

KCCLA

**Sweet & Maxwell Seventh Annual
Lecture**

What I should like to do to the
Housing Grants, Construction and
Regeneration Act 1996

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Speaker Profile

Jeremy has specialised in construction and engineering law and related matters for most of his career. He has acted in both contentious and non-contentious matters for a broad range of both domestic and international clients, including government bodies, local authorities, housing associations, developers, contractors, subcontractors, professionals and consultants. Typical issues dealt with include contract formation, defects, certification, loss and/or expense, prolongation/delay, determination/repudiation and insolvency.

He is an accredited adjudicator and regularly advises on both the conduct of adjudication and the enforcement of adjudicators' decisions in the courts. Jeremy is also increasingly involved in the dispute resolution opportunities offered by mediation and expert determination as well as adjudication.

Jeremy graduated from York University with an honours history degree before studying for the CPE and Law Society finals at Trent Polytechnic, Nottingham. He was articled at Fishburn Boxer, then spent a period on secondment with Ebsworth & Ebsworth in Sydney. He joined Fenwick Elliott in January 1997 and was made a partner in 2002.

Jeremy organises and regularly addresses the six-monthly Fenwick Elliott adjudication seminars. He works with Robert Fenwick Elliott preparing annual updates of *Building Contract Disputes: Practice and Precedents* and the forthcoming *Building Contract Disputes: Materials and Cases Handbook* due to be published at the end of the year. He edits Fenwick Elliott's monthly legal bulletin, *Dispatch*, and regularly contributes to the *Construction Industry Law Letter* and other journals.

An introduction - why the need for change?

1. As our chairman, His Honour Judge LLOYD QC, commented in one of the well known early enforcement decisions of the Technology & Construction Court ("TCC"):

The Housing Grants Construction and Regeneration Act 1996 (and the Statutory Instrument made under it) constitutes a remarkable (and possibly unique) intervention in very carefully selected parts of the construction industry whereby the ordinary freedom of contract between commercial parties (without regard to bargaining power) to regulate their relationships has been overridden in a number of areas...⁽¹⁾

2. This "remarkable intervention" introduced new payment rules and notices, which are now mirrored in all standard forms of construction contracts and a new forum for dispute resolution - adjudication. It is the intention of this paper to discuss both elements.
3. The HGCR has now been in operation for over six years. In general terms there is no doubt adjudication has been well received by the industry. Statistics produced by Glasgow Caledonian University's Adjudication Reporting Centre show that around 2,000 adjudicators are nominated by Adjudicator Nominating Bodies each year. Of all the disputes which go to Adjudication, only a fraction end up in court and an even smaller fraction end up in a successful challenge to the decision.
4. There is self-evidently no fundamental flaw in adjudication which requires fixing. So why embark now on a talk about changes to the HGCR? The reason is simple - change is in the air. Gordon Brown announced in the last budget that there should be an inquiry into payment and related issues. Sir Michael Latham was asked to lead this inquiry and two Working Groups were established - the Construction Umbrella Bodies Adjudication Task Group under Graham Watts and the Payment Working Group under Richard Haryott.
5. The results of that review were presented to the Government in September 2004. The original plan was that this would lead to a consultation paper followed by responses by the end of the year. Detailed mechanisms for implementation would then be prepared with a view to their being implemented at the end of March 2005.
6. However, the planned reform of the HGCR is now expected to be delayed until after the next election. The consultation paper is not due out until next month at the

⁽¹⁾*Outwing Construction Limited v H Randell & Son Limited* [1999] 15 Constr LJ Vol.3).

earliest and the current plan is for this to be followed by at least a three-month consultation period.

7. This delay perhaps makes it more difficult to predict with any certainty what the results of the review will be. However, as a result of review to date, it is possible to highlight the key issues under discussion. This delay also, of course, gives those who have embarked on a task such as mine, a little more freedom for manoeuvre.
8. Here it is important to remember that there are two distinct parts to the review. The HGCR Act is not just about adjudication but about payment as well.
9. Paragraph 3.59 of section 3 of the March 2004 budget stated:

following concerns expressed by the construction industry on unreasonable delays in payment, the Government will review the operation of the adjudication and payment provision in the Housing Grants, Construction and Regeneration Act 1996 to see what improvements can be made.

10. Nigel Griffiths said:

I am very pleased that someone of Sir Michael's expertise and experience is leading the review in this important area. The government's commitment to identify what improvements can be made to the Construction Act is good news for the construction industry and its clients. It underlines the government's promise to address the problems of disputed, late and non-payment, and will provide assurances that this legislation is working as effectively as possible."

11. Accordingly it seems appropriate to begin with payment issues.
12. A caveat. When considering any changes, the ethos behind the original Latham report should not be forgotten. The aim of the HGCR Act was to move focus away from what was perceived as the adversarial nature of the industry. The aim of any change therefore should be to lead to a decrease in the number of disputes.

Payment

13. Here, three fairly obvious topics spring to mind.
 - (i) Payment and withholding notices;
 - (ii) What happens if you suspend work for non-payment? and
 - (iii) Is it possible to withhold sums against an adjudicator's decision?

(i) Payment and withholding notices

The legislation

14. Section 110 - Dates for payment-states that:

(1) Every construction contract shall

(i) provide an adequate mechanism for determining what payment becomes due under the contract, and when, and

(ii) provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

(2) Every construction contract shall provide for the giving of notice by a party not later than 5 days after the date on which a payment becomes due from him under the contract, or would have become due if

(a) the other party had carried out his obligations under the contract, and

(b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,

specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated...

(3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) or (2), the relevant provisions of the Scheme for Construction Contracts apply.

15. Section 111 - Notices of Intention to Withhold - states that:

(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.

The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.

(2) To be effective such a notice must specify -

(a) the amount proposed to be withheld and the ground for withholding payment, or

(b) if there is more than one ground, each ground and the amount attributable to it, and must be given not later than the prescribed period before the final date for payment.

(3) The parties are free to agree what that prescribed period is to be.

In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts.

(4) Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than -

(a) seven days from the date of the decision, or

(b) the date which apart from the notice would have been the final date for payment, whichever is the later.

What does it mean?

16. The basic requirement for a payment notice is to ensure that the payee knows at an early stage of the payment cycle, the amount which he can actually expect to receive, together with the basis upon which that amount has been calculated. The aim is to make clear at an early stage, any differences between the parties regarding the amount "due". By giving the payee that knowledge, he should then be in a position to start adjudication proceedings to challenge the assessment of the amount "due" relatively quickly, if he disagrees with what is in the payment notice.
17. In looking at the notice requirements contained in section 110(2) and Section 111, one should bear in mind the important distinction between the "due" date for payment and the "final date for payment" which is made for the purposes of the payment provisions generally. These concepts are clearly central to the HGCR. Unfortunately, neither term is defined in the legislation. However, section 110(1)(a) requires that every construction contract shall provide an "adequate mechanism" for determining what payments become "due" under the contract, and when; and section 110(1)(b) provides a similar requirement for a "final date for payment" in relation to any sum which becomes "due". It is to the particular contract that you must therefore look in order to identify when monies become "due" under the contract.

18. What constitutes an “adequate mechanism” under section 110(1)(a) is unclear.⁽²⁾ Lord MacFadyen in *Maxi Construction Management Limited v Mortons Rolls Limited* gave some consideration to this issue. The contractor, Maxi Construction, contended that they were entitled to an interim payment in respect of application no. 10. There was some debate about which terms had been incorporated into the contract, and ultimately the decision turned upon the nature of the contractor’s submission for payment. The contract in question required the employer’s agent to agree the valuation with the contractor before making a claim for payment. There was no obligation on the employer’s agent to agree a valuation within a clear timescale. As this effectively meant that claim for payment could be delayed indefinitely, Lord MacFadyen held that it was an inadequate mechanism. A payment provision that does not provide a clear timescale for dealing with and resolving payment issues is therefore inadequate, but Lord MacFadyen does not offer any guidance as to a test which could be applied in order to determine whether a payment mechanism is adequate or inadequate.
19. The more interesting aspect of section 110 is the payment notice contained in subsection 2. The paying party is supposed to serve a notice on the other party specifying the amount of the payment or the amount to be paid, and the basis of that payment. The notice should identify the amount due under the contract, assuming that the other party had carried out its obligation under that contract, and ignoring set-off or abatement in respect of other contracts. Before the Act came into force, it was not entirely easy to reconcile the somewhat rigidity of the requirement of that notice against the mechanisms and practices in respect of periodic monthly payments most frequently encountered in the construction industry. The JCT family of contracts have adopted the wording of the Act within the payment provisions, while the NEC Contract has adopted a slightly different approach. Under that form of contract the project manager’s certificate is taken to be the payment notice, provided by the project manager on behalf of the employer, to the contractor.
20. What happens if a notice of payment is not served? In nearly all cases nothing. The Act does not say what happens if a Notice of Payment is not served. However, the Act does not make any provision for a failure to issue such a payment notice. Lord

⁽²⁾ In the Hansard debate at the time on 26 February 1996: “The noble Lord, Lord Berkeley, said that lawyers will have a field-day in relation to what constitutes an ‘adequate mechanism’ for payment. The industry covers thousands of different operations and dozens of different types of contract. Payment is already determined in far too many ways for us to come up with a single definition. This legislation requires that payment should be defined in terms of amount and date. That will be a big improvement on what happens at the moment...”

MacFadyen in the case of *SL Timber Systems Limited v Carillion Construction Limited*⁽³⁾ said:

In my opinion the adjudicator fell into error in the first place by conflating his consideration of section 110 and 111 of the 1996 Act...these sections have different effects and the notice which they contemplate have different purposes. Section 110(2) prescribes a provision which every construction contract must contain...But there the matter stops. Section 110 makes no provision as to the consequence of failure to give the notice it contemplates. For the purposes of the present case, the important point is that there is no provision that failure to give a section 110(2) notice has any effect on the right party who has so failed to dispute the claims of the other party. A section 110(2) notice may, if it complies with the requirements of section 111, serve as a section 111 notice (section 111(1)). But that does not alter the fact that failure to give a section 110(2) notice does not, in any way or to any extent, preclude dispute about the sum claimed. In so far, therefore, as the adjudicator lumped together the defenders' failure to give a section 110(2) notice with their failure to give a timeous section 111 notice, I am of the opinion that he fell into error. He ought properly to have held that their failure to give a section 110(2) notice was irrelevant to the question of the scope for dispute about the pursuer's claims.

21. Another case which considered that nature of a section 110(2) payment notice was *VHE Construction plc v RBSTB Trust*⁽⁴⁾. RBSTB employed VHE Construction to carry out remediation work. The contract was a JCT Standard Form with Contractor's Design (1981) edition. That form of contract is somewhat different to the rest of the JCT family, in that clause 30.3.5 provides:

Where the Employer does not give any written notice pursuant to clause 30.3.3 and/or to clause 30.3.4, the Employer shall pay the contractor the amount stated in the application for interim payment.

22. HHJ Hicks QC reviewed these clauses, compared them to section 110(2) and said:

I observe that section 110 operates by requiring there to be certain contractual provision. There are default provisions which apply if the contract itself does not conform, but if (as here) it does so the statute, in an important sense, drops out of the picture. It is, however, necessary to have the terms of section 110 in mind when construing section 111.

It seems that the provisions in the JCT with Contractor's Design goes somewhat further than the requirements of the Act, in that failure of the employer to give a

⁽³⁾ [2001] BLR 516

⁽⁴⁾ (2000) BLR 187

written notice means that the employer is then obliged to pay the contractor the amount of the contractor's application, regardless whether the amount of that application is a sum properly due under the contract. Section 110(1)(a) requires a mechanism that determines what payment becomes "due under the contract", and arguably a contractor's application might include items which are not properly due under the contract.

The problem

23. Unlike with s111, there is no consequence of failing to serve a payment notice. The Latham payment committee noted that if the failure to serve s110 notice went to adjudication, an adjudicator could only conclude that the notice should have been served. Accordingly many people neglect to serve one.
24. The legislation does not state what the consequences of failing to serve a payment notice are or should be. It is an early identification of any differences between the parties regarding the quantification of the amount "due". As stated above, some standard forms, such as JCT With Contractors Design 98, go beyond this by providing that if the payment notice is not served, the amount claimed by the contractor becomes the amount "due" and must be paid in full accordingly (subject to any withholding notice).
25. Although there is no sanction for failure to serve the section 110 payment notice, case law has established that it still remains open to the payer, notwithstanding the failure to serve this notice, to dispute the sums claimed by the payee to be "due" (other than in WCD 98). There is often a difference between the amount "claimed" and the amount "due" under the contract/appointment.
26. The HGCR provides for two consequences of failure to serve a withholding notice. Under section 111 the paying party "may not withhold payment after the final date for payment of a sum due under the contract". Second, Section 112 provides that if the paying party withholds the whole of the amount, or any part of it, beyond the final date without an effective withholding notice, the payee is entitled to suspend performance of its obligations under the contract.
27. The absence of a withholding notice does not preclude a dispute about the amount properly "due", which is quite different from a dispute about whether part or all of a sum of money "due" can be withheld. If there is a dispute about whether a sum claimed is "due", the claimant must prove that the sum claimed is contractually "due", following the mechanism in the contract to establish the amount; if it does

this, then the defendant cannot withhold payment on some separate ground unless it has served a valid withholding notice.

28. Hence there is a distinction between abatement and set-off, the former being something which falls to be considered at the time a payment notice is given, and the latter is something that should be included in a withholding notice. It has clearly been established that if an effective withholding notice is not given in time, the amount “due” under the contract must be paid without deduction. To take one example:

If it were correct that the effect of a failure to serve a valid notice of intention to withhold payment under Section 111 was that the amount of the valuation or invoice was to be regarded as a sum “due under the contract”, the consequence would appear to be that neither an adjudicator nor the court could properly refuse to order payment in full even though it might be perfectly clear for example that the work or the materials claimed for had not been carried out or supplied, or that the wrong rate or price had been claimed or that there had been some other error in the invoice or valuation.⁽⁵⁾

What can be done

29. This is a difficult question to answer. There has been no consensus from the Latham payment group. The options include:
- (i) Do nothing;
 - (ii) Remove s110;
 - (iii) Give s110 some teeth and introduce some form of sanction.
30. The second suggestion is probably the way forward. I agree with the Latham Committee. If the HGCRA is revised to include an “ascertainment date” as to when the whole payment process should start then that should add a great deal of clarity.
31. This second suggestion has the added benefit of removing the concept of a “due date” for payment. Currently if a party makes a claim because they have not yet received a section 110(2) notice, that claim will fail, as no sum is due for payment before the final date and will be subject to withholding before it becomes due for payment. It has been suggested by the Latham group that the due date and the final date should be combined at the final date, the point when it actually becomes

⁽⁵⁾ HHJ Gilliland QC in *Millers Specialist Joinery Company Ltd v Nobles Construction Ltd*

possible to bring a claim. Meanwhile the payment process would begin at an “ascertainment date”.

32. The Latham review concluded it would be better to remove section 110(2) and replace it with a definition of what constitutes an “adequate mechanism for determining what will be paid and when” in the contract, as required by section 110(1) of the Act. That must be right. TeCSA have suggested such a mechanism should include agreement of:

- What amounts are determined;
- When does this determination occur;
- How these amounts are to be calculated/assessed;
- When the payment determined must be made (i.e debt crystallisation). This date would be referred to as the Payment Date;
- The provision of information (who provides what, to whom and in what level of detail);
- What happens in default of operation of the contractual mechanism;
- How are entitlements (e.g. loss and expense and retention) to be determined and paid?.

33. In New Zealand, as the case of *TUF Panel Construction v Capon* demonstrates, a system has been introduced which introduces a simply default mechanism into contracts for any failure to operate the payment mechanism. The amount claimed as due by the payee would become payable if no withholding notice were served. This has certain commercial logic and provides clarity about the status of an application in the legislation, a matter which, somewhat inconsistently up to now, has been left only to contract. Under some contracts at present, no application process is necessary.

34. Of course some safeguards need to be considered. The following has been suggested:

- (i) a notice by the payee as a reminder to the payer to observe the process in the legislation before the date for payment;
- (ii) a provision allowing any sum paid which was not due under the contract to be revised subsequently by an adjudicator, judge or arbitrator or taken into account in a subsequent payment; or
- (iii) allowing an adjudicator to open up whether the amount claimed was due.

35. However, that does not detract from the best way forward.

(ii) Suspension

The legislation

36. Section 112 states:

(1) Where a sum due under a construction contract is not paid in full by the final date for payment and no effective notice to withhold payment has been given, the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of his obligations under the contract to the party by whom payment ought to have been made ("the party in default").

(2) The right may not be exercised without first giving to the party in default at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.

(3) The right to suspend performance ceases when the party in default makes payment in full of the amount due.

(4) Any period during which performance is suspended in pursuance of the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.

Where the contractual time limit is set by reference to a date rather than a period, the date shall be adjusted accordingly.

What does it mean?

37. The only express remedy for failure to comply with the payment provisions contained in the legislation is the right of the payee to suspend performance of his obligations under the contract, which arises if:

- (i) a sum "due" under the contract is not paid in full by the final date for payment; and
- (ii) no effective withholding notice has been given.

38. In those circumstances, the right to suspend will arise. However, subsection (2) provides that such right can only be exercised if the party intending to do so gives to the other party at least 7 days' notice in writing in which he specifies the ground or grounds for suspension.

39. The right to suspend will only arise in respect of the non-payment of a sum "due" under the contract. This is consistent with the wording used throughout the payment provisions as a whole. It follows that considerable care should be taken to ensure that the particular amount upon which the party is relying is indeed "due". It is insufficient that the money has been applied for and not paid. The failure by the paying party to serve a Section 110 notice will not make the amount applied for "due" save where the conditions of contract so provide.
40. Clearly, a suspension in circumstances where the particular amount has not in fact become "due" would be a wrongful suspension disentitling the suspending party from any ancillary rights to extension of time and/or loss and expense. Furthermore, suspension in those circumstances would certainly amount to a breach of contract entitling the other party to damages and is likely to constitute grounds for determination of the contract. Part payment of an amount "due" under the contract is insufficient to disentitle a payee from the right to suspend.
41. The fact that the suspending party can suspend performance of "his obligations", rather than simply "the execution or carrying out of the works" is significant. Where the works are complete, this expression would clearly extend to performance of any obligations under the defects liability period. Whether, however, it would extend to any obligation undertaken pursuant to a collateral warranty agreement or guarantee is unclear. Subject to the precise wording of the document, in principle the right to suspend should not apply in respect of obligations which arise under a warranty or guarantee rather than the underlying contract itself.

The problem

42. The compensation to which the suspending party is entitled under the legislation in the event of a legitimate suspension is not generous. Subsection (4) simply confirms that the suspending party is entitled to an extension of time for completion of the works covering the period during which performance is suspended. That extension would not necessarily extend to the 7-day notice period prior to the right to suspend becoming operative. That is perhaps understandable but nor will it apply to the time which it takes to re-mobilise following the suspension. This is important since the right to suspend ceases on payment of the amount "due" in full.
43. There is nothing to prevent the parties from conferring more extensive rights through the terms of the contract than the legislation provides. By way of example, clauses 25.4.17 and 26.2.9 of the JCT With Contractor's Design 98 form

entitles the contractor to apply for both extensions of time in respect of “delay arising from a suspension...” and for “loss and expense where appropriate, provided the suspension was not frivolous or vexatious”.

The solution

44. An easy one. Adopt the approach of the JCT.

(iii) Withholding against an adjudicator’s decision

The problem

45. Unsurprisingly, a number of attempts have been made to set off against sums awarded by adjudicators. There have been a number of decisions which have suggested that it might just be possible to do this. However, following the case of *Levolux v Ferson*,⁽⁶⁾ it seems fairly clear that this is not the case.

46. In the Court of Appeal, Lord Justice Mantell succinctly summarised the point at issue in the fourth paragraph of his judgment:

A central issue in the appeal is whether, pending final resolution by arbitration or litigation, an adjudicator’s decision should be enforced in derogation of contractual rights with which it may conflict.

47. Ferson were relying on the argument that there were other contractual terms clearly have the effect of superseding, or provide for an entitlement to avoid or deduct from a payment directed to be paid by an adjudicator’s decision, those terms will prevail.

48. Lord Justice Mantell, disagreed:

...to my mind the answer to this appeal is the straightforward one provided by Judge Wilcox. The intended purpose of s. 108 is plain ... The contract must be construed so as to give effect to the intention of Parliament rather than to defeat it. If that cannot be achieved by way of construction, then the offending clause must be struck down. I would suggest that it can be done without the need to strike out any particular clause and that is by the means adopted by Judge Wilcox. Clauses 29.8 and 29.9 must be read as not applying to monies due by reason of an adjudicator’s decision.

⁽⁶⁾ (2003) CILL 1956

49. The language used is reminiscent of the simple straightforward approach of Mr Justice Dyson in *Macob* and the Court of Appeal in *Bouygues*. Thus the situation seems clear, you cannot get round an adjudicator's decision by adopting any set-offs or counterclaims.⁽⁷⁾ However, is that really the case?
50. Under section 111(1), payment may only be retained if a valid withholding notice was issued. Such notice must specify the amounts to be withheld, the grounds for withholding and it needs to be given in a certain time before the date of the final agreement.⁽⁸⁾
51. Section 111(1) HGCRA is not applied consistently by the authorities. The conflict is summarised in the Court of Appeal decision, *Rupert Morgan Building Services Ltd v. David Jervis & Harriett Jervis*.⁽⁹⁾ Jervis withheld payment of part of an interim certificate but failed to issue a withholding notice. Jervis asserted it was still open to them to prove that items of work that made up the claim of Morgan were not done, were duplicated or represented snagging for work that had already paid for. Morgan contended that by virtue of section 111(1) Jervis could not withhold payment.
52. The Court of Appeal pointed out two conflicting strains as to the true meaning of section 111(1) HGCRA, namely the "narrow" and the "wider" approach. The narrow construction, represented by Jervis, is to the effect that if work has not been done, there can be no "sum due under the contract" and, accordingly, section 111(1) does not apply. The wider construction submitted by Rupert Morgan is that work not done cannot affect the due date but that section 111(1) HGCRA applies and, in absence of a timeous withholding notice, the certified sum must be paid⁽¹⁰⁾
53. The Court of Appeal opined for the wider construction and saw the narrow interpretation based on the mistaken presumption that section 111(1) HGCRA determines ultimate and unchangeable positions between the parties in case a withholding notice has not been issued. The court found that the parliamentary aim of section 111(1) HGCRA is simply to safeguard quick payment to the contractor if ordered so in the adjudication decision. LJ Jacob emphasised that the "fundamental thing to understand is that section 111(1) HGCRA is a provision about cash-flow", i.e. in the absence of a withholding notice it operates to prevent the employer withholding the sum due under the contract.

⁽⁷⁾ A similar situation prevails in Scotland. See the decision of Lord Young in *A v B*, 17 December 2002.

⁽⁸⁾ Cf. section 111(2) HGCRA.

⁽⁹⁾ Construction Industry Law Letter 2003, 2051 et seq.

⁽¹⁰⁾ Cf. *Whiteways Contractors v Impresa Castelli* [2000] 16 Construction Law Report 453; *Millers Specialist Joinery v Nobles* Available on www.adjudication.org; *Levolux AT Limited v Ferson Contractors Limited* [2003] Construction Industry Law Letter 2003, p1956 and *Keating on Building Contracts* (7th Edition 2001, para 15-15H).

54. According to the wider view, rights to retain money or to set-off do not serve as a defence against enforcement. A party who has failed to give a timeous withholding notice has to pay the money awarded by the adjudicator first, and can reclaim any overpayment later by way of a further adjudication or if necessary by way of arbitration or litigation. Thus, section 111(1) HGCRA does not affect but only defers existing contractual rights to withhold payment to subsequent proceedings.
55. The wider interpretation fits well into the “pay now, argue later” public policy of the Act. However, a principal disadvantage of the wider construction from the paying party’s point of view is that if it has overpaid it is at risk of insolvency of the contractor. The Court of Appeal acknowledged this mischief but held the risk is one which can be avoided by checking the certificate and giving a timeous withholding notice. Besides, the court indicated that a duty of architects might exist to ensure that a lay employer is aware of the possibility of serving a withholding notice in sufficient detail and good time.
56. However, the outcome in a particular case may largely depend on the specific contract terms. For example in *Shimizu Europe Ltd v LBJ Fabrications Ltd*,⁽¹¹⁾ the contractual payment machinery required the issue of an invoice in order to trigger a period of time leading to the final date for payment. Thus, it was held possible by the TCC to serve a valid withholding notice before the final date for payment which will be effective against the adjudicator’s decision.

What can be done?

57. Is it a step too far to suggest that the HGCRA should be amended to prohibit a party from withholding or setting off against an adjudicator’s decision? If it is, then the only solution is vigilance on the part of the successful (or likely victor) party in adjudication.

Adjudication

58. One of the objectives of the ICE adjudication procedure is “to reach a fair, rapid and inexpensive determination of a dispute arising under the contract” - that is on all fours with the intentions of the original Latham report. Obviously the easiest way to do that is to keep the lawyers out! So inevitably any reform of the HGCRA should start with those sections that seem to most exercise the courts. These are:

- (i) agreements in writing;
- (ii) the meaning of dispute; and
- (iii) natural justice.

(i) Agreements in writing

The legislation

59. Paragraph 107 states that:

(1) The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.

The expressions "agreement", "agree" and "agreed" shall be construed accordingly.

(2) There is an agreement in writing -

- (a) if the agreement is made in writing (whether or not it is signed by the parties),
- (b) if the agreement is made by exchange of communications in writing, or
- (c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means.

What does it mean

60. The most straightforward reading of this clause is that it requires the existence of the contract to be evidenced in writing. However, that is not how the clause has been interpreted by the courts. Everyone will be familiar with the three

⁽¹⁾ CILL 2003 2015

alternative scenarios put forward by the Court of Appeal in *RJT Consulting Engineers Ltd v DM Engineering (NI) Ltd*.⁽¹²⁾ Here HHJ Mackay approached the intent behind the drafting of section 107 as follows:

I decided to look at the problem in what Mr Wood described as a purposive way. I look to see what the Act was meant to do and what the Act is trying to do. It seems to me that if I were to find that it is necessary to have a recitation of the terms of an agreement when the existence of the agreement, the parties to the agreement and the nature of the work and the price of the agreement are plainly to be found in documentary form, where a contract is worth more than three-quarters of a million pounds because the initial agreement was oral, it is not caught by the Act, and it seems to me such an attempt would run contrary not only to the terms of the Act but contrary to my duty to carry out what I believe to be the law at any particular time.

61. Accordingly, it appeared that where there is an abundance of correspondence post contract formation that clearly records the parties' understanding of their agreement that this should be sufficient for the purposes of the Act.
62. In response to that, the Court of Appeal held that the terms of the contract must be evidenced in writing. It is not entirely clear which terms. According to Lord Justice Walker it is all the terms, according to Lord Justice Ward it is all but the trivial terms, whilst according to Lord Justice Auld it is the terms in dispute.
63. The Court of Appeal decision has understandably been largely followed:
 - (i) HHJ Bowsher QC⁽¹³⁾ said that an adjudicator did not have jurisdiction to consider a dispute about an oral variation to a contract that was in writing.
 - (ii) More recently, in *Murray Building Services v Spree Developments*⁽¹⁴⁾ the documents put forward, namely a fax stating that work should commence on site and an order, did not state the contract price for the works, and were insufficient to be a construction contract "evidenced in writing" for the purposes of s.107(2)(c) of the HGCRA.
 - (iii) S107 expressly provides that the criteria can be met if the agreement is "evidenced in writing". A recent TCC decision in this respect was *Connex South Eastern Ltd v MJ Building Services Group plc* (25 June 2004). The parties neither entered into a signed contract nor was there a written order from *Connex* to *MJB* to start the work. However, there was a reference to

⁽¹²⁾ [2002] BLR 217

⁽¹³⁾ *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*

Connex giving an instruction to *MJB* to commence the project immediately in one set of meeting minutes. The minutes were written with the authority of both parties. The judge held that therefore the agreement was “evidenced in writing” pursuant to section 107(4) of the Act.

- (iv) Finally one should consider the consequences of a “battle of forms”. These were highlighted by the Court of Appeal in *Pegram Shopfitters Ltd v Tally Wiejl (UK) Ltd*.¹⁵ During contract negotiation, the parties were involved in a “battle of forms” in which Pegram argued that the contract was under the JCT Standard Form of Prime Cost Contract 1998, while Tally Wiejl said that the contract was based upon a standard form that they had proposed. Lord Justice May held that the premise that the relationship between the parties was governed by a construction contract was wrong. In fact he concluded that the parties had not agreed a construction contract at all. Accordingly, there could be no contract in writing for the purpose of the Act what led to the adjudicator acting outside his jurisdiction.

The problem

64. The problem is a simple one. It is well known that the industry rarely records all the terms of a contract in writing, let alone the material ones. In part this is because the parties are concentrating on getting the job done. However, this decision did potentially open the door to a flood of jurisdictional challenges. Lord Justice Ward in *RJT* recognised this. He acknowledged that it would be: “...a pity if too much ‘jurisdictional wrangling’ were to limit the opportunities for expeditious adjudication...” and he hoped that “adjudicators will be robust in excluding the trivial from the ambit of the agreement and the matter must be entrusted to their common sense”.
65. It is more difficult to comment on whether *RJT* did indeed open the floodgates. I used the word potentially, because the evidence from the current court cases is that natural justice is the issue which is exercising judicial minds to the greatest extent today. One reason for this is that a number of adjudications are being stopped in their tracks. I am currently drafting two Protocol letters because whilst the contracts at issue would be evidenced in writing on any purposive approach, it clearly fails the strict *RJT* test.

⁽¹⁴⁾ [2004] 3 BLISS

⁽¹⁵⁾ Construction Industry Law Letter 2004, 2059 et seq.

What can be done

66. Encourage parties to evidence their contracts in writing. Lord Justice Walker is right to say:

Writing is important because it provides certainty. Certainty is all the more important when adjudication is envisaged to have to take place under a demanding timetable. The adjudicator has to start with some certainty as to what the terms of the contract are.

67. This could be done by one of the parties writing to the other stating:

We hereby confirm that there exists between us for works at...the terms of which are.../the terms of which are contained in the following documents.

68. This was certainly the approach suggested by HHJ Kirkham in the case of *Debeck Ductwork Installation Limited v T & E Engineering Limited*. Here the judge found that:

it seems to me to be quite wrong that a claimant should be entitled to rely on a document which it said contained all of the relevant terms and to ignore and invite the court completely to disregard the additional terms which the defendant says were agreed orally.

It is clear from the judgments in the *RJT* case that the writing must evidence the whole of the agreement. S.107 does not permit the claimants to identify those parts of the agreement on which he relies and ignore the matters which the defendant says were agreed between the parties.

69. In answer to the rhetorical question posed by the claimant as to what a claimant should do in these circumstances if it wished to obtain the benefit of the protection of the Act, the judge commented:

It seems to me that the answers are quite straightforward. A contractor can require a contract to be reduced to writing. A contractor can at some later stage clarify the terms which he believes have been orally agreed and invite the other contracting party to agree that those are indeed the agreed terms of the agreement. The door is by no means shut to a contractor in these circumstances.

70. How practical that approach might be is a difficult question to answer. However, it represents a response to one of the three alternatives put forward by the Latham review about how to tackle this issue:

- (i) Endorse the *RJT* decision. The HGCRA should only apply to contracts where all the terms are in writing or evidenced in writing;

- (ii) Endorse the purposive approach and allow the HGCRA to apply to contracts which are evidenced partly orally and partly in writing;
- (iii) Follow the Australian and NZ approach and extend the HGCRA to wholly oral contracts.

All three possibilities have their own problems.

71. In relation to the first, there is still a large body of construction contracts to which the HGCRA will not apply, because they have not been reduced in writing. That was not the approach of Parliament. It is also possible, as HHJ Seymour QC suggested, for a contract which was once part of the HGCRA to be taken out of the ambit of the Act because of an oral variation to its terms.

72. The third, though in many ways the simplest, is probably a step too far. As HHJ Bowsher QC said in *Grovedeck v Capital Demolition Limited*⁽¹⁶⁾,

Disputes as to the terms, express and implied, of oral construction agreements are surprisingly common and are not readily susceptible of resolution by a summary procedure such as adjudication.

73. My preferred approach is to adopt the approval of Lord Mackay.

(ii) What is a dispute?

The Legislation

74. Section 108 states that:

(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose "dispute" includes any difference.

(2) The contract shall:

- (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
- (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
- (c) require the adjudicator to reach a decision within 28 days of the referral or such longer period as is agreed by the parties after the dispute has been referred;

⁽¹⁶⁾ CILL April 2000

- (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
- (e) impose a duty on the adjudicator to act impartially; and
- (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

What does it mean?

75. In simple terms it means exactly what it says. There is judicial confirmation of this. Mr Justice Dyson in *Herschel Engineering Ltd v Breen Property Ltd*⁽¹⁷⁾ said, albeit about s108(2):

Parliament has decided that a reference to adjudication may be made "at any time". I see no reason not to give those words their plain and natural meaning.

76. There is a relatively small change to s108(1) that has been proposed by the CUB and that is to amend the section so that it reads:

A party to a construction contract has the right to refer a dispute under or arising out of the contract.

77. The reason for this is simply to address the problem which has been raised that strictly the original wording of s108(1) might not include claims for damages for breach of contract.⁽¹⁸⁾

What are the problems?

78. There are two:

- (i) How can you tell if a dispute has arisen?
- (ii) Is every dispute that arises under a contract for construction operations really suitable for adjudication?

Has a dispute arisen?

79. The problem is that there is uncertainty as to the test to be applied to whether a dispute has arisen. I say that even though, as will be seen, both tests have been applied by judges when it comes to considering whether or not there was a dispute.

⁽¹⁷⁾ (2000) BLR 272

80. There have been a number of cases and a number of different results and approaches. Whilst these will be familiar it is worth repeating a few. It is certainly true that care is needed not just to adequately identify the matters in dispute, but also to identify the precise scope of the supporting arguments. A change to the detail supporting a claim may well result in a different claim. The other party must then have the opportunity to consider, and accept or reject it. In summary:
- (i) A dispute is a claim that has been asserted by one party and rejected by the other. Failure to respond within a reasonable time will amount to a rejection *Fastrack v Morrison*.
 - (ii) A claim must amount to an assertion by one party rather than a mere request for others to value the works *Maxi v Morton Rolls*.
 - (iii) If parties are arguing about a variety of issues then it is difficult to argue that no dispute exists *British Waterways Board*.
 - (iv) A dispute can contain many matters. The breadth of the dispute depends on the assertions and rejections in existence before the Notice to Refer, and those that are referred to in the Notice itself *Fastrack v Morrison, Chamberlain Carpentry v Alfred McAlpine*.⁽¹⁹⁾
 - (v) The complexity of the matters in dispute and volume of disorganised documents in support of those matters does not mean that there is no “dispute” *Chamberlain Carpentry v Alfred McAlpine, Balfour Kilpatrick v Glauser*.
 - (vi) Is the dispute referred the one that has been claimed and rejected? *Edmund Nuttall v Carter*.
 - (vii) Has the contractual machinery run its course? *Durtnall v Kaduna*.
81. The general test to determine the meaning of dispute was laid down by the Court of Appeal in *Halki Shipping Corporation v Sopex Oils Ltd*,⁽²⁰⁾ an arbitration case. The court applied an “ordinary meaning” of the term and held a dispute included any claim which the other party refused to admit or did not pay whether or not there was an answer to the claim in fact or in law. Briefly put, a dispute therefore requires a demand and either a rejection of the demand or silence. This rationale

⁽¹⁸⁾ It is unclear whether this was really a problem. It was not in Scotland - see *Diamond v PJW*

⁽¹⁹⁾ Note that McAlpine’s adjudication rules provided that the referring party should be responsible for all the costs incurred on a full indemnity basis. This was unless McAlpine were the referring party, in which case both parties were to bear their own costs. I think this is against the spirit of the HGCRA and, although this is not a point covered in this paper, a change needs to be made to outlaw this and similar practices.

⁽²⁰⁾ [1988] 1 Weekly Law Reports 726.

was adopted for the purposes of adjudication in *Fastrack*.⁽²¹⁾ However, a number of cases, for example *Kaduna*, sit uneasily with it.

82. The TCC followed the same line in *London & Amsterdam Properties Ltd v Waterman Partnership Ltd*.⁽²²⁾ *Waterman* argued that no dispute existed since they had never been given a proper opportunity for any consideration or negotiation of the claim because vital information as to causation and quantum had not been provided prior to adjudication. On the other hand, *LAP* contended that a dispute had arisen since they had presented a claim for payment based upon liability and quantum aspects and *Waterman* had failed to pay. HHJ Wilcox held that the reasoning in *Halki* as to what constitutes a dispute in arbitration proceedings applied with equal effect in adjudication proceedings. He therefore accepted that, in view of *Waterman's* rejection to pay, there was a dispute in respect of both matters. A further aspect, connected to the foregoing problem, is the question whether the dispute referred to adjudication is the one that has actually been claimed and rejected.
83. However, as the *Orange* and *Beck v Peppiatt* cases show, it is not quite that simple. In *Orange EBS Ltd v ABB Ltd*, the case concerned an issue of whether a dispute had arisen for the purposes of adjudication, in circumstances where the referring party submitted its final account on 2 December 2002 and gave its notice of adjudication on 6 January 2003. Judge Kirkham referred to the definition of dispute as the "simple test in *Halki*".
84. The claim had not been admitted or paid at the time that *Orange* commenced the adjudication process after the Christmas break. On that basis a dispute had arisen by the time the adjudication started. The adjudication process was therefore valid.
85. Shortly before *Orange* was decided, however, Judge Forbes gave judgment in *Beck Peppiatt Ltd v Norwest Holst Construction Ltd* (20 March 2003). That case, like many recent adjudication enforcement cases, was also concerned with the question of whether a dispute had arisen prior to the adjudication.
86. In considering the point, Judge Forbes cited a passage from a judgment of His Honour Judge Lloyd QC:

For there to be a dispute for the purposes of exercising the statutory right to adjudication, it must be clear that a point has emerged from the process of discussion or negotiation that has ended and that there is something that needs to be decided.

⁽²¹⁾ [2000] Building Law Reports, 168 et seq.

⁽²²⁾ Construction Industry Law Letter 2004, 2071 et seq.

87. Judge Forbes held that this statement of principle was entirely consistent with the approach taken by the Court of Appeal in *Halki*. Although he also observed that each case must be determined on its facts, there are those that disagree.

What can be done?

88. Maybe the only way round this impasse is to adopt a more stringent test, namely that of Lord Saville in *Hayter v Nelson* [1990] 2 Lloyds Rep 265, where the Judge refused to give summary judgment and stayed the matter because of the existence of an arbitration clause. Lord Saville said that the word "dispute" should be given its ordinary meaning and went on to set out what some would say the infamous "boat race" definition of a dispute effectively any form of disagreement would suffice.

...to have an argument over who won the university boat race in a particular year. In ordinary language they have a dispute whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that one is right and the other is wrong, does not and cannot mean that the dispute does not in fact exist, because a man can be said to be in dispute if he is right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them...

89. This, of course has the advantage of certainty.
90. However, you can hear the complaints from a mile off. How much easier it would be for a party to (using a phrase beloved by opponents of adjudication) ambush another.
91. I think that the *Halki* test is too narrow. It is also uncommercial. The HGCRA has widely borrowed from the law of arbitration and it is useful to consider the steps set out by Mr Justice Jackson in the recent case of *Amec v The Secretary of State for Transport*, where in the context of an arbitration, the Judge had to consider whether a dispute had arisen.
- (i) The word dispute should be given its normal meaning;
 - (ii) Despite the number of cases, there are no hard-edged legal rules as to what is and what is not a dispute. The accumulating judicial decisions have merely produced helpful guidance;

- (iii) The mere fact that one party notifies the other of a claim does not automatically and immediately give rise to dispute. A dispute does not arise until it emerges that the claim is not admitted;
- (iv) There are many circumstances from which it may emerge that a claim is not admitted. There may be an express rejection, there may be discussions from which objectively it can be said that the claim is not admitted, or a party may prevaricate thus giving rise to the suggestion that it does not and omit the claim. Silence may well also give rise to the same inference;
- (v) The period of time for which a party may remain silent depends upon the facts of the case and the contract. Where the gist of the claim is well known, a short period may suffice. Where the claim is notified to an agent of a respondent who has an independent duty to consider the claim, a longer period of time may be required;
- (vi) If a party imposes a deadline for responding to the claim, the deadline does not have the automatic effect of curtailing what otherwise would be a reasonable time for responding. However, it is something for a court to consider;
- (vii) If the claim as presented is so nebulous and ill-defined that a party cannot sensibly respond to it, neither silence, nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.

92. Judge Kirkham has been criticised for deciding a dispute arose between early December and early January. Here, applying these tests led to the conclusion that a five-day deadline given in a letter to respond was a reasonable one. The deadline was imposed for a good reason, namely that the limitation period was about to end. In addition, as a result of previous deadlines it was clear that the deadline would not cause Amec any further difficulty. It was self-evident that Amec would not be prepared to admit liability for massively expensive defects on a viaduct. This solution may not be ideal, since there is always scope to apply the facts of any situation. However, it seems to be a fair and reasonable approach to take.

Complex claims

93. The wording of s108 is clear. Any dispute can be referred, however complex. Should every dispute be referred?
- (i) Final accounts;
 - (ii) Other complex-document heavy disputes;
 - (iii) Professional negligence;

(iv) Difficult areas of law.

94. Is every dispute suitable for adjudication? A lot of me would like to say yes. I have seen quite complex final account disputes successfully and quite fairly dealt with via adjudication. Indeed, is it really a problem? Are the complaints coming from disappointed parties? How can you decide what is a complex dispute? Just because the numbers are small does not mean the matter is going to be a simple one

95. There is, I think it is fair to say, some judicial unease about more complex disputes being referred to adjudication; in *London & Amsterdam v Waterman*, Judge Wilcox commented that:

182. Where, as in this case the dispute is complex, involving the evaluation of the activities of a number of parties over a long period of time and issues of professional negligence and where the project is substantially complete the post-mortem is best suited to arbitration or litigation.

183. Even where an adjudicator is prepared to firmly and impartially exercise the powers given to him under the Scheme to investigate control and manage the hearing of a dispute there may well be cases which because of their complexity and/or the conduct of a Claimant are not susceptible of being adjudicated under the Scheme fairly and thus impartially.

184. The Scheme does not envisage that there should be a provisional resolution of a dispute by an adjudicator at all costs.

185. That would be far greater an injustice and mischief than that which the HGCR was enacted to remedy.

What should be done?

96. On balance - nothing. I do not think that you can impose limits on a party's right to adjudicate and there are a number of safeguards which should serve to protect parties:

(i) Is there dispute? For example, in a professional negligence claim, has the responding party been given a reasonable opportunity to respond to the claim? If a party has not seen or had an adequate chance to respond to an expert report, there can be no dispute.

(ii) Does the adjudicator have sufficient time to come to a decision? The courts have made it clear that it is open (or even incumbent on an adjudicator) to

say if he needs more time - and to stress that if he is not given that time he will not be able to reach a fair decision.⁽²³⁾

- (iii) Common sense. A tricky one I know - we all use it of course...! It is becoming increasingly clear that some of these adjudications are incredibly time-consuming and expensive. One of the parties in the *Amec v Whitefriars* case spent some £100k. The courts in that case commented that had the parties gone to arbitration (and note the development of the 100 short form procedure) then they would have achieved a final result in a shorter time frame and possibly at significantly cheaper cost.

(i) Natural Justice

97. The two key clauses are s108(2)(e) and (f).

What does it mean?

98. Currently, the major defence against enforcement of an adjudicator's decision is the commonly used argument of breach of natural justice. Natural justice is not a defined term but it requires a tribunal that is acting in a judicial manner to be fair in all of the circumstances. There are two limbs to this requirement. The first limb refers to the prevention of bias to the effect that the adjudicator as decision-maker should not have, nor appear to have, any direct interest in the dispute. Section 108(2)(e) HGCRA partly embodies this requirement by imposing the duty to act "impartially". Secondly, there must be a fair hearing which means that where one party makes an allegation against the other, that other party should have reasonable opportunity of answering the allegations made.

99. It was accepted in *Disclaim Project Services Limited v Opec Prime Developments Limited*⁽²⁴⁾ that the rules of natural justice apply to adjudication within the limitations imposed by Parliament. The decisions tend to focus on three core elements of natural justice which are:

- (i) Sufficient ability of parties to present their case.
- (ii) Sufficient consideration of parties' submissions by the adjudicator.
- (iii) Reasonable opportunity of the parties to comment on material supplied by third parties to the adjudicator.

100. Examples include the following:

- (i) August 2000. *Discaim v Opecprime*. Adjudicator spoke to one party on the telephone without communicating the contents to the other: BREACH.

⁽²³⁾ And here possibly, the adjudicator could be given power to see directions from the courts.

⁽²⁴⁾ [2001] Building Law Reports, 285 (paragraph 39).

- (ii) February 2001. *Glencot Development and Design Co. Ltd. V Ben Barrett & son (Contractors) Limited.* ⁽²⁵⁾ Adjudicator became involved in mediating some of the issues between the parties: BREACH.
- (iii) April 2002. *Balfour Beatty v Lambeth.*⁽²⁶⁾ Adjudicator delayed analysis work without giving the parties the opportunity for further comment: BREACH.
- (iv) January 2003. *Try v Eton House*⁽²⁷⁾ Adjudicator made an assessment of delay entitlement based on analysis of agreed delay expert: NOT A BREACH.
- (v) May 2003. *Shimizu v LBJ.*⁽²⁸⁾ Adjudicator rejected the position of both parties that they had contracted on the basis of a letter of intent, and did not give the parties the opportunity to make further submissions on the question of contract formation: BREACH.
- (vi) October 2003. *Dean & Dyball v Kenneth Grubb.*⁽²⁹⁾ Adjudicator took evidence from witness in the absence of the other party: NOT A BREACH.
- (vii) December 2003. *London & Amsterdam v Waterman.*⁽³⁰⁾ Adjudicator allowed late evidence from referring party: BREACH.
- (viii) December 2003. *Costain v Strathclyde.* Strathclyde claimed that the adjudicator had obtained professional advice but failed to disclose the results to the parties. BREACH.
- (ix) April 2004. *Buxton Building Contractors Limited v Governors of Durand Primary School.* The adjudicator failed to consider relevant information submitted by them in relation to a cross-claim. By doing so “serious irregularities in the adjudication procedure” were constituted. Accordingly, the decision was “inherently unfair”. BREACH.
- (x) July 2004. *A&S Enterprises v Kema.* Adjudicator made adverse comments on the failure of an individual to attend a meeting. BREACH.

What is the problem?

⁽²⁵⁾ February 2001, (2001) BLR 207

⁽²⁶⁾ <http://www.adjudication.co.uk/cases/bblambeth.htm>

⁽²⁷⁾ www.adjudication.co.uk/cases/try.htm

⁽²⁸⁾ CILL 2015

⁽²⁹⁾ [2003] EWHC 2465, CILL 2045 at paragraph 53.

⁽³⁰⁾ [2003] EWHC 3059 (TCC) Judge Wilcox.

101. Adjudicators have become hamstrung. S108(2)(f) is becoming redundant as adjudicators are reluctant to take the initiative.

What is the solution?

102. Ensure the adjudicators are up to it. A lot has been said about the need for adjudicators to receive adequate training. That has to be a given. A requirement should be introduced to ensure that adjudicators are of a suitable standard and receive regular and continuing training.
103. However, although this was the first point I thought of when I started considering this paper, in particular because I felt that adjudicators were becoming increasingly constrained, it might well be that the situation will change as a result of recent guidance from the courts. That decision is from the Court of Appeal - *Amec v Whitefriars*. This was a case where it was suggested that a decision should be declared to be invalid on the grounds of apparent bias. The test for ap[pare]nt bias is whether a fair-minded and informed observer, having considered all the circumstances which have a bearing on the suggestion that the decision-maker was biased, would conclude that there was a real possibility that he was biased. ⁽³¹⁾

It is easy enough to make challenges of breach of natural justice against an adjudicator. The purpose of the scheme of the 1996 Act is now well known. It is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement. The intention of Parliament to achieve this purpose will be undermined if allegations of breach of natural justice are not examined critically when they are raised by parties who are seeking to avoid complying with adjudicators' decisions. It is only where the defendant has advanced a properly arguable objection based on apparent bias that he should be permitted to resist summary enforcement of the adjudicator's award on that ground.

104. In the first adjudication the adjudicator has taken legal advice which he had not disclosed to the parties. In the second adjudication, the argument was on a different point, so that the legal advice can have no impact.
105. Other arguments were raised. The adjudicator had a telephone conversation with the solicitor acting for Amec, he obtained advice relating to this jurisdiction and there was the possibility of a claim made by Whitefriars against Mr Biscoe. Mr Justice Dyson agreed that conversations between one party and the tribunal in the absence of the other party should be avoided. Communications should ordinarily be in writing with copies to all parties. However, after consideration of the

conversation he decided that there was nothing in the circumstances of this conversation, which arose out of an innocuous telephone call to Mr Biscoe's office, which would lead the fair-minded and informed observer to conclude that what was said would give rise to a real possibility of bias.

106. The adjudicator's jurisdiction was challenged. Unsurprisingly, as Mr Justice Dyson remarked, he took legal advice. The adjudicator notified the parties that he had been advised by Clyde & Co and set out the gist of the advice that he had received. Whitefriars' solicitors made submissions on the jurisdiction issue, but did not persuade the adjudicator not to proceed with the adjudication. You might as well ask where the problem was. Apparently it was that the adjudicator decided he had jurisdiction and then disclosed the gist of that advice. The court held that Whitefriars had such an opportunity in the present case and took advantage of it. Mr Justice Dyson continued:

A more fundamental question was raised as to whether adjudicators are in any event obliged to give parties the opportunity to make representations in relation to questions of jurisdiction. I respectfully disagree with the judge's view that the requirements of natural justice apply without distinction, whether the issue being considered by the adjudicator is his own jurisdiction or the merits of the dispute that had been referred to him for decision. The reason for the common law right to prior notice and an effective opportunity to make representations is to protect parties from the risk of decisions being reached unfairly. But it is only directed at decisions which can affect parties' rights. Procedural fairness does not require that parties should have the right to make representations in relation to decisions which do not affect their rights, still less in relation to "decisions" which are nullities and which cannot affect their rights. Since the "decision" of an adjudicator as to his jurisdiction is of no legal effect and cannot affect the rights of the parties, it is difficult to see the logical justification for a rule of law that an adjudicator can only make such a "decision" after giving the parties an opportunity to make representation...Nevertheless, I consider that, where time permits, adjudicators would be well-advised to give the parties the opportunity to make representations on an issue of jurisdiction: they may receive valuable assistance which will help them to decide whether they should proceed with the adjudication. And that is what happened in the present case. But I do not consider that an adjudicator who decides to proceed with an adjudication is acting in breach of natural justice if he does not allow the parties that opportunity.⁽³²⁾

I think this is an important decision which will give adjudicators some comfort.

107. There is a postscript. By letter dated 12 November 2003, Whitefriars' solicitors asked Mr Biscoe to rescue himself on the grounds that his ability to act impartially and unbiased in this matter had been compromised inter alia because he may be

⁽³¹⁾ Porter v Magill, [2002] 2 AC 357

⁽³²⁾ Porter v Magill, [2002] 2 AC 357

liable for some of their clients' costs. Those costs were considerable, some £100,000 in legal costs in contesting the first adjudication, and a further £28,000 in the defending the proceedings issued by AMEC to enforce the first adjudication. The basis for the claim was as damages for proceedings with an adjudication wrongly. This notion was given short shrift. Paragraph 26 of the Scheme provides:

The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith...

108. There was no question of bad faith here. Indeed, Mr Justice Dyson suggested the tactic amounted to "rather crude bullying". He noted:

If the threat of proceedings against a tribunal were, without more, to lead to a conclusion of apparent bias, it would be open to a party to undermine the integrity of the Scheme simply by making such a threat.

Conclusion

109. I began by saying that it was generally thought that the HGCR had worked well. It has been seen that my suggestions for change are limited, which rather goes to reinforce that general feeling. Yes some changes need to be made, but by and large not too many.

110. It of course goes without saying that any changes that do take place will be featured in *Building Contract Disputes: Materials and Cases Handbook*,⁽³³⁾ which is coming to a book shop near you very soon.

⁽³³⁾ You knew there had to be a plug somewhere!