

# CONSTRUCTION : BULLETIN

## Can An Adjudicator Decide More Than One Dispute At The Same Time?

It is a well-established principle that only one dispute may be referred to an adjudicator in a single adjudication. However, a question which has not previously come before the courts is whether the same adjudicator may be appointed in two different adjudications running at the same time. This issue arose in the recent case of *Deluxe Art & Theme Ltd v Beck Interiors Ltd*.

### Background

By a sub-contract dated 7 March 2014, Beck Interiors Ltd (“Beck”) engaged Deluxe Art & Theme Ltd (“DATL”) to supply and install joinery items in respect of a London hotel that Beck had been employed to refurbish pursuant to a main contract. During the course of the project, DATL commenced a total of three adjudications against Beck. All the adjudications were governed by the Scheme for Construction Contracts (the “Scheme”).

In all three adjudications, DATL applied to the RICS for the appointment of an adjudicator and, in accordance with the RICS’ policy of appointing the same adjudicator to deal with disputes arising under the same contract, Mr Bastone was appointed as adjudicator in each case.

In the first adjudication, DATL claimed variations and acceleration costs and was awarded circa £73,000.

DATL commenced the second adjudication on 22 October 2015 in respect of an extension of time and loss and expense/prolongation costs claim. The adjudicator again found in DATL’s favour and awarded DATL circa £120,000 and an extension of time.

Whilst the second adjudication was ongoing, DATL commenced the third adjudication on 9 November 2015 in relation to Beck’s failure to reduce retention from 5% to 2.5% at practical completion. Once again, the adjudicator found for DATL and awarded DATL circa £38,000.

### The enforcement proceedings

Beck refused to pay the sums awarded in the second and third adjudications, so DATL commenced enforcement proceedings.

Beck resisted enforcement on the basis that paragraph 8(1) of the Scheme does not give an adjudicator jurisdiction to adjudicate at the same time on more than one dispute without the consent of all parties.

Paragraph 8(1) of the Scheme provides: *“The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on more than one dispute under the same contract.”*

### Was there more than one dispute?

To overcome Beck’s argument, DATL contended that the second and third adjudications encompassed a single dispute between the parties and therefore paragraph 8(1) did not apply at all.

The court firmly rejected this argument. DATL had obviously considered there to be two separate disputes, which was why they started separate adjudications.

In addition, as part of his decision in the third adjudication, the adjudicator had found that the second and third adjudications comprised two separate



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disputes. DATL could not argue that the third decision was enforceable whilst contending that part of the decision was wrong.

The court also referred to previous case law which has established a basic rule for determining whether there are one or two disputes – if disputed claim no. 1 cannot be decided without deciding all or parts of disputed claim no. 2, that establishes a clear link and points to there being only one dispute. Applying this principle, the dispute about extensions of time and loss and expense was different to the dispute about retention because the extension of time and loss and expense claim could easily be decided without any reference to the claim for the failure to reduce retention.

The court commented that it would be a very unusual set of circumstances for two disputes referred in two separate adjudication notices, described in different terms and started at different times, to form part of the same dispute.

### Can the same adjudicator be appointed in two adjudications under the Scheme at the same time?

Section 108(2)(a) of the Housing and Grants, Construction and Regeneration Act 1996 provides that a party may “give notice at any time of his intention to refer a dispute to adjudication”. There is no doubt that section 108(2)(a) allows a party to start two or more adjudications at the same time, or one after another. The question is whether the same adjudicator can deal with more than one adjudication at the same time.

DATL relied on the case of *Willmott Dixon Housing Ltd v Newlon Housing Trust* (2013), in which the court stated “there is nothing in the CIC Rules or otherwise to prevent a party from giving two notices of adjudication, each relating only to one single dispute and for each of those adjudications then to be referred to the same adjudicator... If a party can commence multiple adjudications there is nothing to prevent the same adjudicator from being appointed in a number of those adjudications”.

However, the important distinction between the *Willmott Dixon* case and the current one is that the adjudications in *Willmott Dixon* were conducted under the Construction Industry Council (“CIC”) adjudication rules, not the Scheme.

The court confirmed that where the Scheme applies, an adjudicator cannot be appointed in relation to more than one adjudication at the same time without the consent of both parties. The court acknowledged that this distinction between the Scheme and CIC Rules “*may well be an unhelpful complication*” but stated that the wording of paragraph 8(1) of the Scheme is very clear and cannot be ignored.

DATL also sought to argue that:

- paragraph 8(1) is only intended to apply where an adjudicator is dealing with multiple disputes arising out of the same notice of adjudication; and
- paragraph 8(1) would be contrary to section 108(2)(a) if it applies in respect of multiple adjudications because it would restrict the right to adjudicate at any time.

The court disagreed, finding that paragraph 8(1) does not contain any wording which allows a distinction to be drawn between multiple disputes in a single adjudication and multiple disputes in separate adjudications.

As for the argument that paragraph 8(1) is contrary to section 108(2)(a), the court confirmed “*The parties can adjudicate at any time. All they have agreed here is that, if one party wants to adjudicate more than one dispute at the same time before a particular adjudicator, then that party needs the consent of the other party. That does not unreasonably fetter or impinge upon the underlying right to adjudicate at any time.*”

Consequently, since Beck had not consented to Mr Bastone dealing with the third adjudication at the same time as the second adjudication, the third adjudication was unenforceable but the decision in the second adjudication was unaffected and enforceable.

### The important consequences of this case

Multiple simultaneous adjudications are surprisingly common as they can give an important tactical advantage. The referring party may decide to commence a series of adjudications to impede the respondent’s ability to deal with each adjudication effectively. The respondent may decide to start a counter-adjudication on a separate issue to wrong-foot the referring party. Bearing in mind that a great many adjudications are also governed by the Scheme, this case may have far reaching implications.

Going forward, referring parties need to be alive to the issue raised in this case and ensure that, where adjudications are governed by the Scheme and more than one adjudication will be running at the same time, the consent of the respondent is obtained before the same adjudicator is appointed in a subsequent adjudication. If the respondent’s consent is not obtained, the referring party will have to wait until any current adjudications have finished, or make clear on the application form to the adjudicator nominating body that a different adjudicator must be appointed.

Adjudicator nominating bodies and adjudicators are also likely to need to review their nomination and appointment procedures in light of this important decision.

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