



**The Date for Decision –
Ritchie Brothers (PWC) Ltd v David Philip (commercials) Ltd**

Ritchie Brothers (PWC) Limited v. David Philip (Commercials) Limited, Court of Session Scotland 24th March 2005.

Ritchie Brothers (RBL) were contractors to David Philip (Commercials) Ltd (DPL) under a construction contract in Scotland. Following the issue of a Notice of Adjudication RBL sent its Referral Notice to the adjudicator under cover of a letter dated 18th September 2003. The letter was posted on the 18th September by Special Delivery. The Royal Mail, on the 19th attempted but failed to deliver. Monday 22nd September 2003 was an Edinburgh Trades holiday, and therefore the Adjudicator did not collect the Referral Notice until Tuesday 23rd September.

On 21st October the representative of DPL wrote to the Adjudicator challenging his jurisdiction on the grounds that the 28 days provided for him to reach his decision, running from the date of the Referral, had elapsed. The Adjudicator by faxed letter the same day requested RBL's consent to postpone his decision until at least 23rd October 2003, albeit that such request was made after the 28 days having elapsed. RBL confirmed its consent by faxed letter dated 21st October 2003. On 23rd October the Adjudicator wrote to the parties requesting *inter alia* payment of his fees and informing that he had reached his decision. On 27th October 2003 RBL wrote to the Adjudicator indicating that it would pay his fees, with effect that the adjudicator delivered his decision and posted his reasons that day.

Enforcement proceedings were issued and the matter eventually went before Scotland's Court of Appeal which reversed the decision of the Lower Court by majority 2-1.

The particular provisions of The Scheme for Construction Contracts (Scotland) Regulations 1998 bearing upon the issues in the litigation were:

“7.-(1) where an Adjudicator has been selected ... the referring party shall, not later than seven days from the date of the notice of adjudication, refer the dispute in writing ('the referral notice') to the Adjudicator.”

19.-(1) The Adjudicator shall reach his decision not later than –

- (a) twenty eight days after the date of the referral notice mentioned in paragraph 7(1);
- (b) forty two days after the date of the referral notice if the referring party so consents; or
- (c) such period exceeding twenty eight days after the referral notice as the parties to the dispute may, after the giving of the notice, agree.



- (2) Where the Adjudicator fails, for any reason, to reach his decision in accordance with sub-paragraph (1) -
 - (a) Any of the parties to the dispute may serve a fresh notice under paragraph 1 and shall request an Adjudicator to act in accordance with paragraphs 2 to 7; and
 - (b) if requested by the new Adjudicator and insofar as it is reasonably practical, the parties shall supply him with copies of all documents which they had made available to the previous adjudicator.
- (3) As soon as possible after he has reached a decision, the Adjudicator shall deliver a copy of that decision to each of the parties to the contract.”

The Scheme provisions are the same as those for England and Wales

The Court of Session decided that Adjudication under “The Scheme” sees the 28 day period for the Decision to run from the date of the Referral not when the Referral is received, and hence the Adjudicator’s Jurisdiction expires 28 days later unless by then an extension has already been obtained by consent of the Referring Party for up to 14 days. The dissenting Judge held that the particular rules were “Directory” rather than “Mandatory” and the strict approach was no benefit to anyone. However, whilst this is not binding upon English Courts, it is persuasive and therefore likely to be followed.

If you are involved in an Adjudication, check the dates carefully otherwise the Adjudicator may be out of time.

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