

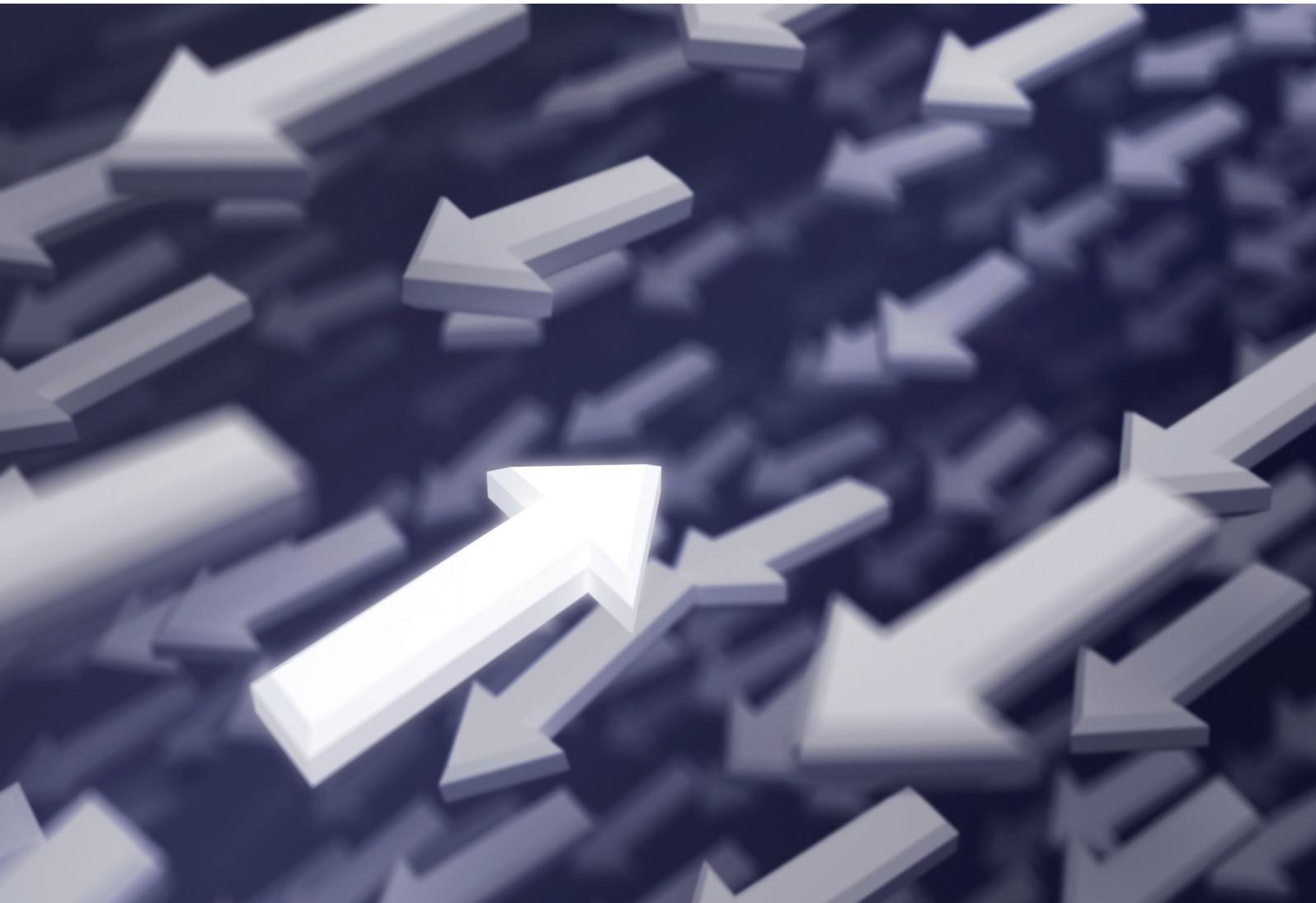


RICS professional guidance, Scotland

**Surveyors acting as adjudicators  
in the construction industry when**

**Scots law applies**

4th edition, April 2018



# Surveyors acting as adjudicators in the construction industry when Scots law applies

RICS guidance note, Scotland

4th edition, April 2018



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# Foreword

Adjudication has firmly established itself as an effective means of resolving construction and engineering disputes – this much has been clear since shortly after its introduction in 1998. Widely recognised as offering the benefit of a binding decision (albeit on an interim basis) by means of a relatively quick and cost-effective process, there are clear advantages for parties in dispute. Although adjudication decisions, by their nature, are only temporarily binding, pending final resolution by arbitration or litigation, the majority of parties accept the adjudicator's decision and choose not to refer their dispute to any further proceedings – a strong indicator of the success of adjudication.

However, since its ambitious beginnings almost two decades ago, following the implementation of the *Housing Grants Construction & Regeneration Act 1996*, adjudication has now evolved into an often complex and legally sophisticated process, requiring adjudicators now, more than ever, to remain up to date on the latest case law and developing issues. While the courts have maintained their continued support of adjudication over the years, this is of course subject to adjudicators' abilities to produce enforceable decisions, adhering strictly to the law and dealing with all the technical aspects of the dispute in an efficient and appropriate manner. Providing a well-reasoned, comprehensive written decision is essential to allow the parties in dispute to move on and to gain the confidence of the industry in the process. The skills and integrity of adjudicators is paramount to the continued success of adjudication.

The aim of this guidance note, therefore, is to provide adjudicators with a clear understanding of their role and duties, and a strong foundation on which to build, ensuring enforceable decisions are produced. While this guidance note does not set out to provide a complete and comprehensive guide to all aspects of adjudication, it should be considered an essential basis for practice as an adjudicator, where Scots law applies. It is appropriate to give tribute to the authors of the England and Wales RICS guidance note, now in its fourth edition, which provided the basis for this Scots law edition. It is also of note that this guidance is reflective of current practice and law at the time of drafting. Adjudicators should remain aware of this, and ensure any advice taken from this guidance note is supplemented with up-to-date knowledge of adjudication and its principles.

This guidance note also provides useful insight into the process for parties to disputes, and those representing them, to ensure they are aware of key matters and procedural considerations.

By providing this overview of best practice, it is hoped that adjudication can continue its reputation for being an effective and efficient means of resolving construction disputes.

I am very pleased to have been invited by RICS to write this foreword and take this opportunity to thank my colleagues on the working party for their assistance in producing this guidance.

**Janey L Milligan LL.M, FRICS, FCIArb**

**Chair of the Dispute Resolution Professional  
Group Board**

**RICS Scotland**

# RICS professional guidance

## Definition and scope

RICS guidance notes set out good practice for RICS members and for firms that are regulated by RICS. An RICS guidance note is a professional or personal standard for the purposes of RICS Rules of Conduct.

Guidance notes constitute areas of professional, behavioural competence and/or good practice. RICS recognises that there may be exceptional circumstances in which it is appropriate for a member to depart from these provisions – in such situations RICS may require the member to justify their decisions and actions.

## Application of these provisions in legal or disciplinary proceedings

In regulatory or disciplinary proceedings, RICS will take account of relevant guidance notes in deciding whether a member acted professionally, appropriately and with reasonable competence. It is also likely that during any legal proceedings a judge, adjudicator or equivalent will take RICS guidance notes into account.

RICS recognises that there may be legislative requirements or regional, national or international standards that take precedence over an RICS guidance note.

## Document status defined

The following table shows the categories of RICS professional content and their definitions.

| Type of document   | Definition  |
|--|---|
| <i>RICS Rules of Conduct for Members and RICS Rules of Conduct for Firms</i> | These Rules set out the standards of professional conduct and practice expected of members and firms registered for regulation by RICS.   |
| <i>International standard</i>  | High-level standard developed in collaboration with other relevant bodies..   |
| <i>RICS professional statement (PS)</i>                                      | Mandatory requirements for RICS members and regulated firms.  |
| <i>RICS guidance note (GN)</i>   | A document that provides users with recommendations for professional advice and areas of good practice.   |
| <i>RICS code of practice (CoP)</i>   | A document developed in collaboration with other professional bodies and stakeholders that will have the status of a professional statement or guidance note.   |
| <i>Jurisdiction guide</i>  | These guides provide relevant local market information associated with a global RICS standard. This will include local legislation, associations and professional bodies as well as any other useful information that will help understand the local requirements connected with the global standard. This is not guidance or best practice material but rather research information to support adoption and implementation of the global standard locally. |

# 1 General introduction

## 1.1 Scope, application and interpretation

This guidance note applies to RICS members who are either nominated by RICS or another adjudicator nominating body (ANB), or appointed directly by the parties, to adjudicate disputes relating to:

- works carried out under a construction contract as defined in Part II of the *Housing Grants, Construction and Regeneration Act 1996* as amended by Part 8 of the *Local Democracy, Economic Development and Construction Act 2009* ('Construction Act'). Readers should note that, while the original form of the Construction Act continues to apply to construction contracts entered into before 1 November 2011, this guidance note only applies to adjudications conducted under construction contracts entered into on or after this date, i.e. it only applies to construction contracts to which the amended form of the Construction Act applies. Readers should refer to the 3rd edition of this guidance note for guidance on adjudications conducted under the original form of the Construction Act; and
- works carried out under a contract to which the Construction Act does not apply, but under which the parties have agreed a contractual mechanism to enable them to adjudicate disputes.

It is also intended to assist the parties and those acting for them by making them aware of the procedures likely to be followed in an adjudication. However, this guidance note should not be taken as a complete statement of the law and practice of adjudication generally. Readers should also ensure that they are aware of any developments in the relevant law and practice which arise after publication.

This guidance note is based upon the law and practice in Scotland. Readers should be aware that the law and practice in England, Wales and Northern Ireland differs somewhat.

Readers should also note that, although this publication provides outline guidance, those acting as an adjudicator will need to have a wider and deeper understanding of the law and practice than has been considered appropriate to provide here.

## 1.2 The principles of adjudication

Adjudication in the construction industry is a process that enables a dispute arising under a construction contract to be referred to another person (the adjudicator) at any time. The adjudicator, acting impartially on the basis of such information as the parties to the dispute provide, reaches conclusions as to the parties' rights and obligations under their contract in a very limited timescale (28 days unless

extended). These conclusions are set out in a decision that is binding on the parties, unless or until the original dispute is finally determined by legal proceedings or by arbitration (if the contract so provides or the parties so agree), or by agreement between the parties.

Adjudication is a quasi-judicial process. It deals with the parties' rights and obligations under the contract, and in making their decision the adjudicator makes a statement of those rights and obligations. In order to do this properly the adjudicator should ascertain the facts and the law by reviewing the parties' written submissions and conducting meetings and site visits as necessary, while always complying with the rules of natural justice. If the adjudicator does not properly ascertain the facts and the law, their decision is unlikely to reflect the parties' rights and obligations.

## 1.3 The adjudicator

RICS expects adjudicators to have sufficient knowledge of the Construction Act and the relevant Statutory Instrument, the Scheme for Construction Contracts (Scotland) Regulations 1998 as amended by the Scheme for Construction Contracts (Scotland) Amendment Regulations 2011 ('the Scheme'), as well as an understanding of the courts' interpretation of them at the time.

The adjudicator should be aware of how the drafters of standard forms of contracts have incorporated the requirements of the Construction Act into their documents and, where a particular standard form of contract forms the basis of the construction contract out of which the adjudication arises, to understand how that particular contract works and has been interpreted by the courts.

The adjudicator should have a detailed, accurate and up-to-date understanding of the law and practice of adjudication and sufficient knowledge of the general subject matter of the dispute in order to be able to identify the relevance of, and decide, all matters before them. The adjudicator is also expected to be available, and be prepared to carry out the function of adjudicator, within the timescale allowed.

By agreeing to be nominated or appointed by RICS, an RICS adjudicator is declaring that they have the competence and ability to deal with the dispute referred within the period allowed for the adjudication. RICS expects the highest standards from those on its panel of adjudicators, and complaints relating to the conduct of those adjudicators will be investigated thoroughly. Any complaint that is upheld may result in appropriate disciplinary action being taken by RICS, which may include the adjudicator being removed from the RICS panel of adjudicators.

## 1.4 The statutory framework

### 1.4.1 The Construction Act

The statutory right to adjudication only applies to construction contracts as defined in s.104 of the Construction Act, and to disputes or differences arising 'under the contract', albeit the words 'under the contract' have been given an expansive meaning by the courts. Alternatively, the contract may expressly widen this to cover disputes arising 'in connection with' the contract or similar. The statutory right to adjudication does not apply to contracts entered into with residential occupiers as defined in s.106 of the Construction Act, albeit a contract with a residential occupier may include provisions which provide for contractual adjudication.

The statutory right to adjudication applies to a construction contract where the terms are oral, partly oral or in writing, and s.108 contains the requirements to be incorporated into a contract if it is to be compliant with the Construction Act. The requirements of s.108 are fundamental and need to be understood by anyone involved in adjudication.

### 1.4.2 The Scheme for Construction Contracts

If the construction contract does not contain adjudication provisions, or does but they do not comply with the Construction Act, then s.108(5) of the Construction Act provides that the entirety of the adjudication provisions set out in Part I of the Scheme have effect as implied terms.

When the Scheme applies, Part I provides the framework within which the adjudication is to be conducted, and this framework effectively constitutes the 'adjudication rules'. Part II of the Scheme includes various payment provisions which replace any provision in the contract that does not comply with the requirements of the Construction Act. All references to the Scheme in the remainder of this guidance note are to Part I of the Scheme unless stated otherwise.

## 1.5 The contractual framework

A contract may be compliant with the Construction Act in respect of its adjudication provisions, but may also include provisions that do not conflict with the requirements of the Construction Act. For example, the contract may include a set of adjudication rules that incorporate additional provisions. In this event, the adjudication will be governed by, and have to comply with, the procedure that has been agreed between the parties. It is therefore imperative that the adjudication provisions in the contract are carefully checked by the parties and the adjudicator in all cases.

It had previously been generally accepted that where any part of the adjudication provisions in a contract did not comply with the requirements of the Construction Act that the adjudication provisions in the Scheme replaced the contract provisions in their entirety. However, in the Court of Session Outer House case of *Profile Projects Limited v Elmwood (Glasgow) Ltd* [2011] CSOH 64, the judge held that only the non-compliant parts of the adjudication clause should be replaced by the relevant provision in the Scheme.

## 2 Appointment and acceptance

### 2.1 Nomination by RICS

#### 2.1.1 Application to RICS for a nomination

An application to RICS for the nomination of an adjudicator may be made for a number of reasons. It may result from:

- the naming of RICS as the ANB in the contract; or
- a decision by the referring party, in the absence of any particular nominator or ANB being named in the contract, that RICS is the body that it wishes to make the nomination.

When a dispute arises there is no need for the referring party to seek the permission of the other party before making an application for the nomination of an adjudicator; this can be done unilaterally following the issue of a notice of adjudication. Nor is there any need to try to agree the name of an adjudicator before approaching RICS. A party to a construction contract has a statutory right to refer a dispute to adjudication at any time, and the appointment of an adjudicator can be made without any involvement of the other party.

Where specific adjudicators are named in the contract, it is not usually appropriate to apply to RICS for a nomination until all of the named individuals have been approached and have indicated that they are unwilling or unable to act.

#### 2.1.2 Details of the application

A party applying to RICS for the nomination of an adjudicator is required to complete a form available from the RICS Dispute Resolution Service ([www.rics.org/drsscotland](http://www.rics.org/drsscotland)). Details of the dispute, the parties to the dispute, any representatives appointed and the preferred professional background of the adjudicator are required, together with details of any adjudicators who may have a conflict of interest. It should be noted that any misleading or inaccurate representations made when completing the application form, and in particular with regard to alleged conflicts of interest, may invalidate the nomination process rendering the adjudicator's decision unenforceable. An application for the nomination of an adjudicator must be accompanied by a copy of the notice of adjudication.

#### 2.1.3 Timescales

The Construction Act requires that the contract includes a procedure for the appointment of the adjudicator and the referral of the dispute to the adjudicator within seven days of the notice of adjudication. If the referral of the dispute is more than seven days after the date of the notice of adjudication, the adjudicator's decision is likely to be unenforceable unless the other party to the adjudication has waived its rights in relation to the late service of the referral.

If the responding party suggests a lack of jurisdiction due to the late referral, it is recommended that the adjudicator seeks the referring party's views and considers those views on the basis of the applicable adjudication procedure and the relevant legal principles.

Upon receipt of the referral, the adjudicator should immediately inform the parties of the date that it was received. It is recommended that the adjudicator should also confirm the date for the decision, being 28 calendar days (subject to s.116 of the Construction Act, reckoning periods of time, which excludes public holidays) from the date of the referral. Where the Construction Act does not apply to the contract, but the parties have agreed a contractual mechanism to enable them to adjudicate disputes, the adjudicator should carefully check the contract and establish whether or not public holidays are included in the adjudication period.

#### 2.1.4 Responsibility, disclosure and disqualification

Appointment as an adjudicator carries with it heavy responsibility. Every effort is made by RICS to ensure that the person nominated is suitable for appointment and that the nomination is made in accordance with the current guidance on conflicts of interest.

If an RICS panel member is considered suitable for nomination, they will be approached and asked to confirm a number of matters, including (but not limited to) whether:

- the subject matter of the dispute falls within the sphere of their normal professional practice, not merely that of their firm
- they will be able to undertake the task within the time limits set out in s.108 of the *Construction Act*, or the contract
- they have made appropriate enquiries and are satisfied that they have no current involvements that would give rise to a real or perceived conflict of interest, or any such involvements in the past five years
- they comply with any special requirements identified on the application form or notice of adjudication; and
- they will have regard to the latest edition of the RICS guidance note *Surveyors acting as adjudicators in the construction industry when Scots law applies*.

In deciding whether to accept the nomination, the prospective adjudicator should take into consideration all matters that could reasonably be considered to create a conflict of interest. The prospective adjudicator is required to disclose to RICS every matter which they consider could potentially lead a fair minded and informed observer to conclude that there was a real possibility that they are biased, and to disclose such matters to the parties if the prospective adjudicator is thereafter nominated. If the

prospective adjudicator wilfully fails to disclose a conflict of interest, RICS may conclude that they are not suitable for future nominations.

The test of what constitutes a conflict of interest is an objective one. It is not restricted to specific conflicts that the prospective adjudicator may have, and it extends to others in their firm or organisation. If the prospective adjudicator belongs to an organisation that has many widespread offices they should ensure that there is a suitable system in place to identify possible conflicts of interest. Furthermore, if a potential conflict of interest arises after the prospective adjudicator has been nominated they should inform the parties immediately.

Further guidance in this area can be found in the RICS guidance note *Conflicts of interest for members acting as dispute resolvers*, which includes a hierarchy of conflicts with examples under each category. Adjudicators should have regard to this professional statement, as well as being familiar with case law on conflicts of interest and bias.

Disclosure of an involvement with a property, party or representative does not mean that the prospective adjudicator will not be nominated. Rather, taking account of the involvement disclosed and any representations of the parties, RICS will determine whether a fair minded and informed observer would consider there to be a real possibility of bias if the prospective adjudicator was appointed. If the factors are evenly balanced, it is likely that RICS will err on the side of caution and not appoint the individual in question. It must be noted that RICS is not obliged to seek representations from the parties concerning possible conflicts of interests before nominating an adjudicator.

Another aspect of the prospective adjudicator's suitability for nomination relates to the subject matter of the adjudication. The party making the application is given the opportunity to identify any special requirements that the adjudicator should fulfil. The prospective adjudicator should look very carefully at any specified requirements and confirm whether they fulfil them. Even if no special requirements are identified, the prospective adjudicator is expected to have considered the details of the notice of adjudication and be satisfied that they are competent to deal with the dispute between the parties.

If at any point after the appointment, once the adjudicator becomes better apprised of the dispute, the adjudicator believes that they do not in fact possess the competence required to decide the dispute and that expert advice is unlikely to assist the adjudicator, they should inform the parties and resign.

### 2.1.5 The adjudicator's immunity

Under s.108(4) of the Construction Act the adjudicator is given immunity for their actions, save when they constitute bad faith. Where the Construction Act does not apply to the contract, but the parties have agreed a contractual mechanism to enable them to adjudicate disputes, the adjudicator should carefully check the contract and establish whether it provides them with immunity for

their actions. If it does not, it is recommended that the adjudicator includes such a provision in their terms and conditions of engagement.

### 2.1.6 After nomination

Under paragraph 5 of the Scheme 'The person requested to act as adjudicator...shall indicate whether or not he is willing to act within two days of receiving the request'.

At this stage, the adjudicator should be mindful that the dispute may not be referred to them. This could be for a number of reasons; one of the most likely is that the notice of adjudication has galvanised the responding party to commence or resume negotiations on the dispute. In the event that there is no referral, there is no adjudication.

The adjudicator should nonetheless take preliminary steps to advise the parties of the appointment, for example by confirming the applicable rules of the adjudication, the latest date for delivery of the referral, and the protocol for communications. The adjudicator may also be required to address issues of jurisdiction during this period.

### 2.1.7 Terms and conditions of engagement

Where the adjudicator is nominated by an ANB they should send their terms and conditions of engagement to the parties at the outset, and may wish to invite the parties to expressly agree to them. However, in reality there may not be time for the adjudicator to expressly agree their terms and conditions with the parties and/or the parties may not engage on this matter. The adjudicator may therefore choose to simply advise the parties that their terms and conditions will apply to their appointment; if the parties then take further steps in the proceedings without challenging the adjudicator's terms, those terms will likely be deemed to have been accepted by the parties' conduct.

Alternatively, one or both parties may expressly object to all or part of the adjudicator's terms and conditions. The adjudicator should avoid getting embroiled in arguments concerning their terms and conditions because, whether or not they are accepted, the adjudicator will ultimately be entitled to a reasonable fee. The adjudicator is able to state the total amount of the fee in the decision, and this aspect is as enforceable as the rest of the decision, save where the fee is unreasonable.

The imposition of a lien on fees is not an acceptable practice, and the courts have found that, even where parties have agreed to a lien, such an agreement is invalid. Equally, the practice of seeking an appointment fee or payment of fees in advance of work being undertaken is not one that RICS endorses in relation to adjudication. It is certainly not an acceptable practice where payment of such a fee is stated to be a condition of commencing work as adjudicator.

It is, however, acceptable for the adjudicator to submit interim applications for payment in respect of fees, particularly where the timetable for the adjudication has been extended. A final reconciliation of fees and any apportionment thereof should be dealt with in the decision.

Under some contracts, the adjudicator's terms will be covered by the requirement that the adjudicator and the parties enter into a specific form of agreement. These agreements normally contain a provision that the decision of the adjudicator is not invalidated if a party does not enter into the agreement. The form and detail of such agreements is usually the subject of party agreement prior to the dispute arising and RICS does not endorse the amendment of, or addition to, such agreements.

## 2.2 Appointment by the parties

### 2.2.1 Before appointment

Where there is a direct approach from the parties, the prospective adjudicator should be careful to check his/her own suitability for the role of adjudicator. The prospective adjudicator should also check for any possible conflicts of interest, and should immediately inform the parties if any exist.

The prospective adjudicator should decline to be appointed in a matter in which they do not have the appropriate technical expertise, even though they have been selected by the parties.

In order to avoid any appearance of bias, the prospective adjudicator should avoid any direct conversations with either party in the absence of the other, and/or any other unilateral communications, either leading up to the appointment or thereafter.

### 2.2.2 Terms and conditions of engagement

Where the parties agree the adjudicator, then the adjudicator may make the appointment conditional on both parties expressly accepting their terms and conditions of engagement. However, where the appointment is not conditional upon acceptance, the situation differs little from where there is a nomination by an ANB (see paragraph 2.1.7).

### 2.2.3 Naming the adjudicator in the contract

Parties sometimes name a specific adjudicator or adjudicators in the contract. However, a situation may subsequently arise where the adjudicator(s) may not be suitable for the actual dispute that has arisen and/or may be unavailable. The naming of the same adjudicator by an employer or a main contractor in a number of contracts may also lead to accusations of possible bias. A party agreement at the time the dispute arises or an ANB nomination overcomes these potential problems.

## 2.3 Objections to nomination/ appointment

### 2.3.1 Objection by a party

It is not uncommon for a responding party to inform the ANB that there is a reason why the nomination should not be made. This objection may be because the responding party considers that there is no dispute, or for other jurisdictional reasons more fully described at paragraph 3.1.5. It is not RICS' responsibility to investigate jurisdictional matters, and the nomination will, in normal circumstances, be made even in the face of such an objection. The objection will almost invariably be repeated directly to the nominated adjudicator when the responding party receives confirmation of the nomination or the referral itself.

If the responding party objects to the appointment of a particular adjudicator on the basis of a conflict of interest, then RICS will investigate this matter as set out in paragraph 2.1.4.

### 2.3.2 Resignation

As explained in paragraph 3.1.5, if the adjudicator does not have jurisdiction then it is likely to be appropriate for the adjudicator to resign. Some adjudication rules and the Scheme also permit the adjudicator to resign on other narrow grounds. Any decision to resign should be considered extremely carefully, and should only occur for a justifiable reason. It should be noted that the fact that a party will not agree the adjudicator's terms and conditions of engagement is not a valid reason for resigning (see paragraph 2.1.7).

## 3 Procedure and other matters

### 3.1 Powers and duties of the adjudicator

#### 3.1.1 Sources

The powers of the adjudicator arise out of the express and implied terms of the contract between the parties. Those powers may either:

- be set out within the contract itself, or the contract may include reference to a particular set of adjudication rules or the Scheme; or
- in the case of a contract which does not comply with the Construction Act, be set out in the Scheme.

The adjudicator's powers usually provide that they have absolute discretion as to the conduct of the adjudication, albeit that this discretion is governed by the requirements set out in the Construction Act, particularly in respect of timescales and the requirement to act impartially. The Scheme and the various sets of adjudication rules generally contain a list of typical powers.

The adjudicator is expected to act judicially in exercising their powers. This does not mean that the adjudicator must act like a judge in every regard, but they are expected to give each party a fair opportunity to put forward their case and to respond to their opponent's case.

The adjudicator should comply as fully as possible with the rules of natural justice, particularly when determining the adjudication procedure, dealing with the parties and their submissions, and in reaching the decision.

#### 3.1.2 Obtaining assistance

There is nothing intrinsically wrong in the adjudicator using their staff or obtaining outside assistance to help in the more laborious aspects of the process. This is certainly the case if it means that the adjudicator's overall fee is less than it would otherwise be (see paragraph 12(b) of the Scheme). However, it is advisable to take into account a few basic considerations:

- the adjudicator should not run the risk of any suggestion that they have delegated their decision making in any way
- the confidential nature of the adjudication process should be maintained
- the adjudicator should:
  - o inform the parties beforehand if they are going to employ additional resources to provide support or assistance
  - o clearly specify the roles and responsibilities to be undertaken by the assistant; and

- o identify the rates or charges that will apply and give the parties the opportunity to object.

However complex the dispute the parties are entitled to expect the decision of the appointed adjudicator and to pay a fee commensurate with that decision.

#### 3.1.3 Legal or technical advice

While it is the sole responsibility of the adjudicator to make the decision, they usually have the power to take legal or technical advice from a third party if they consider it necessary. For example, the adjudicator may require assistance from a delay analyst, a lawyer or some other form of expert evidence where that has not been provided by the parties themselves. Some adjudication rules require the adjudicator to inform the parties before they do so. However, even if this is not the case, it is recommended that any intended advisers and their proposed fees be identified to the parties in advance in case either party has any legitimate objections, for example in order to avoid possible conflicts of interest.

It is always open to a party to challenge the adjudicator's fee where charges are made for legal or technical advice on the basis that it was not reasonable for the adjudicator to take it.

It is essential for the adjudicator to let both parties have sight of whatever advice has been obtained and allow a reasonable opportunity for them to comment on it. It must also be made clear that by obtaining such advice, the adjudicator has not delegated any part of their decision making. If the adjudicator does not follow the above procedures then their decision may be unenforceable on the grounds that there has been a breach of natural justice.

#### 3.1.4 Communication with the adjudicator

The parties are free to communicate between themselves as they wish, but, as a general rule, any communications from a party to the adjudicator or vice versa should be copied at the same time and by the same means to the other party. The adjudicator should always communicate with both parties at the same time and in the same manner.

The adjudicator should not speak to or meet with either party in the absence of the other, and any unavoidable conversations should be limited to essential procedural matters only. In circumstances where the adjudicator does meet or talk to a party without the other being privy to the conversation, the adjudicator's actions must be seen to be fair. It is therefore essential in such circumstances to ensure that the adjudicator makes the other party aware as soon as practicable of what went on in sufficient detail, together with the impressions and/or views that they have formed as a result, to enable the other party to address them.

### 3.1.5 Jurisdiction

Jurisdiction is the authority granted to the adjudicator to decide the dispute. One of the relatively few grounds upon which the courts may decline to enforce an adjudicator's decision is where the adjudicator lacks jurisdiction to decide a dispute or the decision strays beyond the limits of the jurisdiction that the adjudicator possesses by virtue of the notice of adjudication and/or the submissions of the parties.

#### 3.1.5.1 The basis of jurisdiction and when challenges are made

There are two aspects of jurisdiction:

- threshold jurisdiction, which arises when the essential elements are in place that give the adjudicator the authority for their appointment (i.e. 'can the adjudication be set in train at all?'); and
- what can most conveniently be termed 'internal jurisdiction', which relates to the scope of the dispute to be decided (i.e. 'what has to be decided?').

There are three common points in the process when jurisdictional questions may arise:

- upon appointment – namely whether there is threshold jurisdiction enabling the adjudicator to proceed at all; typically, the responding party will challenge the appointment of the adjudicator at the start of the adjudication, disputing the validity of their appointment on matters that go to the question of whether the adjudicator has threshold jurisdiction, but the challenges may also include questions of internal jurisdiction
- during the procedure – jurisdictional challenges are typically in relation to questions of internal jurisdiction arising out of the parties' submissions; and
- after the decision has been delivered to the parties – jurisdictional challenges are typically in relation to internal jurisdiction, in particular the scope of the decision reached and whether the right questions have been answered.

#### 3.1.5.2 Threshold jurisdiction

As regards threshold jurisdiction, the essential questions include (but are not limited to):

- Is there a conflict of interest preventing the adjudicator from acting?
- Is there a contract?
- Are the parties to the contract the same parties who are bringing the adjudication?
- Does the appointment comply with the requirements of the applicable contractual adjudication provisions?
- If not, does the contract fall within the ambit of the Construction Act, such that the parties are entitled to commence adjudication?
- Has the appointment been made in accordance with the applicable procedure, including by the appropriate

ANB?

- Is there a crystallised dispute?
- Has the dispute arisen 'under' (or in some cases 'in connection with') the contract?
- Has more than one dispute been referred?
- Is there a previous adjudication decision that has decided the same dispute?
- Has the dispute been referred within seven days of the notice of adjudication?

#### 3.1.5.3 Resolving challenges to threshold jurisdiction

In the main, it is for the parties to raise jurisdictional issues. However, if the adjudicator identifies an obvious issue which goes to threshold jurisdiction, it is recommended that they ask the parties for their views about the issue and how they wish to proceed. Otherwise, a party wishing to rely upon a ground for a jurisdictional challenge must raise it as early in the process as possible.

It is open to a party to waive its right to rely upon a jurisdictional issue, either by positively agreeing to proceed notwithstanding the issue, or by taking further steps in the adjudication without taking issue with the ground for challenge.

The usual position is that the adjudicator has no jurisdiction to decide their own jurisdiction (in other words to make a binding decision as to their own jurisdiction), unless the adjudication procedure provides for this or the parties agree otherwise. In the usual case, any conclusion the adjudicator reaches on jurisdiction will therefore not be binding on the parties, and may be challenged in court.

The adjudicator should investigate any jurisdictional challenge as early as possible, to determine whether it has any substance. The adjudicator will usually give the parties an opportunity to provide submissions on the issues. If the adjudicator concludes that there is clearly no threshold jurisdiction, then they should resign, unless the challenging party agrees to waive the issue. If the adjudicator comes to the conclusion that the dispute is the same or substantially the same as one that has previously been referred, and a decision has been made, then the adjudicator must resign.

However, the adjudicator should not allow an unwilling responding party to derail the process, and in circumstances where there is uncertainty about the merits of a challenge, the adjudicator should give priority to proceeding with the adjudication rather than resigning. In such circumstances the adjudication effectively proceeds at the risk of the referring party, and it is up to that party to weigh up the validity of the grounds for any challenge to jurisdiction and the prospect of the decision subsequently being set aside by the courts, against the cost of proceeding with the adjudication. It should always be remembered that a party is free to apply to the court to deal with the question of jurisdiction at any time.

Having considered the jurisdictional issues raised the adjudicator should advise the parties of their non-binding conclusion, together with brief reasons, and confirm

whether or not they are going to proceed to reach a decision.

#### **3.1.5.4 Internal jurisdiction (scope of the reference)**

With regard to internal jurisdiction, the scope of the adjudicator's jurisdiction is governed by the dispute identified in the notice of adjudication.

If it is necessary for the adjudicator to determine the extent of the dispute, then they should define it in broad terms and look at the essential claim which has been made. The referring party may rely on new facts, arguments and evidence in the referral, provided that they pertain to the dispute and the responding party has a fair opportunity to respond to them.

However, if the referral includes matters that do not fall within the scope of the dispute identified in the notice of adjudication then the adjudicator has no jurisdiction to deal with them, unless the responding party chooses to admit them to the adjudicator's jurisdiction. If the responding party objects, but the adjudicator nevertheless deals with matters which are outside of their jurisdiction, it may be possible to sever those parts of the decision provided they are readily identifiable.

Where there is any uncertainty regarding the scope of the dispute referred, the adjudicator should separately deal with each part of the dispute, including allocating their fees to each part. If the adjudicator does not and the decision cannot be severed then the entire decision is likely to be unenforceable.

#### **3.1.5.5 Internal jurisdiction and the defences of the responding party**

The responding party can deploy all available defences, and is not restricted to defences for which it has previously given notice. However, generally speaking, the adjudicator has no jurisdiction to deal with a counterclaim unless the referring party agrees to extend the adjudicator's jurisdiction. In this context, a counterclaim relates to any matter that does not arise directly from the dispute referred.

Where the referring party is claiming payment of a sum of money, a responding party is entitled to defend itself by reference to any legitimate available defence (including set-off), provided it has issued an effective payment notice and/or pay less notice in regard to that defence.

A responding party can initiate its own adjudication process dealing with its own claims against the referring party, which are not within the scope of the dispute already referred. That dispute may be referred to the same adjudicator. However, if the Scheme applies then by virtue of paragraph 8(1) it may not be possible for that adjudicator

to be validly appointed until after they have completed the original adjudication, unless the parties agree otherwise.

## **3.2 Establishing the procedure**

### **3.2.1 Directions to the parties**

The adjudicator has complete discretion as to the procedure that is to be adopted in reaching their decision, unless there are specific requirements within the applicable contract or adjudication rules.

The adjudicator should write to the parties on receipt of the referral setting out the procedure for the adjudication. In determining the procedure, the adjudicator should take account of any requirements of the contract or adjudication rules and comply with the rules of natural justice. The adjudicator should also be mindful of the need to avoid unnecessary expense when determining the procedure, particularly where the value of the dispute is relatively low.

### **3.2.2 Timescales**

In setting the procedure, the adjudicator should bear in mind that they have to reach the decision in the limited time allowed by the Construction Act, or within such extended time that may be agreed by the parties. Twenty-eight days from referral of the dispute is a very short period of time, and the adjudicator needs to manage this time effectively.

### **3.2.3 Extension of time**

It is often the case that the matters involved in the adjudication are such that it will be difficult for the parties to make their submissions and for the adjudicator to reach and issue a decision within the 28 day period. The adjudicator has no unilateral power to extend the 28 day period, but the referring party may agree to extend the time for the decision by up to 14 days without the agreement of the responding party (see s.108(2)(d) and paragraph 19(1)(b) of the Scheme). A longer extension requires the agreement of both parties (see s.108(2)(c) and paragraph 19(1)(c) of the Scheme).

If neither party agrees to extend the time for the decision, the adjudicator has to complete it within the 28 day period in order to fulfil their obligations. In large adjudications, where the parties are not prepared to allow an extension beyond 28 or 42 days (as the case may be) and the adjudicator is genuinely unable to decide the dispute in that time, then the adjudicator should resign.

## **3.3 Establishing the facts and the law**

### **3.3.1 The procedure**

It is for the adjudicator to decide the best way to establish the facts and the law consistent with the procedure governing the particular adjudication. Depending on the nature and scope of the adjudication the adjudicator may

proceed entirely on the written submissions of the parties or they may meet with the parties. The adjudicator may take advice on legal or technical matters that are outside their own competence (see also paragraph 3.1.3), but any procedure adopted must comply with the principles of natural justice.

### 3.3.2 'Natural justice'

Natural justice is, broadly speaking, the right of every party to have a fair hearing and to be heard by an impartial tribunal. Breaches of natural justice may include bias or apparent bias, including predetermination due to the adjudicator failing to properly apply their mind to the decision because they have already made up their mind. It also includes a failure to act impartially, and procedural irregularity.

The question of natural justice is a difficult one when applied to adjudication as the time restraints restrict the extent to which the principles of natural justice can be exercised. Nonetheless if a breach is material then the decision will not be enforced. The objective of the adjudicator is therefore to establish a procedure that, within the restrictions of the process, fulfils their duty to act impartially and is fair, and seen to be so, in the eyes of the parties.

As far as fairness is concerned, each party must have a fair opportunity, within the restrictions of the adjudication process, to make its case, and where one party makes an allegation, the other party should have a reasonable opportunity to reply. The parties must also be given an opportunity to comment on any evidence or analysis, including that produced by the adjudicator (or any assistant, legal or technical adviser).

### 3.3.3 Submissions from the parties

The most common procedure is to allow the responding party to submit a written response to the referral and then allow the referring party to reply to this in writing. The adjudicator can seek any clarification that is required by means of further submissions or written questions, or at a meeting with both of the parties.

The adjudicator may request that the written submissions are limited. This is allowed under paragraph 13(g) of the Scheme, but such limitations could be unnecessarily restrictive on the parties, particularly if the dispute is complex.

If a party raises new matters in a submission that are within the jurisdiction of the adjudicator and on which one or more of the issues in dispute may turn, then the other party should be given a reasonable opportunity to respond.

### 3.3.4 The referral

The referral should be limited to matters identified in the notice of adjudication. If the referral seeks to widen the dispute beyond the ambit of the notice of adjudication, the adjudicator will be exceeding their jurisdiction if such matters are dealt with, and the adjudicator's decision may be unenforceable as a result (see paragraph 3.1.5).

However, if a party does not object to the adjudicator exceeding their jurisdiction and has gone on to address the point in question, then it is likely that that party will be regarded as having agreed by its conduct to give the adjudicator ad hoc jurisdiction, effectively meaning it has waived its right to object at a later date.

### 3.3.5 The response

Certain forms of contract allow the responding party to make a response in writing within a specified number of days of the referral. Other forms leave it to the adjudicator to decide what is appropriate in the circumstances. While potentially disruptive, the adjudicator should be hesitant to disregard a response or any other submission simply because it is served late. Provided the adjudicator has time to consider the late submission before reaching their decision and allows the other party the opportunity to comment on it if appropriate, it should be taken into account.

### 3.3.6 Further submission from the referring party

It is usual for the adjudicator to allow the referring party to reply to the response, although the procedure is at the adjudicator's discretion. It is recommended that the adjudicator proceeds in the way that they consider will best enable them to ascertain the facts and the law, and establish the parties' respective rights and obligations under the contract. The adjudicator is advised to fit the procedure to the dispute and not the dispute to the adjudicator's customary procedure.

### 3.3.7 Subsequent submissions

In some instances, especially where no meeting is called, the adjudicator may allow further submissions if they would assist in reaching the decision.

Where the adjudicator is acting under the Scheme they should be mindful of paragraph 17 and the obligation to consider all relevant information, but the adjudicator should also effectively manage the process in order to avoid an endless series of further submissions. The adjudicator should direct the parties to any specific matter on which they require a further submission.

### 3.3.8 Identifying the issues

It is the adjudicator's duty to deal with all aspects of the dispute referred to them by the parties. It may not be possible to precisely identify the issues from the referral alone as it will sometimes contain nothing more than a chronology of events and the redress sought. For example, the redress sought by the referring party may be a payment of monies, but the actual issue is whether or not there has been a breach of a term of the contract by the responding party. The issues may only become clear after all of the submissions have been reviewed and clarified as necessary.

It is recommended that the adjudicator sets out the issues in the form of questions and thinks about the potential answers to those questions when formulating the issues.

It is also recommended that the adjudicator orders the issues logically so that the redress sought can be granted and/or denied in the most efficient manner.

## 3.4 Evidence

### 3.4.1 'Rules of evidence'

There is nothing in the Construction Act to say that the strict rules of evidence apply, but the adjudicator is required to act impartially and comply with the rules of natural justice, and therefore the adjudicator should take heed of the rules of evidence to the extent possible within the constraints of the adjudication process.

Evidence is admissible if it is probative or disprobative of some matter that requires proof, and the weight to be given to any particular piece of evidence is a matter of judgment for the adjudicator, as is the amount and nature of evidence required to prove the allegation.

The adjudicator should also be aware of certain exclusionary rules of evidence, such as the parole evidence rule and privilege, and in particular without prejudice privilege.

### 3.4.2 Documentary evidence

The parties may provide an overwhelming amount of documentary evidence. While it may take time for the adjudicator to sift through it all and establish what actually happened, this process may be key to the outcome of the adjudication.

### 3.4.3 Witnesses of fact

It is not uncommon for witness statements to be provided in an adjudication. Although witnesses may, in an appropriate case, give evidence during meetings, questions should normally be put by the adjudicator and formal cross-examination is unusual.

### 3.4.4 Expert witnesses

Expert evidence may be presented by either or both parties on matters such as delay, loss and expense, defects, etc. Experts who are RICS members are obliged to comply with the RICS practice statement, *Surveyors acting as expert witnesses* (2014). The principal message of this practice statement is that the primary duty of the expert is to the tribunal, and the evidence given must be the expert's independent opinion, and fall within the expert's expertise, experience and knowledge. The practice statement also requires the evidence to be impartial and uninfluenced by the party instructing or paying the expert. Experts of other professions may be subject to similar mandatory requirements, but even if they are not it is recommended that the adjudicator takes heed of the requirements of the RICS practice statement when assessing the expert evidence.

### 3.4.5 Adjudicator's own knowledge

The adjudicator may be appointed due to their knowledge of the technical and/or contractual matters relating to

the dispute between the parties, and the adjudicator can be expected to use this knowledge. However, the adjudicator should be careful to ensure that they give the parties the opportunity to comment upon any matters within the adjudicator's own knowledge which have not been canvassed by the parties and which the adjudicator proposes to take into account in reaching the decision. For example, the adjudicator may wish to draw the parties' attention to a particular clause of the contract or case not relied on by the parties in their submissions, and invite comment on it. Failure to provide the parties with an opportunity to comment on such a matter may result in a decision being challenged on the grounds of a breach of the rules of natural justice.

### 3.4.6 Ambush

The timescales in adjudication can tempt a referring party to try to take advantage of the fact that the responding party has only a very short time to respond to a referral. The referral might be carefully constructed, and accompanied by a significant volume of documentation. It might also be served just before a holiday period. This is referred to as an 'ambush' and can result in the responding party appearing to be disadvantaged. However, provided the adjudicator considers that they have sufficient time to reach their decision and the responding party has sufficient time to respond to the referral, then the process is likely to be found to be fair. If necessary the adjudicator should ask the referring party to extend the date for the decision by up to 14 days, or ask both parties to agree a longer extension (see paragraph 3.2.3).

## 3.5 Other procedural matters

### 3.5.1 Meetings and site visits

It is often possible for the adjudicator to reach a decision using the submissions alone, but it can also be of great assistance to hold a meeting with the parties. A meeting can range from an informal discussion in the site hut to a formal hearing where cross-examination takes place. However, the adjudicator should avoid meeting with parties individually.

If the adjudicator decides to hold a meeting then they should give the parties sufficient notice and indicate who should attend the meeting. The adjudicator should also indicate which parts of the dispute will be discussed at the meeting and, if necessary, provide an agenda in sufficient detail to allow the parties to prepare.

It may also be of assistance to the adjudicator to undertake a site inspection in order to become familiar with the building or works in question. A site inspection is likely to be particularly helpful where there are allegations of defective work which has not yet been rectified.

### 3.5.2 Party representatives

Paragraph 16 of the Scheme provides that parties to the dispute may be assisted or represented by such advisers and representatives as they consider appropriate, whether or not the representatives are legally qualified.

There is nothing to stop the parties engaging whatever representation they consider appropriate. Representatives who are RICS members are obliged to comply with the RICS practice statement *Surveyors acting as advocates* (2017).

Where one or both parties are unrepresented the adjudicator may have to set out the adjudication process in more detail, and/or refer the parties to any relevant guidance. However, the adjudicator should also take care not to be perceived to be making a case for the unrepresented party by providing it with too much assistance.

### 3.5.3 Intimidatory tactics

A party's representative may consider it to be in the best interests of its client to place undue pressure on the adjudicator. This may take the form of delaying tactics, repeated challenges to the adjudicator's jurisdiction, or threatening to take no further part in the adjudication without good reason. Very rarely this can be coupled with direct threats against the adjudicator in personal terms, for example casting doubt on the adjudicator's credibility, integrity, impartiality and/or competence. The adjudicator should deal with these tactics robustly, yet politely and calmly. The adjudicator should avoid getting into petty email exchanges which may exacerbate the problem.

Delaying tactics should not be successful if the adjudicator reminds the parties of the adjudicator's duty to reach a decision within the 28-day period (or otherwise extended). However, delays may also be the result of a genuine problem in dealing adequately with submissions; it is best practice to try and uncover this and deal with it early in the process, asking permission for an extension to the date for the decision if necessary.

Where a party makes repeated jurisdictional challenges, the adjudicator is advised to investigate the issue regarding their jurisdiction as soon as possible (seeking the other side's submissions before making any non-binding conclusion). If the adjudicator decides that they have jurisdiction then the adjudicator should continue with the adjudication. Most of the time, the party challenging the adjudicator's jurisdiction will decide to continue participating while also reserving its right to challenge the enforceability of the decision at a later stage.

Where a party has indicated that it does not intend to participate any further in the adjudication, the adjudicator should examine the reasons why and encourage that party to participate. Even if a party does not participate, the adjudicator should continue to send that party all correspondence, including the decision.

## 3.6 The adjudicator's decision

### 3.6.1 Time

Paragraph 19(1) of the Scheme states that the decision shall be reached not later than 28 days after the date of the referral or such other period as prescribed under subparagraphs (b) or (c). Paragraph 19(3) of the Scheme states that: 'as soon as possible after reaching a decision,

the adjudicator shall deliver a copy of that decision to each of the parties to the contract'. The courts have taken the view that reaching and delivering a decision are different, but have concluded that a decision must, in any event, be reached within the required timescale. It would seem that as long as the decision is communicated to the parties as soon as possible after it has been reached then it will still be valid.

A decision that is not communicated forthwith, or as soon as possible after it is reached, will be issued late. As a consequence it will be unenforceable and may expose the adjudicator to a claim for damages, including wasted costs incurred by both parties in conducting the adjudication. To avoid any doubt, it is therefore recommended that the decision is reached and delivered within the required timescale.

### 3.6.2 The requirements for the adjudicator's decision

There are no specific requirements in the Construction Act or the Scheme as to what the adjudicator's decision must contain. However, it is recommended that the decision should as a minimum:

- describe itself as an 'Adjudicator's Decision'
- include a statement to the effect that the adjudicator has been appointed to adjudicate a dispute between the parties
- include the names of the parties to the dispute
- set out the way in which the adjudicator has been appointed
- include the name and/or address of the project
- identify the contract between the parties
- detail the adjudication provisions under which the adjudicator is authorised to act
- set out the nature of the dispute between the parties
- set out any specific procedural matters that are of note, including the timetable
- detail any representatives of the parties
- identify the key documents and the dates they were submitted
- include any particular reason for exclusion of any documents
- explain any conclusions the adjudicator has reached regarding his/her jurisdiction
- set out the redress sought
- list the issues that have to be decided
- against each issue, include a brief statement of the contentions of the parties (however, this is not the place to recite the opposing submissions in any great detail)
- set out the findings on each issue, including the reasons for those findings (unless reasons are not required)

- include the determination as to the costs of the parties (if so empowered)
- detail the determination as to liability for the adjudicator's own fees and expenses
- include a summary of the declarations being granted; and
- be signed and dated.

At paragraph 18.04, p.480 of his book *Construction Adjudication (3rd edition)*, 2015, the Honourable Mr Justice Coulson sets out seven 'golden rules' for adjudicators, addressing both procedural matters and matters to be considered in reaching the decision, which are endorsed by this guidance note, namely:

- be bold
- address jurisdiction issues early and clearly
- identify and answer the critical issue(s)
- be fair
- provide a clear result
- do it on time; and
- do not make silly mistakes.

### 3.6.3 Deciding each issue

Each adjudicator will have their own particular process for deciding issues and sub-issues, and the following is just one way in which the adjudicator may undertake this task:

- identify the submissions and evidence applicable to each issue and sub-issue
- determine what is common ground and what is in dispute
- decide the facts in dispute and then decide the relevant law
- apply the law to the facts (in some circumstances a decision on an issue may be reached more efficiently by deciding the law before the facts)
- In deciding the facts in dispute:
  - the adjudicator should determine which party's submissions and evidence they prefer
  - in doing so, the adjudicator should consider consistency and probability; if the contemporaneous evidence is consistent with the witness evidence this may be a key factor; and
  - the adjudicator should remember that the burden of proof is on the party asserting a particular fact, and the standard of proof is the normal civil standard, i.e. on the balance of probabilities.
- in deciding the relevant law the adjudicator must ascertain the contractual rights and obligations of the parties and determine what law applies and how it affects the parties.

The adjudicator's findings on each issue should be set out in the body of their decision, or alternatively in a schedule

attached to, and forming part of, the decision. Schedules can be particularly useful where multiple variations and/or defects are in dispute.

### 3.6.4 Reasons

The contract/adjudication rules may require the adjudicator to give reasons for their decision, and/or the parties may expressly ask the adjudicator to give reasons. The adjudicator should ensure that their reasons are set out in a clear and logical manner for each issue.

If reasons are not expressly required and/or requested, the adjudicator may ask the parties whether or not they wish the adjudicator to give reasons. Alternatively, subject to issues of proportionality, the adjudicator may provide reasons in any event in order to assist the parties to understand the decision. Reasons will often assist the losing party to understand why it has lost, and will also help the winning party to understand why it has perhaps not recovered as much in the adjudication as it had claimed. This will very often put the parties into the position of understanding those conclusions and thus can assist in resolving the dispute.

Even if the adjudicator is asked not to give reasons, they should carefully work through the submissions and evidence as if they are giving a reasoned decision. It is surprising how often the process of considering the reasons in detail, and working through all the evidence and submissions, will result in a different conclusion to that from an initial perusal of the documents.

It is not usually recommended to be critical of the parties' actions, unless it is necessary to do so to explain a decision. Criticism or gratuitous advice may cause the parties to resist accepting the decision.

### 3.6.5 Interest

The adjudication rules may provide the adjudicator with the power to award interest on any sums found due, for example paragraph 20(c) of the Scheme. However, this is not a free-standing power and the courts have stated that an adjudicator can only award interest under paragraph 20(c) where:

- there is a right under the contract or in law to do so and interest is claimed; or
- the parties to the dispute have agreed that questions of interest are within the scope of the adjudication; or
- the adjudicator considers questions of interest to be 'necessarily connected' with the dispute.

A right to interest in law may arise under the *Late Payment of Commercial Debts (Interest) Act 1998* ('1998 Act') and/or as damages.

### 3.6.6 Party costs

Section 108A of the Construction Act concerns the award of party costs:

- (1) This section applies in relation to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract.
- (2) The contractual provision referred to in subsection (1) is ineffective unless –
- a. it is made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties, or
  - b. it is made in writing after the giving of notice of intention to refer the dispute to adjudication.'

There is some uncertainty as to the correct interpretation of this clause. The narrow interpretation is that the only permissible contractual provision relating to the allocation of adjudication costs is one that allows the adjudicator to allocate only their fees and expenses between the parties. The wide interpretation is that any contractual provision relating to the allocation of adjudication costs, including the parties' own costs, is permissible, provided that it allows the adjudicator to allocate their fees and expenses. In such circumstances so-called 'Tolent clauses', which provide that one party will be liable for the costs of the adjudication regardless of the outcome, would be permissible.

At the time of writing, s.108A has not yet been subject to detailed consideration by the courts. The adjudicator should therefore be mindful of any future case law on this topic.

The adjudicator should also be aware of the requirements of the 1998 Act that were incorporated by the Late Payment of Commercial Debts Regulations 2013. In the event that the 1998 Act applies to a contract then the supplier is entitled to the reasonable costs of recovering a debt due under that contract by virtue of section 5A(2A) of the 1998 Act. A party to a construction contract that has undertaken work may therefore be entitled to the reasonable costs of recovering a debt due by means of adjudication. However, there is a potential conflict with the narrow interpretation of s.108A, and at the time of writing there are no reported cases in which the courts have directly addressed this point in detail. The adjudicator should therefore also be mindful of any future case law on this topic.

If the parties make an ad-hoc agreement after the notice of adjudication has been issued allowing the adjudicator to award party costs, then the adjudicator should obtain submissions from both parties on costs, and include their assessment of costs in the decision.

### 3.6.7 Apportioning costs

If the adjudicator does have the power to award party costs, they would be advised to follow the general principle that costs follow the event, unless there is a good reason for departing from that rule. If the dispute involves multiple issues, some of which have gone one way and some the other, the adjudicator, in exercising their discretion, would be advised to consider the relative success of the parties against each issue. The adjudicator may also wish to consider any offers to settle which are disclosed during the assessment of costs.

In considering the award of costs, the adjudicator should bear in mind the following:

- the proportionality and reasonableness of the costs incurred
- the conduct of the parties, before and during proceedings from which the costs have arisen
- the particular complexity of the matters under consideration or the question(s) asked
- the skill, effort, specialised knowledge and responsibility of those involved
- the time one would consider necessary to spend on the case; and
- the manner, time and place in which events were carried out.

Fees charged by the ANB (if any) are part of the referring party's costs, and therefore should not be awarded unless the adjudicator has the power to award party costs.

### 3.6.8 The adjudicator's fees and expenses

The adjudicator is entitled to a fee and to have their expenses paid whether or not the adjudicator's terms and conditions of engagement were agreed at the outset. However, the amount charged must be reasonable. It is open to a party to challenge the fees that are charged according to general principles of law, but the burden is on that party to establish that the fees are unreasonable and so there has to be some demonstrable basis to such a challenge.

The adjudicator should keep a detailed log of the time spent so that they can justify their fees if asked to do so.

The adjudicator will usually have complete discretion as to how to allocate their fees and expenses between the parties. However, RICS considers that the adjudicator should normally order the unsuccessful party to pay the adjudicator's fees and expenses. For example, if the adjudicator awards the referring party the whole or a substantial part of what the referring party has claimed, the adjudicator should normally order the responding party to pay the adjudicator's fees and expenses. Likewise, if the responding party successfully defeats the referring party's claim then the adjudicator should normally order the referring party to pay the adjudicator's fees and expenses.

However, it is not always possible to clearly identify one party as successful and the other party as unsuccessful. For example, it may be the case that the referring party has succeeded in obtaining an award of payment, but that this is substantially less than the referring party had claimed. In such circumstances the adjudicator may wish to allocate their fees and expenses between the parties based on the relative success of the parties against each issue. The adjudicator may also wish to take into account the time they have spent on each issue. Regardless of how the adjudicator allocates their fees and expenses, it is important to note that the parties will usually be jointly and severally liable for the whole of the adjudicator's fees and expenses.

### 3.6.9 Draft decision

It is the view of RICS that draft decisions should not be issued to the parties.

### 3.6.10 Issuing the decision

The adjudicator is expected to have their decision ready no later than the 28th day, or on the revised final date if time is extended. The Scheme requires that the adjudicator delivers a copy of the decision to the parties as soon as possible after the adjudicator has reached it, but to avoid any doubt the decision should be reached and communicated within the required timescale.

It is unlikely that a late decision will be enforced, and it is less likely still that the adjudicator will be successful in seeking an order for payment of their fees after delivering a late decision. The importance of delivering a decision on time therefore cannot be over emphasised.

### 3.6.11 Slips and mistakes

The Construction Act expressly provides that the adjudicator may make corrections so as to remove clerical or typographical errors arising by accident or omission (s.108 (3A), and paragraph 22A of the Scheme). The Scheme requires that any such correction must be made within five days of the delivery of the decision to the parties.

Some adjudication rules also provide for the correction of slips. For example, the ICE Adjudication Procedure allows the adjudicator to correct a decision to remove any clerical mistake, error or ambiguity within 14 days of the decision being notified to the parties.

Any corrections made must maintain the original intention of the adjudicator in reaching their decision on a particular issue. Corrections might include the correction of a failure to give credit for sums found to have been paid or the correction of typographical or arithmetical errors. The adjudicator may not amend the decision to give effect to any second thoughts, because the decision has already been reached and cannot be changed.

## 3.7 Enforcement

The enforcement of an adjudicator's decision is a matter for the courts. As far as the adjudicator is concerned, they should avoid acting in such a way that will give parties grounds to resist the enforcement of the decision. The Court of Session has developed a rapid procedure for hearing enforcement claims on a summary judgment basis, but it is unlikely that the adjudicator will be required or entitled to take an active role in any such proceedings.

## 3.8 Complaints

An RICS member acting as an adjudicator is deemed not to be carrying out surveying services within the normal surveyor/customer relationship. This means that, unless otherwise agreed, the adjudicator (or their firm's) usual complaints handling procedure will not apply. Nevertheless, RICS Regulation may investigate an RICS member for any alleged breach of professional conduct arising out of their acting as an adjudicator.

Where an adjudicator is a member of the RICS Chairman's Panel in Scotland they will be subject to RICS DRS's Customer Complaints Procedure (CCP). Regardless of whether a complaint is received under the CCP, RICS DRS may investigate all issues relating to the competencies to be reasonably expected of an adjudicator, as well as issues relating to the manner in which the adjudicator conducted the adjudication. However, it is important to note that neither RICS Regulation nor RICS DRS can investigate complaints regarding the substance of an adjudicator's decision itself. Consequently, any investigation by RICS will not result in an adjustment or modification of the adjudicator's decision.

## Further sources of information

### Books

Beale, H., *Chitty on Contracts* (32nd edition), Sweet & Maxwell, 2015 (ISBN 9780414050693)

Bailey, J., *Construction Law* (2nd edition), Informa, 2016 (ISBN 9781138800427)

Coulson, P., *Coulson on Construction Adjudication* (3rd edition), Oxford University Press, 2015 (ISBN 9780198726548)

Dennys, N. and Clay, R., *Hudson's Building and Engineering Contracts* (13th edition), Sweet and Maxwell, 2015 (ISBN 9780414034174)

Ramsey, V. and Furst, S., *Keating on Construction Contracts* (10th edition), Sweet & Maxwell, 2016 (ISBN 9780414055711)

Pickavance, J., *A Practical Guide to Construction Adjudication*, Wiley Blackwell, 2015 (ISBN 9781118717950)

Rawley, D., Williams, K., Martinez, M., Land, P., *Construction Adjudication and Payments Handbook*, Oxford University Press, 2013 (ISBN 9780199551590)

Riches, J., Dancaster C., *Construction Adjudication* (2nd edition), Wiley Blackwell, 2004 (ISBN 9781405172066)

Royce, D., *Adjudication in Construction Law*, Informa Law, 2015 (ISBN 9781138911451)

### Subscription services

Building Law Reports, Informa PLC

Construction Industry Law Letter, Informa PLC

Construction Law Reports, Lexis Nexis

Emden's Construction Law, Lexis Nexis

Practical Law, Thompson Reuters

### RICS professional statements and guidance notes

The latest editions of RICS guidance notes and professional statements available via [rics.org](http://rics.org), including (but not limited to):

RICS guidance note, *Conflicts of interest for members acting as dispute resolvers*

RICS practice statement and guidance note, *Surveyors acting as expert witnesses in Scotland*

RICS practice statement and guidance note, *Surveyors acting as advocates*

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Tel: +44 (0) 131 240 0832

Web: [www.rics.org/drsscotland](http://www.rics.org/drsscotland)

Email: [drsscotland@rics.org](mailto:drsscotland@rics.org)

### Housing Grants, Construction and Regeneration Act

*The Housing Grants, Construction and Regeneration Act 1996* can be found at:

[www.legislation.gov.uk/ukpga/1996/53/part/II](http://www.legislation.gov.uk/ukpga/1996/53/part/II)

*Part 8 of the Local Democracy, Economic Development and Construction Act 2009* can be found at:

[www.legislation.gov.uk/ukpga/2009/20/part/8](http://www.legislation.gov.uk/ukpga/2009/20/part/8)

### Scheme for Construction Contracts

The Scheme for Construction Contracts (Scotland) Regulations 1998, SI 1998/687 can be found at:

[www.legislation.gov.uk/uksi/1998/687/contents/made](http://www.legislation.gov.uk/uksi/1998/687/contents/made)

The Scheme for Construction Contracts (Scotland) Amendment Regulations 2011, SI 2011/371 can be found at:

[www.legislation.gov.uk/ssi/2011/371/contents/made](http://www.legislation.gov.uk/ssi/2011/371/contents/made)

### Websites

[www.adjudication.co.uk](http://www.adjudication.co.uk)

[www.baillii.org](http://www.baillii.org)

[www.rics.org/drsscotland](http://www.rics.org/drsscotland)

[www.scl.org](http://www.scl.org)



## Confidence through professional standards

RICS promotes and enforces the highest professional qualifications and standards in the development and management of land, real estate, construction and infrastructure. Our name promises the consistent delivery of standards – bringing confidence to the markets we serve.

We accredit 125,000 professionals and any individual or firm registered with RICS is subject to our quality assurance. Their expertise covers property, asset valuation and real estate management; the costing and leadership of construction projects; the development of infrastructure; and the management of natural resources, such as mining, farms and woodland. From environmental assessments and building controls to negotiating land rights in an emerging economy; if our members are involved the same professional standards and ethics apply.

We believe that standards underpin effective markets. With up to seventy per cent of the world's wealth bound up in land and real estate, our sector is vital to economic development, helping to support stable, sustainable investment and growth around the globe.

With offices covering the major political and financial centres of the world, our market presence means we are ideally placed to influence policy and embed professional standards. We work at a cross-governmental level, delivering international standards that will support a safe and vibrant marketplace in land, real estate, construction and infrastructure, for the benefit of all.

We are proud of our reputation and we guard it fiercely, so clients who work with an RICS professional can have confidence in the quality and ethics of the services they receive.

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