowledge of all need no proof and are open to no evidence of rebuttal. In legal terminology this is known as 'judicial notice'. An adjudicator will be quite right to use matters that are of general knowledge in reaching his decision without telling the parties, but he must be absolutely certain that it is general knowledge and not specialised or knowledge that is particular to him.

The burden of proof is removed from a party where there is a formal admission by either an express admission or a submission. It is also removed where there is a failure to rebut an allegation.

This last is a problem area for the adjudicator faced with submissions from non-legally qualified parties. In arbitration, the statements of case are usually prepared with the normal conventions of legal pleadings in mind. Where a statement of defence is prepared, care is generally taken to ensure that every allegation is identified and responded to by an admission as to the fact it is true or by a denial. This makes the position quite clear for the arbitrator. He can work on the basis that unless there is a denial the alleged fact is accepted.

In adjudication things are unlikely to be so clear-cut. Allegations may be made that are not

answered. Should the adjudicator follow the convention that they are accepted or not? It is suggested that it is inappropriate to operate on strict legal principles. Where, upon perusal of the papers, it appears that there is no reaction whatsoever to an allegation, the adjudicator should, at the very least, seek clarification. He should be careful not to accept an allegation of this nature without question just because it is not denied. The application of the strict legal principles of pleading in the High Court is not acceptable in adjudication and not only should the adjudicator avoid falling into this trap by his own doing, he should be wary of any attempt to bulldoze him into accepting them. They are not the rules of this game!

Equally, the adjudicator must appreciate that he treads a narrow path. He must, if he seeks clarification, do no more than that. He must avoid at all costs the possibility that what he does is perceived by one party as being biased in favour of the other, as this could result in his decision not being enforced.

Probability

Probability is a test that is applied to individual statements made. For instance, in respect of a claim for labour costs the adjudicator must be satisfied that it is probable that the operative in respect of whom costs are claimed was working on the activity claimed for in the light of the progress of the works.

One final matter is what happens where it is impossible to decide between conflicting evidence. This happens particularly in connection with the evidence of two witnesses who state that there were diametrically opposed results from a meeting. One says there was an agreement, the other says that there was not. Normally there will be evidence that corroborates one or the other. But what if there is no such evidence and the subsequent actions of the parties give no clue? The adjudicator does not know which witness to believe but he must make a decision between them. What is the adjudicator to do? The answer lies once again with the burden of proof. The party who asserts must prove. If the adjudicator cannot separate them the party making the assertion must fail.

Consideration of the subsequent actions of the parties as corroboration must be used circumspectly, especially if the dispute relates to a contract or an alleged agreement. This is an example of an area where the need for the adjudicator to have a basic idea of the concepts attaching to the formation of a contract is so important. There is a long line of cases including the decision of Lord Hoffman in *Investors Compensation Scheme* v. *West Bromwich*,[1] that confirm that in construing a contract it is not appropriate to take the subsequent actions of the parties into consideration.

It is not for a practical guide such as this to go into the detail of contract law. It is important, however, that anyone taking on the task of adjudicator should obtain some familiarity with such matters, enough at the very least to ring warning bells and encourage him to seek advice. Decisions made that are totally contrary to the settled law are unlikely to result in a resolution of the dispute to which they relate.

Assessing the evidence

At the time the adjudicator starts to pursue his enquiries, it is likely that all he has before him will be the notice of referral. He will, in most adjudications, seek the responding party's views in some form of written statement. He will no doubt have accompanying documents.

[1] *Investors Compensation Scheme* v. *West Bromwich Building Society* [1998] 1 WLR 896.

The assertions in the statements presented by the parties and even the written evidence may well conflict. If they do, these conflicts will have to be resolved by the adjudicator. In setting his timetable at the outset of the adjudication the adjudicator will always have to bear in mind this possibility and do his best to allow time to undertake any oral examination of those making the assertions.

In this event the adjudicator will be able to call those making the conflicting statements in front of him and try to make up his mind as to which one he believes. It is not always possible, however, to decide from the demeanour of a witness whether he is telling the truth or not. In fact, sometimes the most nervous of witnesses can be shown to have been telling the truth where the barefaced liar appears to be very convincing.

What the adjudicator has to do in these circumstances is the same function as anyone who has to consider evidence. He has to assess and test it for consistency and probability. The basic approach is to have a framework of incontrovertible facts. This should always be done at the outset of any consideration of evidence. This framework could be said to form all the edge pieces of a jigsaw and all the inside pieces have to be fitted into place. Some pieces of evidence will fit directly into the pieces at the edge that are already in place. These are consistent with what is already known. The added interest and problem for the individual assessing evidence can be seen as a jigsaw that has got mixed up with another and there are pieces that at first glance appear to fit but on further examination they do not. These pieces may well be placed in the hole because they appear probably to fit but they may have to be rejected later as the whole picture develops because they cannot be reconciled with the other evidence.

Some examples of the tests that must be applied to individual pieces of evidence are now considered.

Consistency

Consistency in respect of evidence given by a single witness is tested by considering the relationship of the evidence to the following:

- The incontrovertible facts
- The other parts of the witness' own evidence
- Evidence as to what the witness has said other than in his own statement
- Evidence of what that witness has done
- The evidence of other witnesses
- The documents.

All the above apply equally to a general statement submitted by a party in the adjudication.

The balance of probabilities

This is where another legal concept comes into play. What standard of proof is the adjudicator to apply to test whether the assertions made are true?

If the adjudicator is not to apply a hurdle greater than that applied in civil proceedings in the court, he must go no further than seeking to ascertain on the balance of probabilities whether the assertions made are true. One of the better examples of this concept relates to the two separate trials that American footballer OJ Simpson underwent in the USA. He was accused of murdering his wife. In the criminal trial he was found not guilty on the basis of

his guilt not being 'beyond reasonable doubt'. In the civil trial that followed he was found to be guilty because the standard of proof required was 'on the balance of probabilities'.

Often this is a simple matter. It can, however, be an area where the adjudicator has to be very careful. The adjudicator may, having examined the papers in the time available to him, come to the conclusion that the evidence shows that there is a possibility that the claim is well founded. The responding party must have caused some of the loss claimed; the adjudicator is, however, not sure how much. His experience tells him that in similar circumstances it is common for this to be the case. He feels from his own experience and on the balance of probabilities from the evidence that he has seen, that there must be some blame on the responding party. There is, however, no real evidence to back up this conclusion. If he has the time he will be able to take active steps to ascertain what actually went on when considering a disruption claim. If there is no time for such an investigation the adjudicator might suggest to the referring party that the period be extended by 14 days, as he is permitted to do without needing the responding party's agreement. If the referring party refuses to allow the extension, the adjudicator may well draw the inference that the investigations would not produce an answer that was favourable to that party. The adjudicator would be well within his rights to draw such inferences, and 'fairness' probably suggests that he should inform the parties that he is doing so. That at least gives the party against whom he is drawing the inferences a chance to do something about it.

The ascertainment of the facts by the adjudicator himself

Section 108(2)(f) of the Act requires that the contract shall enable the adjudicator to take the initiative in ascertaining the facts and the law. Note that the provision does no more than enable the adjudicator to do this; it does not require him to do so.

The adjudicator may be satisfied that the materials presented to him by the parties provide him with sufficient information to reach his decision without anything more. He may not have any time to do more than this. There may, however, be a situation where the adjudicator considers that he must find out more before he can fulfil his obligations as adjudicator properly.

It is worth mentioning here the wording of the Scheme, paragraph 12(a) of which requires that the adjudicator *shall* reach his decision in accordance with the applicable law relating to the contract. This is a very onerous requirement and begs the question regarding who is fit to undertake such a responsibility in a 28-day period. This point is looked at in rather more detail elsewhere.

The adjudicator is fully at liberty to ask the parties to provide further information, but he is also allowed by section 108(2)(f) to make his own investigations. The time factors may mean that this is a far more sensible means of getting to the root of things than merely waiting for submissions, which may not arrive in time to be considered properly. Making investigations may well include using information that is already within his own knowledge.

In arbitral proceedings the basic concept of 'natural justice' or fairness applies and it is improper for the arbitrator to use specialised knowledge or particular knowledge without inviting argument from the parties. This is an area in which the adjudicator, operating under a different regime, has to be very careful. He may in fact have been engaged as adjudicator for the very reason of his own knowledge and experience. Does the concept of fairness go out of the window given the tight timescales? Is the adjudicator obliged to inform the parties of matters within his own knowledge that will affect his decision? Common sense would

suggest that the answer must, in all normal circumstances, be yes. It is vital to do this when the information results in a conclusion that differs from that which might reasonably be reached from the information provided by the parties. This is particularly important when the adjudicator has to give reasons. It would certainly not assist in the resolution of the dispute if it becomes quite clear from the reasons, that the adjudicator has used a private theory that flies in the face of the evidence or even the law of contract. If the time period for the adjudication precludes informing the parties of the results, it is suggested that it is appropriate to seek the approval of the parties to the extension of the time for reaching the decision. Reasons for requesting the delay will probably have to be put forward. If a party refuses to allow extra time they have only themselves to blame if the decision goes against them.

Anyone who has operated in a particular trade or profession will have formed views concerning the way in which work is done or contractual clauses should be applied from their own experience and practice. The adjudicator should beware of applying privately developed conclusions without carefully considering whether evidence before him that may conflict with those conclusions should be ignored. For example, if the adjudicator has views which appear to him to be perfectly reasonable, being based upon years of experience, but he finds that they conflict with the evidence before him, then he should do his very best to ensure that he makes the time to appraise the parties of those views and gives them the opportunity to argue against them if they wish.

The above six paragraphs are repeated verbatim from the first edition. They are as true now as when they were written in 1999. As already noted in Chapter 10, adjudicators have been found to have acted unfairly when they have applied their own knowledge and experience or used information that has not been seen by the parties (*Balfour Beatty* v. *Lambeth*[2] and *RSL* v. *Stansell*[3]).

Deciding the law

The adjudicator must endeavour to ascertain the contractual rights and obligations of the parties. Adjudication arises out of the contract. The parties have, by entering into that contract, agreed to be bound by it. That contract operates within the overall framework of the law of the land. The adjudicator will not be doing his job properly if he fails to take these matters into account.

It may be that a provision similar to that in the original ORSA Adjudication Rules applies and the parties have agreed that the adjudicator can apply commercial reasonableness to his decision. The law may become less important but the adjudicator should be careful not to fly in the face of any agreement that is evident from the contract between the parties.

It is worth in this context repeating the points made with regard to fairness, in the introductory paragraphs to the earlier section of this chapter headed 'The Process of Making the Decision'. A decision that seeks to be 'fair' to the claimant party may fly in the face of the interpretation of contract law or the common law as developed by the courts. The example given earlier related to an attempt to be fair by altering the effects of a contract clause that, a party argues, creates unfairness. Seeking to redress the balance may in fact be acting unfairly towards the other party who is likely already to be making recompense for the apparent unfairness in the contract price.

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[2] *Balfour Beatty Construction Limited* v. *The Mayor and Burgesses of the London Borough of Lambeth* [2002] BLR 288.
[3] *RSL (South West) Ltd* v. *Stansell Ltd* (16 June 2003).

The process of deciding the law is similar to that discussed above for deciding the facts, but it needs its own analysis. The questions that the adjudicator must ask himself are:

- What law applies?
- From where does that law arise?
- How does that law affect the parties?

Answering these three questions will certainly require an inquiry into the contract that the parties have entered into, in order to ascertain what effect it has on the parties.

The adjudicator may receive an analysis of the effects of the relevant contract from one or both the parties, that includes all the relevant authorities (textbooks, previously decided cases and the like) that support the contentions of the party putting them forward. In this case the adjudicator will have to review these submissions and will decide the law that applies by a process of analysis. He must of course be particularly careful to question the conclusions if such submissions come from one side alone. It is not unknown for an extract from a court judgment, taken in isolation, to appear to say something entirely different from what it does when taken in context.

In a situation where there is no formal submission of the law from either party the adjudicator will have to decide the law without their assistance. There will, however, in all likelihood be general statements regarding each party's interpretation of what the other party has failed to do which it is alleged they were required to do by the contract. In that event the adjudicator has to answer all the same questions; what law applies, from where does that law arise and how does that law affect the parties, and if the parties' submissions are of little or no help, he will have to do some investigation on his own account. There is, of course, no absolute requirement on the adjudicator to do this under the Act but, if he does not, he may well be less likely to produce a decision that reflects the true contractual position and puts the parties into the position of being able to resolve the dispute.

This may well entail an inquiry into the implied terms of the contract and the effect of any applicable case and statute law. The adjudicator himself may well need to consult the authorities in order to ascertain with any certainty what the law is in relation to the assertions of the parties.

If in this process the adjudicator ascertains law that the parties have not made him aware of, as confirmed by *RSL* v. *Stansell*, he must ensure that he makes the time to put this to the parties and allow them to comment.

Once he has done all this, the adjudicator is in a position to decide the law that applies to the dispute or, more to the point, the rights and obligations of the parties.

Pulling the strands together

The adjudicator has now completed his jigsaw of the facts and has as complete a picture of what did or did not happen as he is going to get. He has decided what the law is and he knows what rights and obligations each party has in respect of the matters that are in dispute.

There are two ways of reaching each individual decision that makes up the decision as a whole, the linear method and the intuitive method.

In the linear method the adjudicator takes each issue and works logically through each applicable decided fact and applies the decided law to those facts, ultimately reaching his decision on each issue.

The alternative, the intuitive method, is probably a far more likely course in adjudication

given the timescale. During the assembly of all the details that relate to the dispute, the adjudicator will have intuitively decided the answer to the various questions that he ultimately will have to decide. He just knows which party is going to succeed in respect of each issue. The danger here is that the conclusions he has reached do not logically flow from the facts and the law. If an adjudicator reaches his decision in this way it is vital that he returns to basics and reviews everything using the linear method. If he does not do this he may get away with it in a decision that does not include reasons, but if he has to give reasons they may well not stand up to scrutiny in these circumstances. It is a well known phenomenon among those who make decisions in complicated matters that they start out convinced as to the answer. By the time they have analysed all the evidence and the submissions and reasoned it all through in detail, the actual answer is the reverse of what they originally believed to be the case. The adjudicator must test and test again until he is satisfied that his conclusions follow from the evidence, through his reasoning, even if not set out formally, and into his decision.

If there is one consistent cause of complaint about adjudicators' decisions it is that it is not possible to find the link between the conclusions reached and the facts and law that have been identified earlier in the decision. It can be most disconcerting for parties when, having asked for reasons, they receive a decision that recites the fact that, for example, work was carried out later than programmed and then reaches a conclusion that the contractor should be recompensed for that occurrence on the basis that the entitlement arises from the fact of the lateness without setting out the adjudicator's reasons for deciding that the employer was liable for the delay.

Once he has completed this process, the adjudicator has finalised his decisions on each individual issue making up the overall dispute and is in a position to complete his written decision.

Draft decisions

Some adjudicators like to present the parties with a draft of their decision before finalising it. Others do not. If a draft decision is sent to the parties it should be on the strict understanding that it is only for the purpose of allowing the parties to identify obvious mathematical errors and other obvious slips or errors that might cause confusion once the decision is finally released. The danger is that the losing party will see this as an opportunity to try to reopen all the arguments. Although the adjudicator has not formally reached his decision at this point the logistics of allowing the other party to respond to the further submissions and dealing with all the new material are impossible, and any attempt to make further submissions other than on specifically identified matters must be strongly resisted if this course is taken.

Writing the decision

The title of the written decision

There is a tendency in some quarters to refer to the adjudicator's decision as an award. This has connotations of the arbitration process and this, in the authors' view, is not appropriate. It is important to remember that adjudication is a separate and distinct process and it should as a result have its own separate and distinct terminology and avoid anything

that is reminiscent of arbitration. Neither the Scheme nor the Act mention the word 'award'.

It is recommended that the written result of the adjudicator's considerations should therefore be entitled the 'Adjudicator's Decision'. That decision may well, of course, include the award of a sum found to be due.

The general format of the written decision

The decision must be set out in a logical and understandable format. The sections that a decision conveniently falls into are as follows:

- The introductory section which sets out what the document is, who the parties are, the nature of the contract, how the adjudicator was appointed and the like.
- The section that identifies the detail of the issues that the parties require the adjudicator to decide and sets out the adjudicator's conclusions in respect of each one.
- The decision itself, which summarises the conclusions reached and sets out what each party has to do and when. This will also, if appropriate, set out the adjudicator's conclusions relating to the costs of the adjudication.
- Finally, the concluding words, which will include the adjudicator's signature and the date.

We shall now look at these aspects individually in some detail.

The decision – the introductory section

The decision must, as noted above, state what it is. It does not have to take the form of an arbitrator's award. An arbitrator's award will, for example, commence with the formulaic words 'In the matter of the Arbitration Act 1996 and in the matter of an arbitration between…'. We are aware that many adjudicators use this concept in the heading to their decision for example using 'In the matter of the Housing Grants, Construction and Regeneration Act 1996 and in the matter of an adjudication between…'. In our view this reference to the Act in the headings to an adjudicator's written decision is not appropriate in an adjudication which is, after all, a process governed by the contract, and even if the Scheme applies it is not the Act that applies but the Scheme as implied terms of the contract.

Based on advice received from the Technology and Construction Solicitors Association there should be included in the title of any action concerning a decision 'In the Matter of an Adjudication' or 'In the Matter of a Proposed Adjudication' as appropriate. This is however what is required in an action in the courts and decisions have been and continue to be enforced that do not include these formulaic words.

An early point relates to the terminology that is used to describe the parties. In arbitration the party commencing the arbitration is called the claimant and the other party is called the respondent. These terms could quite easily be used in adjudication but it is the authors' view that this again creates a document rather reminiscent of an arbitrator's award. As noted in Chapter 1, the authors are of the opinion that the appropriate terminology is 'referring party' or 'applicant' and 'responding party' or 'respondent'.

As far as the written decision itself is concerned, the authors' view is that as this decision is a matter that arises out of the contract, it is quite appropriate to use the contract terminology to describe the parties. Thus, if the referring party is the contractor in the contract and the

responding party is the employer, those are the terms that should be used to describe them in the decision.

This convention becomes a little more unwieldy if the dispute arises between a sub-contractor and a sub-sub-contractor, but with the availability of macros in modern word processing programs this is easily dealt with if the words have to be used on numerous occasions in the decision. In any event, if this all becomes too much, the names of the parties could be used. One other way sometimes seen is to use initials as shorthand; Bloggs Contractors Limited would for example be identified as 'BCL' or 'Bloggs' throughout the written decision.

Another area concerning the form of the adjudicator's decision relates to what are commonly known as 'recitals' in an arbitrator's award. The purpose of such recitals is to set out in readily accessible form the following information:

- the contract and the agreement to arbitrate;
- the nature of the dispute referred to the arbitrator; and
- the method of appointment.

The inclusion of these points establishes that the arbitrator has jurisdiction to make the award. The attitude of arbitrators to recitals is quite varied, ranging from minimalist to long, flowery descriptive passages including what might be described as quasi-legal terminology. Some arbitrators even go to the length of setting out in great detail the submissions of the parties in the view that this is the best and safest way of identifying the nature of the dispute. This is, in the authors' view, unacceptable in arbitration and should certainly never be considered in adjudication. It is worth remembering the wise words of the authors of *Commercial Arbitration* (2nd edition), Mustill & Boyd, who suggest on page 383 that the inclusion of such information, if not absolutely accurate, may be a source of confusion and dispute.

There is thus little benefit in saying any more than is absolutely necessary in a decision. A decision is a working contract document that is there to convey the adjudicator's conclusions to the parties. The decision needs to be identifiable for what it is if the successful party needs to take action to enforce it. Save in the situation where the responding party has taken no part at all in the proceedings, both parties should be fully aware of everything that has gone on during the progress of the adjudication.

The document must obviously be identifiable as 'The Decision' that includes decisions on all the issues referred to the adjudicator. It must state the names of the parties and the contract out of which it arises. It should state what the dispute is that the adjudicator has been asked to decide and it should give the adjudicator's name and address. It should also identify that there is an adjudication provision in the contract or that there is no such provision and that the adjudication is governed by the Scheme. In order to reduce the possibility of challenge due to any question arising regarding the adjudicator's appointment, the decision should include brief details of how this came about.

A matter for consideration is whether these introductory parts need to set out, in any detail, the particular nature of the dispute. It is suggested not; this will be done later in the decision when each aspect of the dispute is detailed. A brief reference to the general nature of the dispute will be necessary as it may well be that there are a number of separate disputes arising out of one contract, each with its separate written decision. It must be remembered that these will not all necessarily be dealt with by the same adjudicator.

All the necessary information in the above respects can be readily accommodated on the title page of the decision covering the following points:

- Heading – 'Adjudicator's Decision'
- Name and address of adjudicator
- Name and address of referring party
- Name and address of responding party
- Details of contract
- Nature of dispute
- Date.

The decision – the substantive aspect

The substantive aspect of the decision is that part that deals with each individual issue and sets out the conclusions that the adjudicator has reached. There may of course be only one issue, in which case this part of the decision will be extremely short, especially if reasons are not required.

Implementation and enforcement are the most important requirements. If the adjudicator's decision cannot be implemented or if one party refuses to implement it or it cannot be enforced, for reasons within his powers, the adjudicator is wasting his and both parties' time.

The decision must relate to the issues put to the adjudicator for him to decide upon. An adjudicator is not fulfilling his obligations if he fails to deal with something that the referring party has referred to adjudication, unless it is not within his jurisdiction. The other side of the coin is that any decision that he makes will not be enforced if it is not something that has been the subject of the notice of adjudication and indeed part of a dispute that has crystallised between the parties before the adjudication commenced.

The decision must set out the obligations and liabilities of the losing party in a clear and understandable fashion. If it does not do this, the winning party may well be disadvantaged in that the decision will not be implemented by the losing party in the way that the adjudicator intends, and the court may find it impossible to enforce.

A clear simple decision is far less likely to be challenged than one that goes into intricate detail and offers the opportunity of more than one interpretation of the decisions reached.

The adjudicator must ensure, as discussed earlier, that he does not usurp the authority of the contract administrator in any way, save of course where the dispute itself relates specifically to the jurisdiction of the contract administrator.

While the decision is binding on the parties, the dispute may be reopened in arbitration or in the court. The obligation of the adjudicator relates to the matters referred to him. He should avoid the temptation to attempt to second guess what may transpire later. The adjudication process stands alone. The decision has been reached in a very short time, probably on the basis of far less information than will be available should the matter come before an arbitrator or the court. The adjudicator's decision will in all probability be considered to be an irrelevance in later proceedings.

The basic concept to be borne in mind in our view is the 'KISS' principle (keep it simple – stupid!). Reasons may be required or the adjudicator himself considers that reasons should be given (of which more later), but all the parties really need to know is what it is that they each have to do and when. The simpler it is the better.

If this concept is followed, the arguments of the parties, the interpretation of the contract clause that relates to the issue and the facts that have been decided should be kept brief. These will all have had to be considered by the adjudicator and it is vital that he goes through this process before putting pen to paper in writing his decision, but there is no need to set them out in detail.

If the issues are in any way complex, there may be merit in setting out a summary of what each party has to do and if a monetary award is made, what the amount to be paid is in net terms.

Claims will very often include mention of VAT. What the adjudicator has to remember is that he has no authority in this area. That is a matter between the parties and the Customs and Excise. If an adjudicator is asked to deal with VAT he should do so. He cannot decide the amount. The most that an adjudicator should do in all normal circumstances is to declare that any VAT that is properly due on any sums awarded should be paid. The party who is receiving money then issues a VAT invoice and the paying party has the right to object to the amount of VAT charged and seek the ruling of the Commissioners for Customs and Excise if he wants to.

The only exception to this is the case where a householder or other party who is not registered for VAT has had to effect repairs upon the failure of a contractor to carry them out. In that event it is often the case that the householder has paid VAT and seeks to recover it as a part of the claim. The adjudicator when faced with this situation is quite entitled to include recovery of the VAT element of the claim in his decision.

The decision – reasons

The next question to consider is whether the decision should include reasons. As already noted, the adjudicator may be required to give reasons by the contract or by his agreement with the parties. He may be operating under the Scheme and one party may ask for reasons. In that situation the decision whether to give reasons in his decision is taken out of his hands. He has no option but to do so.

Where he does have an option regarding the giving of reasons, there are a number of points to be considered for giving reasons and against including them.

The arguments for the giving of reasons include:

- the losing party may accept the decision more readily and the winning party accept that it has been awarded a lesser amount than it had hoped for if they understand the thought process behind it; particularly if the adjudicator has taken legal or technical advice, the detail of that advice may well assist in persuading the parties to accept the decision;
- the giving of reasons will impose on the adjudicator a discipline, which will assist in ensuring that his decision stands up to scrutiny if necessary.

While they are not reasons for the substantive issues, an adjudicator may set out the reasoning behind his decision to proceed in the face of a challenge to his jurisdiction and also the reasons for any action that he has taken which might appear to the losing party to be a failure in procedural fairness. At least the court will then have some idea of the adjudicator's position, and enforcement may be less likely to be refused as a result.

The arguments against reasons include:

- an unreasoned decision is less likely to be picked over for mistakes;
- giving reasons may emphasise the limited information the decision is based on and encourage parties to seek to open up the dispute afresh at arbitration or litigation;
- the time to prepare the written decision may be less and thus the parties get the decision sooner and possibly at a lesser cost.

Reasons should not be given merely because the adjudicator feels that they will assist in later proceedings. It must be remembered that in the event of the dispute being reconsidered

afresh in arbitration or litigation, the adjudicator's decision is almost certainly an irrelevance.

If the adjudicator decides of his own volition to give reasons, he should be certain that the end result of doing so will benefit the parties to the dispute. He should not do it for his own benefit. He must at all costs resist the temptation to show off how clever he has been in interpreting all those difficult problems that the parties have given him to solve.

The only real reason for the giving of reasons is that it will assist the parties, particularly the losing one, to understand why the adjudicator has reached his particular conclusions. As a result it may make it less likely that that party will seek to open up the dispute afresh in arbitration or through the courts. Human nature being what it is, there is a considerable danger that the reverse situation will apply and the reasons given will be used by the losing party to encourage him into an arbitration or litigation to get back the money awarded in the adjudication.

When adjudication under the Act started, the received wisdom was for an adjudicator not to give reasons unless specifically asked to do so. Things have moved somewhat since then and many adjudicators now give brief reasoning as a matter of course unless specifically asked not to. The arguments for and against remain the same but it is generally the case that losing parties do want to, and deserve to, know why they have lost.

There is one other aspect to the giving of reasons. A trend that has become apparent is that the adjudicator's decision can create a climate for discussions to settle the dispute. A winning party may feel that it has not received enough and seeks to achieve a higher settlement. Equally a losing party may seek to reduce the amount awarded in the decision. Rather than take the dispute afresh to arbitration or the courts, they commence further negotiations. Reasons in the decision, if clearly articulated, will give both parties a lead in these discussions.

In *Joinery Plus* v. *Laing*[4] Judge Anthony Thornton QC gave a detailed résumé of his views concerning reasons:

> 39. The statement by the arbitrator that he was only giving reasons for a limited purpose or was only giving limited reasons has little if any practical effect. If an adjudicator gives any reasons, they are to be read with the decision and may be used as a means of construing and understanding the decision and the reasons for that decision. There is no halfway house between giving reasons and publishing a silent or non-speaking decision without any reasons. There is no way in which reasons may be given for a limited purpose and which are only capable of being used for that purpose.
>
> 40. Indeed, although adjudicators are, under some adjudication rules, permitted to issue a decision without reasons, it is usually preferable for the parties for reasons to be given so that they can understand what has been decided and why the decision has been taken and so as to assist in any judicial enforcement of the decision. A silent decision is more susceptible to attack in enforcement proceedings than a reasoned one. Moreover, judicial enforcement, being a mandatory and compulsory exercise imposed by the state, should only be ordered by a court once it has been satisfied that the underlying adjudication decision is valid, is in accordance with law and complies with all applicable contractual and statutory procedures. For that purpose, a court will always be greatly assisted by cogent, albeit succinct, reasons.

Even if no reasons are given on the face of the decision, it is vital that the adjudicator is very clear as to the reasoning behind his conclusions. He must have reached his conclusions logically and in accordance with the facts of the matter in dispute. It is very easy to jump to a conclusion on the basis of experience. That conclusion may be right but it may just as equally

[4] *Joinery Plus Ltd (in administration)* v. *Laing Limited* (15 January 2003).

be wrong, and will be so if it is not relevant to the facts in the dispute. It is vital to test conclusions fully. If the adjudicator's conclusions have been reached by a logical progression through the documents, the reasoning is probably already there. If the conclusions have been reached intuitively, care must be taken to ensure that the conclusion fits the facts. This is especially important to bear in mind in relation to the short period that is available to the adjudicator. This aspect has been examined earlier in this chapter where the mechanics of decision-making are looked at more fully.

If reasons are to be given, how should this be done? What is still probably the best advice regarding reasons was given by Sir John Donaldson, as he then was, in his judgment in *Bremer Handelsgesellschaft* v. *Westzucker*[5]. He was referring to arbitrators but this advice applies to adjudicators just as much:

> 'All that is necessary is that the arbitrators set out what, in their view of the evidence, did or did not happen. They should explain succinctly why, in the light of what happened, they reached their decision and what the decision was.'

That is really all there is to it. 'Tell the story in a simple and concise fashion' is another way of putting it. Whatever else is done it is vital to ensure that the reasons relate to the matters in dispute set out in the submissions of the parties. The reasons should be logical and the conclusions reached must actually follow from the reasoning given.

If any legal or technical advice has been taken, in giving his reasons the adjudicator should set out the results of that advice together with the conclusions reached. He must let the parties see the advice and allow them to comment (*RSL* v. *Stansell* once again) albeit that the Scheme has no requirement to allow the parties to do this.

Reasons utilise the evidence given to form a bridge between the issues and the conclusions. They have to relate to both the evidence given and the conclusions reached. It is vital to ensure that a logical connection of this nature is made and can be seen in the reasons given. If reasons are included in the decision, sufficient time must be taken to ensure that they fulfil these objectives. It is all too easy in the rush to complete the task within the given time limit, to know exactly how the conclusions have been reached but fail to explain it properly or clearly in the reasoned written decision.

One other matter that needs consideration is what the adjudicator should cover when he gives reasons. An arbitrator has historically only been required to give reasons for his decisions on the law, albeit this may well be different under the Arbitration Act 1996. This is not appropriate for the adjudication process. When the parties ask for reasons what they want is the adjudicator's reasoning relating to all the decisions he has made, whether they be in respect of fact or law. In any event it is extremely unlikely that an adjudicator will, in the 28 days allowed, be able to analyse the contract and the law to give the sort of reasons that an arbitrator gives. At all times the adjudicator must bear in mind the point made earlier in this chapter that his aim must be to prepare a decision that the parties will accept and as a result settle the dispute.

The adjudicator should always be prepared for the situation in the Scheme where the parties have the option of asking for reasons but no time limit is stated. It may be that on receiving an unreasoned decision, one or both parties may ask for reasons. This situation really does mean that the adjudicator should have his reasons set out at least in draft so that there is not an embarrassing wait while he tries to formulate reasons that tie in with his unreasoned decision. Late requests can be made under the Scheme but a sensible adjudicator

[5] *Bremer Handelsgesellschaft mbH* v. *Westzucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130.

will be prepared for this and will have pre-empted the situation by getting the parties to agree to him setting a final date for such requests if he can.

The decision – interest

The basic principle of law in England and Wales has always been that there is no entitlement to interest as damages where the only breach alleged is lateness in making payment. This is now changed by the passing of the Late Payment of Commercial Debts (Interest) Act 1998, which has been subject to phased commencement but is now fully in force for all contracts currently entered into.

This Act makes a considerable change to the recovery of interest upon amounts that remain unpaid. Interest will be statutorily recoverable on outstanding amounts at a rate that may be as much as 8% above base rate. It will, however, only apply to established debts. Adjudicators will no doubt be asked to apply its provisions to sums that they find to be due where there is no provision in the contract for the recovery of interest.

One thing to remember in this respect is that parties to contracts may agree to oust or vary the statutory right to interest, but only if they provide 'a substantial contractual remedy' for late payment. The JCT Standard Forms of Contract include the figure of 5% over base. As far as the authors are aware this has not been a matter raised by referring parties, but were it to be raised adjudicators would have to decide whether this is a substantial remedy. We would not hazard a guess as to the answer in individual circumstances, but it is certainly arguable that 5% over the bank base rate is a substantial remedy in the case of a commercial organisation that can borrow at a lesser figure. Equally, it must be remembered that the figure was originally set by the government at 4% but it was increased to 8% on the basis that it wished to prevent the smallest of businesses suffering because they have to borrow overdraft finance.

A further aspect that may have to be considered is the statutory right set out in the Act to suspend performance. We have no doubt that the right to suspend performance will be argued as a substantial remedy. It is not for us to predict the circumstances in which such arguments may be used. It does seem to us that a contractor who was found to be unable to recover interest to which he was statutorily entitled because he had a right to stop work, might feel that the system was working against him, especially if he had decided not to invoke his right to suspend work in the interests of the contract as a whole.

It may be, however, that there is a contractual right to interest as there is in the JCT and, save for arguments if the amount is substantially below the statutory figure, that will be the provision that the adjudicator will have to apply to any monies that he decides should be paid. Should the question of simple or compound interest arise, the adjudicator must again be guided by the contract between the parties.

A question arises with regard to interest, which we commented on in our discussion of paragraph 20 of the Scheme in Chapter 5: should the adjudicator award interest if it is not claimed? We noted there that there are differing views on this. Where interest is not claimed, the adjudicator must be very careful not to run the risk of making a party's case. At the very least he should notify the parties that he is considering his award of interest and allow them to make submissions on the point to avoid any accusation of unfairness.

There is another aspect of interest in its broadest sense that the adjudicator may be called upon to consider, and that is interest paid on the borrowings needed to fund the operations of the party who claims it. This is commonly known as financing charges. Financing charges are allowable as part of a claim where it can be shown that the failure to pay by the party

against whom the claim is being made had the direct effect of requiring the claimant to borrow money to fund its activities. Financing charges in this event are considered to be what is known as special damages. They have to be a specific head of claim and cannot be wrapped up in a claim for general damages. The validity of financing charges as a head of claim relies upon there being evidence to show that these charges have been incurred and that the reason for them being incurred is the direct responsibility of the party against whom the claim is made.

The adjudicator should not consider financing charges unless they form a part of the claim or the issues put to him for his decision. If put, such a claim should be treated on its merits. If a party has incurred them they will surely form a part of the claim. Financing charges should not be allowed unless it can be shown that there is a proper entitlement. This entitlement may well not be spelt out in the contract between the parties. The adjudicator is then reliant upon the decisions made in the courts as to how the wording of contracts in this respect is to be interpreted. It is not appropriate for us to go into a detailed discussion of the principles of the award of financing charges here, and if the adjudicator has any concerns about dealing with such matters he should take the appropriate advice.

The decision – costs

Insofar as costs are concerned the adjudicator will, as in all other matters, be bound by the contract. If the contract sets out a provision such as 'the parties shall each pay their own costs', the decision is made for him. This is certainly in the general spirit of adjudication as a contractual procedure.

The parties may give the adjudicator power to deal with their costs during the adjudication. This occurs where the referring party claims its own costs in the referral and the responding party does likewise in the response. If the referring party claims its costs and the responding party disputes this, there is no agreement and the adjudicator has no power to award the parties' costs. If the referring party seeks its costs and the responding party is silent, the position is not as it would be in the case of court proceedings where a matter is deemed to be admitted unless specifically denied. There is no agreement and thus no power for the adjudicator to award party costs in this case.

Certain adjudication provisions include the requirement that the referring party pays the costs of both parties come what may. We discussed the case of *Bridgeway* v. *Tolent*[6] in Chapter 1, in which such a provision was not found to be unlawful.

The contract may, however, be silent on the question of costs or alternatively the Scheme may apply and this is also silent in respect of the parties' costs.

There are two conflicting judgments on this question, both at first instance. In *Cothliff* v. *Allen Build*[7] it was held that as the Scheme is silent on the matter, the adjudicator has the option to award costs in certain circumstances. If the parties make no mention of costs, then the adjudicator himself cannot raise it.

This was however not followed in *Northern Developments* v. *J&J Nichol*[8], which appears to be a more generally accepted interpretation of the position regarding the Scheme and costs where it was held that there is no implied term in the Scheme to the effect that an adjudicator

[6] *Bridgeway Construction Ltd* v. *Tolent Construction Ltd* (11 April 2000) unreported.
[7] *John Cothliff Limited* v. *Allen Build (North West) Limited* [1999] CILL 1530.
[8] *Northern Developments (Cumbria) Limited* v. *J&J Nichol* [2000] BLR 158.

may award that one party pay the costs of the other, unless there is an express or implied agreement between the parties that he may do so.

Where the Scheme does not apply and the contract is silent on the matter, the adjudicator would do well to require that the parties each pay their own costs if for no other reason than the interests of finality. It is almost inevitable that a party who is required to pay the costs of the other will contest the level of costs claimed. All this does is to replace one dispute with another. This cannot be a sensible situation and it is one that should be avoided if at all possible. It is our view, in the interests of finality, if the adjudicator decides to make one party pay the costs of the other, that it is vital to include a lump sum in the decision, preferably having called for an estimate of the total beforehand. Anything else means that there will be further argument in respect of the costs, and the adjudication is unlikely to result in a settlement of the dispute.

We are aware of strongly held views to the contrary, that matters of the quantum of costs should be left out of the decision, but we do find some difficulty with this view. The adjudicator is required to deal with all matters in dispute in his decision. It is not clear to us where the adjudicator gets his authority from without a specific dispensation from the parties to deal with this point after the decision is made.

The adjudicator may reach the view that the actions of one party have been such that the costs of the other party have been increased unnecessarily and that there should as a result be some recompense. Nothing can be done by the adjudicator in such a situation unless there is power for him to deal with the parties' costs. If there is, the submission of a claim for costs shortly prior to issuing the decision is the appropriate way to do this.

The adjudicator may not want to reveal his hand at this point and submissions from both parties are generally called for.

The other aspect of costs is the adjudicator's own fees and expenses. Again, the contract may have specific requirements. If it does not, the adjudicator will have to decide whether one party pays the whole amount or whether it will be shared between them in some proportion. The choice between these is a matter for the adjudicator but it seems customary for the referral party and the response party each to seek that the other party pays the adjudicator's fee in full, and winning parties will be rather upset if the adjudicator does not follow the customary course that costs follow the event. This matter should be dealt with finally in the decision, as the adjudicator will obviously know the total fee he is going to charge before he releases the decision.

Stakeholders

The original Latham proposals suggested that the use of stakeholders should only be permitted if both parties agree or the adjudicator so directs. There is no provision in the Act that requires such a procedure. The principle of using stakeholders also conflicts with one of the intentions of adjudication, which is to improve cash flow in the industry.

The contract may, however, include such a provision. This procedure does provide a useful safeguard where there is concern that the adjudicator's decision may be reversed subsequently by an arbitrator or the courts and the party receiving the money is seen as being in danger of going into liquidation. As discussed elsewhere in this book, the authors do not necessarily subscribe to this concern. If a building employer or sub-contractor is worried about the financial stability of an organisation next down the contractual chain, it is seriously arguable that they had the opportunity to investigate before entering into the contract. If they entered into a contract with an organisation that is unstable financially, it

was probably because they obtained a lower price and they should take the consequences of their decision.

Even if there are no such provisions in the contract, the party that is likely to have to pay as a result of the decision may apply during the course of the adjudication for any monies that it may be required to pay to be lodged with a stakeholder. The adjudicator does not have the power to do this if there is no provision to that effect in the contract.

If the adjudicator has the power under the contract to order monies to be held by a stakeholder, he may order this in his decision. There are some hybrid forms of contract that require that any monies due as a result of an adjudicator's decision must be deposited with a stakeholder. It is questionable as to whether clauses of this type comply with the payment provisions of the Act.

The decision – final matters

One point that has to be considered is the inclusion within the decision of any specific enforcement provisions that will be required by the contract or adjudication rules that apply.

The formal enforcement provisions of the Scheme for Construction Contracts are reliant on an amended version of section 42 of the Arbitration Act 1996 as set out in paragraph 24 of the Scheme. In order for this to work the adjudicator has to state in his decision that the whole decision or part of it must be complied with peremptorily. The adjudicator also has to give permission for the application to the court to be made under the revised section 42(2)(b) of the 1996 Act, and the prudent adjudicator will avoid the possible problem of objections that he is no longer empowered to give permission after he has completed his decision by covering this point in his decision as well.

A suggested wording to cover this situation is as follows:

> 'I order that this decision be complied with peremptorily. Either party is, subject to giving notice to the other and to me, permitted to apply to the court for an order requiring compliance with this peremptory order.'

The Scheme appears to have been written in anticipation of there being difficulties in enforcing adjudicators' decisions if there was no such specific provision. Since *Macob* v. *Morrison* this does not appear to trouble the court and decisions are being enforced by another route. This provision of the Scheme is not being utilised greatly any more. Some adjudicators use a wording requiring peremptory compliance but this may be more habit than anything else. If a referring party seeks a peremptory order there is no reason for the prudent adjudicator not to comply with this request. In general the inclusion of a date or period for compliance is sufficient.

As far as the time for compliance with the decision is concerned, there needs to be some specificity. 'Immediately' may create difficulties. 'Forthwith' is a good legal phrase that means as soon as possible. Often adjudicators state the period of seven days, which is generally not unreasonable and lines up with section 114(4)(a) of the Act.

It is worth repeating the point made in Chapter 5 when considering paragraph 20(b) of the Scheme, regarding the question of whether or not an adjudicator has power to order anything. It may be on a pure interpretation of the duties of an adjudicator that he is limited to declaring what the contract says. We repeat our view that there is nothing wrong with actually telling the parties what they have to do.

Once all other matters have been dealt with, the adjudicator will have to draw the decision

to a neat and tidy close. The decision should be signed and dated. It may be witnessed but there is no specific requirement to that effect.

The last thing for the adjudicator to do is to send the completed decision to the parties. If the tradition of arbitration is followed, the original signed decision should be sent to the applicant party, a certified copy being sent to the non-applicant and one retained. It may, however, be just as acceptable for the adjudicator to retain the originally signed document on his file and send copies to the parties.

Arbitrators have historically had a lien on their awards and can, under the 1996 Arbitration Act, require payment of their fees before releasing their award. Adjudicators do not have the same statutory protection. Some sets of rules allow for a similar lien on the adjudicator's decision, others do not. The Scheme requires that the adjudicator shall deliver a copy of that decision to the parties as soon as possible after he has reached it and we interpret this wording to mean that the adjudicator has no power to hold on to it pending payment. The existence of an overriding duty for the adjudicator to deliver his decision by the 28th day unless the parties have specifically agreed otherwise was confirmed in *St Andrews Bay* v. *HBG*[9]. The adjudicator has no choice; he has to release his decision before he is paid, and as a result if the parties do not pay him his only recourse is to sue. Since the decision in *St Andrews Bay*, the Construction Industry Council has altered its Model Adjudication Procedure to delete the lien that it previously included.

The guidelines for adjudicators issued by the RICS deprecate the imposition of a lien without the prior agreement of the parties, and in common with other ANBs the RICS takes the view that the industry expects decisions in 28 days and that their nominees will ensure that their decisions are with the parties in that timescale. Where there is no lien either in the contract or applicable rules, it is arguable that an adjudicator has an implied duty to release his decision to comply with the objects of adjudication. It is equally arguable that no one has any legal duty to extend credit and an adjudicator would be perfectly entitled to hold on to his decision until paid, but this has now been found by the court in Scotland to be unacceptable and we think it unlikely that the English court will differ.

In practice, it is the authors' view that where the work involved in reaching the decision has not been extensive, it is probably in the interests of the adjudication process as a whole to release the decision and then seek payment. However, if there has been a lot of work involved it is unreasonable for the parties to expect to do other than pay up first. It would be inappropriate for the adjudicator, where there is no contractual lien, to do other than to tell the parties at the outset that he intends to operate a lien. If they object, the adjudicator may well have to release his decision without payment first. If neither party pays he will then have to commence proceedings for his money.

Where there is a lien set out in the contract or the rules, as there still is at the time of writing in the ICE Adjudication Procedure, the adjudicator would be within his rights to withhold his decision without notice. The right to a lien is not mandatory however and it is the authors' view that it would still be incumbent upon the adjudicator to acquaint the parties as early in the process as possible that the lien was going to be operated, in order that the parties have the opportunity to avoid any delay once the decision is ready.

One last point is the question of how long the documents used for carrying out the adjudication should be kept. We have considered this in an earlier chapter but it is worth repeating here. The decision itself and the adjudicator's working papers and correspondence

[9] *St Andrews Bay Development Ltd* v. *HBG Management Ltd* (20 March 2003).

should be kept for as long as the period of limitation requires. That is six years if the adjudicator is engaged under a simple contract and 12 years if a deed is involved.

The other papers used can become a bit of an embarrassment from the point of view of storage. If the adjudicator is appointed under the contract as a whole rather than in respect of the individual dispute, he will need to retain them. There is also the possibility in the case of a one-off appointment that the parties will want him to adjudicate on further disputes. Again, he should retain the papers. If, however, he has no further use for the papers there is no reason why he should not request that the parties collect them, giving a time limit. This notice can be accompanied by a statement that the documents will be destroyed if not collected within the set period. Destroyed does not mean put in the dustbin. No party wants its papers blowing about a rubbish tip. Various organisations provide secure destruction services and these should be used.

Checklist for decision

Introduction

- General heading – 'Adjudicator's Decision'
- Adjudicator's name and address
- Method of appointment
- Names and addresses of parties
- Title of contract
- Description of dispute
- Date (here or at end).

Substantive decision

- Adjudication under provisions of contract or under Scheme for Construction Contracts
- Issues considered
- Decision reached on each issue
- Reasons – if required by contract or applicable rules or if asked for by a party under the Scheme
- Summary of decision
- Time for compliance
- Interest or financing charges
- Costs – (a) of parties, (b) of adjudicator
- If requested under Scheme, include formula required for enforcement.

Signature