Fenwick Elliott

RECENT DEVELOPMENTS AND FUTURE PROSPECTS

11TH ADJUDICATION UPDATE SEMINAR

Jeremy Glover

9 May 2005

THE SAVOY HOTEL, LONDON

Introduction

1. The purpose of this paper is to provide an update on the more important developments in relation to adjudication since our last seminar in October of last year. It is in two parts:

   (i) A look at the recent government Consultation Paper on the Housing Grants Act; and

   (ii) A review of some of the more interesting recent cases from the Court of Appeal, Technology and Construction Court, Scotland and New Zealand.

THE GOVERNMENT CONSULTATION PAPER

2. In November of last year, I gave a talk to the King's College Construction Law Association entitled "What I should like to do the Housing Grants, Construction and Regeneration Act 1996". The premise behind the talk was the review undertaken by Sir Michael Latham and his two teams, the construction umbrella bodies adjudication task group under Graham Watts and the payment working group under Richard Harryott into the Housing Grants, Construction and Regeneration Act ("HCGRA").

3. In that paper, I considered the following topics:

   (i) Payment:

   - Payment and Withholding Notices.

- What happens if you suspend work for non-payment?
- Is it possible to withhold sums against an Adjudicator's decision?

(ii) Adjudication:

- Agreements in writing;
- The meaning of dispute; and
- Natural justice.

4. On 22 March 2005, the Construction Minister Nigel Griffiths and the Welsh Assembly Government Minister for Social Justice and Regeneration, Edwina Hart launched a joint Consultation Paper based on that Latham review entitled "Improving payment practices in the construction industry".[1]

5. The Consultation Paper was said to be an "*initial consultation*" and was aimed at improving the ability of parties to a construction contract to:

(i) Reach agreement on what should be paid and when, given the work done under the contract or, where they cannot agree, to make an informed referral to, or response at, adjudication;

(ii) Manage cash flow and enable completion of work on the project in the event of problems such as payment default, or insolvencies elsewhere in the supply chain; and

(iii) Refer disputes to adjudication without disincentives such as avoidance, frustration or unnecessary challenge.

6. The aim of the Consultation was said to be:

> to build a general consensus on the way forward. Should clear support for changes to the legislation be identified, there will then be consultation on draft amendments.

7. It will be interesting to see whether there is clear support for those proposed changes. Nigel Griffiths acknowledged that there was a lack of consensus in the construction industry particularly in respect of the payment provisions. He recognised that:

[1] This can be found on the DTI website at www.dti.gov.uk/construction/hgcra/hgcralead.htm.

> the construction sector does not speak with one voice…. What constitutes fair payment is the subject of considerable debate and views differ depending where a firm may feature in the construction supply chain.

8. Sir Michael Latham has taken a positive view on the Consultation Paper and indeed congratulated the Government for being:

> very bold in taking on matters where there was no consensus between industry sectors in original discussions. There were strong feelings on both sides of the debate, and the government has tried to reflect all views rather than ignoring them. It also goes further than I expected to address payment.

9. However, a number of some notable proposals and suggestions that were made during the initial review have not been pursued. As a starting point I would like to consider how the six points I referred to in my original talk fared.

10. The logical place to start is payment. Of the 14 proposals to be found in the Consultation Paper, 9 relate to this issue.

Payment & Withholding Notices

The problem as I saw it:

11. What was the point of Section 110 of the HGCRA?

12. Section 110 states:

> (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 sub-section (1) or (2), the relevant provisions of the Scheme for Construction Contracts apply.

13. In other words, every construction contract should provide an adequate mechanism for determining what payment became due and when – something that sounds straightforward enough. In addition, every construction contract should provide for the giving of a notice by a party not later than 5 days after the date on which the payment became due setting out the amount (if any) of the payment proposed to be made and the basis on which that amount was calculated. The notice should identify the amount due under the contract, assuming that the other party had carried out its obligations under that contract and ignoring set off or abatement in respect of other contracts.

14. However, the problem was really what happened if a notice of payment was not served. In most cases absolutely nothing. The HGCRA did not say what happens if a payment notice was not served. It made no provision or sanction for the failure to issue such a notice.

15. Some contracts did consider the consequences. Clauses 30.3.3 and 30.3.5 of the JCT with Contractor's Design 1998 provide that if the payment notice was not served, the amount claimed by the contractor became the amount due and must be paid in full accordingly (subject to any withholding notice).

16. This issue has, of course, been considered in a number of court cases[2], all of which conclude that where the Employer fails to issue the requisite notices pursuant to the Contract, then the Contractor is entitled to be paid, even if the Employer has grounds to withhold payment.

The solution I proposed:

17. There were three possible options:-

[2] E.g. *Watkin Jones& Son Limited v. Lidl UK GMBH,* 2002] CILL 1847 or *MJ Gleeson Group PLC v. Devonshire Green Holding Limited* TCC, unreported, 19 March 2004.

(i) Doing nothing;

(ii) Removing Section 110; or

(iii) Giving Section 110 some teeth and introducing some form of sanction.

18. I favoured the second suggestion. It was cleaner.

19. 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.

20. That must be right. TeCSA suggested such a mechanism should include agreement of:

(i) What amounts are determined;

(ii) When this determination occurs;

(iii) How these amounts are to be calculated/assessed;

(iv) When the payment determined must be made (i.e debt crystallisation). This date would be referred to as the Payment Date;

(v) The provision of information (who provides what, to whom and in what level of detail);

(vi) What happens in default of operation of the contractual mechanism;

(vii) How are entitlements (e.g. loss and expense and retention) to be determined and paid?.

21. In New Zealand, a system has introduced which introduces a simple 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.

What has been recommended?:

22. The Consultation Paper proposes:

(i) that the requirement for the notice currently referred to in Section 110(2) should be removed; and

(ii) that the content of an adequate payment mechanism in Section 110(1) be defined to include:

- terms on what amounts constitute the payment under the contract;
- when a payment is to be assessed under the contract;
- how the amounts are to be determined;
- the period of time that should elapse from the "assessment date" before the final date for payment; and
- what information is to be communicated between the parties.

What happens if you suspend work for non-payment?

The problem as I saw it:

23. Under Section 112 of the HGCRA, the payee had the right to suspend performance of his obligations under the contract if a sum "due" under the contract is not paid in full by the final date for payment and no effective withholding notice had been given. That right could only be exercised if the party intending to suspend gave at least 7 days' notice in writing, specifying the ground or grounds for suspension.

24. The problem was that the compensation to which the suspending party is entitled under the legislation in the event of a legitimate suspension was not generous. Subsection (4) simply confirmed that the suspending party was entitled to an extension of time for completion of the works covering the period during which performance was suspended. An extension did not necessarily extend to the 7-day notice period prior to the right to suspend becoming operative, and did not apply to the time which it might take to re-mobilise following the suspension. This was important since the right to suspend ceased on payment of the amount "due" in full.

25. Some standard forms do deal with this point. A good example can be found in clauses 25.4.17 and 26.2.9 of the JCT with Contractor's Design 1998 where delay arising from a suspension is listed as a relevant event and the right to claim loss and expense incurred as a consequence is provided for, provided the suspension was not frivolous or vexatious.

The solution I proposed:

26. Quite simply, I suggested that the approach of the JCT family of contracts should be adopted.

What has been recommended:

27. The consultation paper has recommended that the statutory right to suspend performance should be supplemented with a right to reclaim the reasonable costs of suspension and remobilisation, provided nothing compromised the ability of a payer to reject a claim for such costs where a suspension was unjustified.

28. Slightly more controversially, it has been suggested that insofar as the Scheme for Construction Contracts was concerned, the reasonable costs of suspension and re-mobilisation should not exceed 5% of the value of the payments in default. An appropriate delay in re-mobilisation ought not to exceed 7 days.

Withholding Against an Adjudicator's Decision

The problem as I saw it:

29. Although Court of Appeal Decisions such as *Levolux v Ferson* had left the impression that the attempt to set-off against sums awarded by adjudicators would fail, attempts were still being made to try and get round adjudicator's decisions by adopting set-offs or counterclaims.

30. To many this is contrary to the "pay now, argue later" public policy of the HGCRA.

31. The *Levolux* case was recently considered in the case of *Balfour Beatty v Serco Limited*[3]. Here, Serco engaged BB to design, supply and install variable message signs at locations on motorways. By an adjudication decision, BB were awarded an extension of time providing a revised completion date of 7 June 2004 and also the sum of £620,000 plus VAT. Serco refused to pay saying that as at 6 December 2004 the works were not practically complete. Thus it was entitled to levy liquidated and ascertained damages for the period after 7 June 2004. This sum exceeded the sum payable to BB.

32. Mr Justice Jackson noted:

> 39. In Ferson Contractors Ltd v Levolux AT Ltd [2003] BLR 118, there was a sub-contract in the GC/Works/Sub-Contract form. A dispute arose between the main contractor (Ferson) and the sub-contractor (Levolux) concerning the efficacy of a withholding notice served by Ferson.

[3] 21 December 2004.

The adjudicator held that the withholding notice did not comply with s.111 of the Construction Act. Accordingly, he ordered Ferson to pay to Levolux the sum of £51,659 which was due on application for payment No 2. Ferson declined to pay this sum on the ground that it had determined the sub-contract. The ground for determination was that Levolux has suspended works as a result of non-payment. His Honour Judge Wilcox gave judgment enforcing the adjudicator's award, and that judgment was upheld by the Court of Appeal. The appeal proceeded on the basis that the sub-contract had been invalidly determined. Mantel LJ gave the leading judgment, with which the other two members of the court expressed agreement. At paragraph 30 Mantel LJ said this:

> "But to my mind the answer to this appeal is the straight forward one provided by Judge Wilcox. The intended purpose of s. 108 is plain. It is explained in those cases to which I have referred in an earlier part of this judgment. If Mr Collings and His Honour Judge Thornton are right, that purpose would be defeated. 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."

40. I derive two principles of law from the authorities, which are relevant for present purposes.

> (1) Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision, provided that the employer has given proper notice (insofar as required).
>
> (2) Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the employer is entitled to set off liquidated and ascertained damages against sums awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case.

41. In the present case, for the reasons set out in paragraph 5 of this judgment, the adjudicator has not reached any definitive conclusion as to the total extension of time which is due to Balfour Beatty. No specific entitlement to liquidated and ascertained damages follows logically from the adjudicator's decision. It is strongly disputed between the parties whether any liquidated and ascertained damages are due and payable. Paragraph 10 of Appendix A to Schedule 23 of the Contract requires both parties to give effect forthwith to the adjudicator's decision. The effect of paragraph 13 of Appendix A is that Balfour Beatty is entitled to the relief and remedies set out in the adjudicator's decision and, moreover, is

entitled to summary enforcement of such relief and remedies. These contractual provisions are consistent with the provisions of Part 2 of the Construction Act and with the Parliamentary intention referred to in the authorities.

33. Accordingly, Serco was not entitled to set-off against an adjudicator's decision.

The solution I proposed:

34. Amend the HGCRA to prohibit a party from withholding or setting off against an Adjudicator's decision.

What has been recommended:

35. Nothing.

36. This may well be because the case law is quite clear on this point. 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,*[4] 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.

37. However, the review has proposed prohibiting the right of cross-contract set-off, albeit keeping the right to equitable set-off where "a close relationship exists between the dealings and transactions which gave rise to the respective claims".

Payment – The Other Issues

38. The other recommendations of the Consultation Paper are as follows:

    (i) Payment framework:

    - Redefining the content of withholding notices under Section 111 so that they give details of the amounts (if any) remaining to be paid.
    - Restricting the use of pay-when-certified clauses.

    (ii) Other payment proposals:

    - Making pay-when-paid clauses ineffective in cases of upstream consultancy proceedings.

[4] CILL 2003 2015.

- Allowing stage payments under the Scheme for Construction Contracts to be made from materials in advance of their arrival on site.

39. Moving on to adjudication issues.

Agreements in Writing

The problem as I saw it:

40. The key here is the Court of Appeal decision on the meaning of Section 107 of the HGCRA in *RJT Consulting Engineers Limited v DM Engineering (NI) Limited*[5]. Section 107 says that for that contract to fall within the adjudication decision of the HGCRA, must be evidenced in writing.

41. At first instance 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.

42. 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.

43. The Court of Appeal disagreed and held that all the terms of the contract must be evidenced in writing.

44. However it was not entirely clear which terms they had in mind. 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.

45. The Court of Appeal decision has understandably been largely followed. For example, HHJ Bowsher QC[6] said that an adjudicator did not have jurisdiction to consider a dispute about an oral variation to a contract that was in writing.

[5] (2002) CILL 1841.
[6] *Carillion Construction Ltd* v *Devonport Royal Dockyard Ltd* – (2003) CILL 1976

46. More recently the Court of Appeal Judgment was clarified by Mr Justice Jackson in the case of *Trustees of the Stratfield Saye Estate v AHL Construction Limited* [7].

47. Here the Trustees sought a declaration that an adjudicator did not have jurisdiction because there was no agreed scope of works in writing. The contract had been agreed on a 'cost plus' basis because the exact work content could not be fully identified. Shortly after AHL had commenced work, the Trustees cancelled the contract and AHL claimed for loss of profit on the cancelled work. In the adjudication, AHL were awarded £75,000 but the Trustees refused to pay.

48. Mr Justice Jackson held that all the express terms of a construction contract had to be in writing if the HGCRA was to apply. He said that "the reasoning of Auld LJ, attractive though it is, does not form part of the ratio of *RJT*." However it was not all good news for the Trustees as the Judge found on the facts that the contract and the scope of works were sufficiently evidenced in writing by letters, drawings and minutes of a meeting.

The problem

49. The problem therefore 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".

The solution I proposed:

50. 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.
>
> 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, HHJ Kirkham in the case of *Debeck Ductwork Installation Limited v T&E Engineering Limited* commented:

[7] 6 December 2004.

> 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.

51. 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.

52. All three possibilities have their own problems.

53. 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 Bowsher 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.

54. 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*[8],

> 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.

55. My preferred approach is to adopt the approach of HHJ Mackay.

What has been recommended?:

56. Nothing.

57. For the time being at least, I suspect the *Serco* decision will be seen as clarifying where the law stands.

[8] CILL April 2000.

What is a Dispute?

The problem as I saw it:

58. How can you tell if a dispute has arisen?

59. 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;
> (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.

60. Two schools of thought developed.

61. In *Beck Peppiatt Ltd. v Norwest Holst Construction Ltd* the then head of the TCC Forbes J had to consider this issue. He took the middle way saying:

> In my view the law is satisfactorily stated by His Honour Judge Lloyd QC in his unreported decision of Sindall v. Solland dated June 2001, in which he said:
>
> > '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 which needs to be decided.'
>
> As it seems to me, that is a statement of principle which is easily understood and is not in conflict with the approach of the Court of Appeal in Halki. I would have been very surprised if it was. It has to be borne in mind that, as observed in Halki, 'dispute' is an ordinary English word which should be given its ordinary English meaning. This means that there will be many types of situation which can be said to amount to a dispute. Each case will have to be determined on its own facts and attempts to provide an exhaustive definition of 'dispute' by

reference to a number of specified criteria are, in my view, best avoided. I therefore reject the suggestion that the word "dispute" should be given some form of specialised meaning for the purposes of adjudication.

62. What I did not like was the use of the stringent test, used by that of Lord Saville in *Hayter* v *Nelson* [1990] 2 LLoyds Rep 265, where the Judge refused to give summary judgment and stayed a matter to arbitration 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…

63. Whilst, this, of course has the advantage of certainty, 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.

The solution I proposed:

64. To me the *Halki* test is too narrow and uncommercial. However in many ways the solution has now largely been neatly set out by the Courts.

65. First in October 2004, *CIB Properties Ltd v Birse Construction Ltd*, HHJ Toulmin CMG QC in considering whether there was a dispute, said that:

> the test is whether, taking a common sense approach, the dispute has crystallised. Even after it has crystallised, the parties may wish to have further discussions in order to resolve it. Whether or not it has, in fact, crystallised will depend on the facts … including whether or not the parties are in continuing and genuine discussions … to try to resolve the dispute.

66. Then, in Mr Justice Jackson in the recent case of *Amec* v *The Secretary of State for Transport*[9], in the context of an arbitration, had to consider whether a dispute had arisen. He proposed the following steps:

    (i) The word dispute should be given its normal meaning;

[9] 11 October 2004.

(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.

67. Judge Kirkham in the case of *Orange EBS Ltd v ABB Ltd*[10] has been criticised for deciding that 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

[10] (2003) BLR 323.

scope to apply the facts of any situation. However, it seems to be a fair and reasonable approach to take.

68. The *Amec* decision went to the Court of Appeal who in March of this year confirmed their agreement to the steps put forward by Mr Justice Jackson.

69. Mr Justice Jackson's propositions had previously endorsed by Lord Justice Clarke in the Court of Appeal as being *"broadly correct"* [(11)] Lord Justice Clarke in particular endorsed the general approach that:

> while the mere making of a claim does not amount to a dispute, a dispute will be held to exist once it can reasonably be inferred that a claim is not admitted.

70. Lord Justice Clarke agreed that Mr Justice Jackson was right not to agree with the suggestion in some of the case law that a dispute can only arise once negotiation or discussion had concluded and stated that it appeared to him that:

> negotiation and discussion are likely to be more consistent with the existence of a dispute, albeit an as yet unresolved dispute, than with an absence of a dispute.

Natural Justice

The problem as I saw it:

71. 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.

72. Were Adjudicators becoming hamstrung by the attacks made on their independence?

73. Examples include the following:

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

[11] *Collins (Contractors) Limited v Baltic Quay Management (1994) Limited – 7 December 2004.*

(ii) February 2001. *Glencot Development and Design Co. Ltd v Ben Barrett & Son (Contractors) Limited.* [12] Adjudicator became involved in mediating some of the issues between the parties: BREACH.

(iii) April 2002. *Balfour Beatty* v *Lambeth.*[13] Adjudicator delayed analysis work without giving the parties the opportunity for further comment: BREACH.

(iv) January 2003. *Try* v *Eton House*[14] Adjudicator made an assessment of delay entitlement based on analysis of agreed delay expert: NOT A BREACH.

(v) May 2003. *Shimizu* v *LBJ*.[15] 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*.[16] Adjudicator took evidence from witness in the absence of the other party: NOT A BREACH.

(vii) December 2003. London & Amsterdam v Waterman.[17] 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 "intrinsically 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.

The solution I proposed:

74. 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 given. Requirements to be

[12] February 2001, (2001) BLR 207.
[13] (2002) CILL 1873.
[14] (2003) CILL 1982.
[15] CILL 2015.
[16] [2003] CILL 2045 at paragraph 53.
[17] [2003] (TCC) Judge Wilcox.

introduced to ensure that adjudicators are of a suitable standard and receive regular and continuing training. This is by and large being done.

What has been recommended?:

75. Nothing. However there has been recent guidance from the Court of Appeal in the case of *Amec Capital Projects Ltd v Whitefriars City Estates Limited* [18].

76. 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 see 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.[19]

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

[18] 28 October 2004.
[19] *Porter v Magill*, [2002] 2 AC 357.

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

79. 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.

Adjudication – the Other Issues

80. The Consultation Paper also made the following recommendations:

(i) Preventing the use of trustee stakeholder accounts to suspend an adjudicator's award pending litigation other than when the recipient is involved in insolvency proceedings.

(ii) Providing the adjudicator with the power to rule on certain aspects of his own jurisdiction and providing a right to payment in cases where the adjudicator stands down due to lack of jurisdiction.

(iii) Providing the adjudicator with the right to overturn final and conclusive decisions where these are of substance to interim payments only.

(iv) Extending the adjudicator's immunity under the HGCRA to claims by third parties.

(v) Applying provisions on Adjudicator independence in the scheme for construction acts to all adjudications under section 108 of the HGCRA.

Adjudication - costs

81. The Consultation Paper also noted that government legislation is intended to deal with certain aspects regarding the costs of the adjudication process namely:

(i) Parties to an adjudication should bear their own legal and other costs while the costs of the process are referred to the adjudicator to be decided as part of his decision of the dispute;

(ii) Outlaw contractual provisions which have any other effect – ie as in the *Tolent case;* and

(iii) Provide that, once a dispute has been referred to an adjudicator, if both parties also wish to refer the legal costs they incur in the process, then adjudicator should also award these as part of his decision of the dispute.

Matters not dealt with by the Consultation Paper

82. Of the various issues in the Latham Review of September 2004, there were a number which were not referred to at all in the Consultation Paper. These include:

(i) Introducing a single adjudication procedure for all adjudications. This, in particular, must be a missed opportunity;

(ii) The widening of the scope of the HGCRA to apply to all residential buildings-contracts, PFI contracts and contracts for operations related process-plant[20];

(iii) As mentioned above, widening the meaning of Section 107 of the HGCRA in relation to "contracts evidenced in writing";

(iv) Setting up any statutory limit on payment period lengths; and

(v) Providing a right to redirect payments owed to insolvent contractors to their creditor sub-contractors and suppliers.

RECENT CASE LAW

Since our last seminar there have been more than the usual number of cases. Some of these have already been commented on. I set out below a selection of a few of the more interesting other cases.

What Happens If A Decision Is Late?

83. Well, in England, following the TCC decisions in *Barnes & Elliott Ltd v Taylor Woodrow* and *Simons Construction Ltd v Aardvark Developments Ltd*, this issue is to all intents and purposes resolved. The failure to produce a decision within the required timescale will not necessarily deprive the adjudicator of jurisdiction.

[20] This is no surprise given the comments of Nigel Griffiths in October 2004 when he responded to the Latham Review.

84. However, in March 2005, the Inner House of the Court of Session came to a different conclusion. In the case of *Ritchie Brothers (PWC) Ltd v David Phillip (Commercials) Ltd*[21]. DPL resisted enforcement saying that the decision was reached after the expiry of the relevant time period. At first instance, Lord Eassie had held that underlying paragraph 19(3) of the Scheme, was the intention that once started, the adjudication process should be seen through even if the decision is delivered late. The expiry of the 28-day period is not enough to say that the adjudicator's jurisdiction has come to an end. In other words, the provisions of the Scheme relating to the time within which the adjudicator must reach his decision are directory not mandatory.

85. However, by a 2:1 majority, the Scottish Court of Appeal judges have reversed the decision. LJ Clerk felt that the key question was whether, despite the expiry of the 28-day time limit, the adjudicator retained his jurisdiction. The true interpretation of paragraph 19 was that jurisdiction ceased on the expiry of the 28-day time limit, unless it had already been extended in accordance with the Scheme. The court had had to choose between two possibilities, that jurisdiction expired at the end of the 28th day or that it continued after that date and remained in existence until one of the parties should serve an adjudication notice under paragraph 19(2) of the Scheme. LJ Clerk felt that this interpretation reflected the natural meaning of paragraph 19(1)(a). It was a simple and straightforward approach. Paragraph 19(1) says that an adjudicator "shall reach his decision not later than" 28 days after the date of the Referral Notice (unless extended).

86. Of course, as the court noted noted that the situation in this case need never have arisen. Adjudicators are specialists who should be able to assess the prospects of reaching a decision within 28 days as soon as they receive the papers. If there is any doubt, the adjudicator should at once seek the referring parties' consent to an extension of time or, if need be seek the consent of both parties. Accordingly, the decision of the adjudicator was set aside.

Can A Respondent Introduce New Information?

87. The *William Verry (Glazing Systems) v Furlong Homes Ltd*[22] case raises two issues which have been greatly debated in adjudication circles. Firstly, what is a responding party entitled to produce in its defence of an adjudication and secondly what disputes are suitable for adjudication.

88. Furlong commenced a "kitchen sink final account adjudication". The adjudication notice and the referral were drafted very widely and covered all aspects of the final account. One of the matters referred was Verry's entitlement to an extension of

[21] 25 March 2005.
[22] 13 January 2005.

time. Having been granted an extension of time to 2 February 2004, Verry submitted a claim for an extension of time down to 24 June 2004. Furlong responded that Verry had provided nothing that would add to the extension of time already granted. Furlong's adjudication notice requested a decision that the extension of time granted by Furlong to 2 February 2004 was correct. Alternatively, the adjudicator was asked to decide the appropriate extension of time.

89. In its response, Verry claimed an entitlement to an extension of time to 27 July 2004. Furlong objected to this, stating that Verry were putting forward a new extension of time claim. The adjudicator decided that Verry could rely upon the matters referred to in the extension of time submission in its response and he decided that Verry were entitled to an extension of time to 27 July 2004. In the enforcement proceedings, Furlong contended that the adjudicator did not have jurisdiction to consider Verry's "new claim" for an extension of time.

90. HHJ Coulson QC decided that there were three questions to answer. First, whether the extension of time part of the response was a new claim for an extension of time which had not been made before. Second, if it was, whether Verry were entitled to rely upon it in an adjudication. Third, if Verry were not entitled to rely upon it in principle whether they were able to rely upon it in fact because, by their conduct, Furlong gave the adjudicator the necessary jurisdiction.

91. In answering the first question, the Judge formed the view that Verry's response was a fuller explanation for the claim originally made on 2 July 2004. The fact that a new extension date was sought, reflected the fact that work continued on site after 2 July 2004 and down to 27 July 2004.

92. However, even if the claim were new, the adjudicator was entitled to have regard to it. This was a matter of commercial commonsense. If Furlong had wanted to restrict the scope of the adjudicator's investigation they could have defined the dispute as being whether or not on the basis of the letter of 2 July 2004 and the information contained within it, Verry were entitled to an extension of time beyond 2 February 2004.

93. The Judge then considered the authorities on the question of what can and should constitute a dispute. In Carter v Nuttall it was held that "when a party had had an opportunity to consider the position of the opposite party and to formulate arguments in relation to that position, what constitutes a dispute between the parties is not only a claim which has been rejected... but the whole package of arguments advanced and facts relied upon by each side..." In contrast, in AWG v

Rockingham, it was held that "...an Adjudicator is not confined to considering rigidly only the package of issues, facts and arguments which are referred to him."

94. Here the Judge said that even if the extension of time claim was a new one, it formed part of the dispute which was referred by Furlong. In addition, Verry were responding to this claim, they did not start the adjudication. They had to defend themselves as best they could against the suggestion that their entitlement to an extension of time was to 2 February 2004 and that liquidated damages should be deducted for the period of delay thereafter. They were not to be taken as having agreed that in some way they could only defend themselves with half a shield relying on some matters of fact but not others. According to the Judge, Verry were entitled to take whatever points they liked to defend themselves and the adjudicator was obliged to consider all such points.

95. Finally the Judge was clear in his disapproval of complex final account disputes being referred to adjudication. This is a criticism that is becoming more common from the Courts. However it was not something which was part of the the Construction Act review.

Can every dispute be decided by adjudication?

96. HHJ Coulson QC's, concerns were discussed more fully in *CIB Properties Ltd v Birse Construction Ltd*[23]. Here, following an adjudication where CIB were awarded over £2million, Birse resisted enforcement claiming both that there was no dispute and that the size and complexity of the dispute meant it could not be resolved fairly through adjudication. HHJ Toulmin CMG QC recognised that this was the first time such a challenge had been made.

97. CIB sent a claim, accompanied by an expert report and 15 lever arch files, on 28 July 2003. CIB sought payment within 30 days. Fifty-two files of supporting documents were said to be available for inspection. The Judge noted that as it was holiday time, had the 30-day deadline been strictly adhered to, and had a referral to adjudication followed, he might well have concluded that Birse had not been given a sufficient opportunity to consider the claim and respond and that thus a dispute had not yet arisen.

98. However, matters progressed. There was a mediation. As the Judge said, "both sides were jockeying for tactical advantage in a way which is apparently permitted in adjudication but is not permitted in current litigation practice". The Judge was satisfied that the claim made on 28 July 2003 was disputed by Birse and that the

[23] 19 October 2004.

dispute had crystallised by 14 November 2003, the date of the adjudication notice. In the 15 intervening weeks there had been a proper opportunity for Birse to consider the claims and provide a constructive response. However, Birse had attempted to manoeuvre tactically to try and ensure that the dispute had not crystallised and many of Birse's problems were caused by this decision to play for time.

99. Birse raised a number of complaints based on the size and complexity of the dispute. Birse relied on the value of the claim, over £12 million plus VAT, that 49 files were filed with the Referral Notice (including 16 witness statements), there were a further 52 files related to another claim, and a further 55 files were served during the course of the adjudication. Birse said they were denied the opportunity to investigate properly and/or assess claims made against it or to test the assertions made. Birse was therefore not in a position to defend the case made against it.

100. In his decision, the adjudicator noted the guidance given by HHJ Wilcox in the *London & Amsterdam* case where the Judge said that the Scheme did not envisage that there should be a provisional resolution of the dispute by an adjudicator at all costs. That would be far greater an injustice than that which the HGCRA was enacted to remedy. The adjudicator, here, said that as a result, he decided that if he came to the conclusion that he had not sufficiently appreciated the nature of any issue referred to him, he would not give a decision on that issue. That said, he was confident that he understood the principal issues here and that he had been able to do substantial justice between the parties in arriving at his decision.

101. The Judge said that the test is not whether the dispute is too complicated, but whether an adjudicator is able to reach a fair decision within the time limits allowed by the parties. Here, to reach a fair decision, more than 42 days were needed and the adjudicator sought and obtained the agreement to extensions of time. This enabled him to reach a fair conclusion, having given both parties proper opportunity to put their case. The extension of time meant that the adjudicator was able to reach a decision after making a due and impartial enquiry. There is a general right under section 108(1) of the HGCRA for a party to a construction contract to refer a dispute to adjudication and the adjudicator must be able to reach a decision impartially and fairly within the time limits stipulated. The obvious correlation here is that a party is not bound to agree to extend time beyond the time limits laid down in the HGCRA - the question is what if such a refusal renders the adjudicators' task impossible?

Can you really bring an adjudication at any time?

102. At first instance in *Connex South Eastern Ltd v MJ Building Services Group plc*, HHJ Havery QC had decided, amongst other things, that MJB had the right to refer the dispute between the parties to adjudication notwithstanding that the agreement had been discharged by the acceptance by MJB of Connex's repudiation of that contract. In particular, Connex were aggrieved that whilst this acceptance had taken place in November 2002, the adjudication did not commence until February 2004. Indeed, before the CA, Connex submitted that this was an abuse of process. In other words the phrase "at any time" to be found in Section 108 of the HGCRA had its limits.

103. LJ Dyson he noted with interest the comments of Lord Lucas, during the parliamentary debate which lead to the HGCRA, who said that the words "at any time" were necessary since otherwise:

> it will be possible for a party bent on avoiding adjudication to insert a term which would allow notice to be given within an unreasonably narrow window, and we cannot allow that…I am of course aware that some have doubted the wisdom of allowing parties to refer a dispute…long after work under the contract has ceased. However, as long as there is any possibility of disputes arising…parties will have to live with the fact that an adjudicator's decision may be sought. Indeed, there may be times, even at such a late stage, where it is desirable to have a quick and cheap procedure that can produce an effective temporary decision…this will not prevent parties from seeking a permanent decision through arbitration or the courts.

104. Connex said that if, as a result of the passage of time, it is no longer possible to have a quick and cheap adjudication, then it was an abuse of process to permit an adjudication to take place. The CA disagreed. The phrase "at any time" meant exactly what it said. It would have been possible to restrict the time within which an adjudication could be commenced by reference to the date when work was completed or the contract terminated. This was not done. Subject to circumstances where the right to refer might have been waived, there was nothing to prevent a party from referring a dispute to adjudication at any time.

Parties Are Still Taking Technical Points

105. In *Palmac Contracting Limited v Park Lane Estates Limited*[24], the parties contracted on a JCT with Contractor's Design 1988 Edition. Clause 39A provided that disputes could be referred to adjudication. Application No. 20 on 28 October 2004 applied for the gross sum of £748,447.64. No payment was made and a withholding notice was not issued.

[24] 22 March 2005.

106. Palmac notified Park Lane that they intended to refer the dispute to adjudication. The notice was sent by sent by Special Delivery to the usual place of business and an application was made to the RICS for an adjudicator. The first Notice of Adjudication did not reach Park Lane, and so a second Notice was served. On the same day a further application was made to the RICS to re-nominate the same adjudicator.

107. Park Lane argued that there was no dispute at the time of the reference because service was not in accordance with the contract. Further, the contract required the notice to be issued before an application was made to the RICS. Finally, there was a breach of natural justice in that the adjudicator asked the claimant to provide evidence in respect of which interim payments had been made and how they had been made.

108. HHJ Kirkham held that the first issue as to service had been put to the adjudicator, and therefore he had jurisdiction to decide the matter and the parties were bound by it. In any event, there was an expectation between the parties that applications would be made by email and so service of application no. 20 was effective.

109. In respect of the second issue she noted that whilst jurisdiction arose from the notice, such that an appointment should be made after the notice, the contract did not stipulate that an application to the RICS should be made after the Notice of Adjudication had been served. Section 108 did not prescribe the timing of the notification with regards to the Notice of Adjudication. However, there was no question of ambush here because of the failed attempts to commence adjudication. *Park Lane* clearly knew that Palmac intended to refer the matter to adjudication. Palmac therefore followed the procedure envisaged by the contract.

110. Finally, the adjudicator had not ignored the agreed position with regards to the service of application payment no. 20. He merely invited submissions and did not obtain information from one party without notifying the other nor did he construct one party's case. The adjudicator therefore did not breach the rules of natural justice. The claimant was therefore entitled to summary judgment.

Another Adjudicator Suing For His Fees

111. In *Cartwright v Faye*[25], Mr Cartwright had acted as an adjudicator in respect of a dispute between Miss Lydia Faye and Colonial Preservation & Construction Limited pursuant to a JCT Building Contract. He had been appointed by RICS and issued his terms and conditions to the parties. He apportioned his fee on a 50/50 basis, and

[25] 9 February 2005.

issued an invoice on 13 March 2002 to both parties. Colonial Preservation & Construction Limited paid, but Miss Faye refused to pay on the basis that:

(i) He was not entitled to claim a fee from Miss Faye because she was not a party to the contract;

(ii) The adjudication rules were not incorporated into the contract;

(iii) She was a consumer and could rely upon the Unfair Terms in Consumer Contract Regulations Act 1999; and

(iv) He acted outside of his jurisdiction and was therefore not entitled to be paid.

112. District Judge Rutherford found that if the contract incorporated the adjudication rules, then the adjudicator was entitled to enforce the terms relating to payment of his fee. Miss Faye had signed the contract and was therefore bound by it;

113. He then considered the Unfair Terms in Consumer Contracts Regulation Act 1999 and in particular whether there was a significant imbalance between the parties. He came to the conclusion that the term was not an unfair term. Finally, the adjudicator was acting within his jurisdiction so was entitled to his fee. The Judge therefore ordered Miss Faye to pay the fee, together with interest, the court fee and the expenses of the witnesses.

Care must be exercised where there are successive adjudications

114. The case of *Emcor Drake & Scull Ltd v Costain Construction Ltd & Anr*[26] revolved around an application to enforce the decision of an adjudicator in favour of a claimant sub-contractor employed to undertake electrical services as part of the refurbishment of the Great Western Hotel, Paddington. Costain said the decision was made without jurisdiction and/or in excess of jurisdiction and/or that the reference was an abuse of the adjudication process such that the decision should not be enforced. *EDS* had made three claims to the defendant contractor for extensions of time under the sub-contract. The first claim was referred to adjudication and went in favour of Costain. However third claim was also referred to adjudication. It is this decision which was the subject of the court proceedings case.

115. The first argument was that the decision in the first adjudication encompassed and decided the one-off issue between the parties as to what extension of time the claimant was entitled to under the sub-contract. The second adjudicator did not have jurisdiction in relation to that issue, and so that decision was void for want of

[26] 29 October 2004.

jurisdiction. This was rejected as a "non-sequitur". The second argument was that, in reaching his decision, the adjudicator both considered facts and matters that had been adjudicated upon and reached conclusions contrary to those reached in the first adjudication. In so doing he exceeded his jurisdiction. The court stated that the first adjudicator had not decided that the claimant was not entitled to any extension, but that it had not discharged the burden of showing entitlement on the ground of critical delay. The first award did not make an unequivocal statement that the claimant caused delay elsewhere and the second adjudicator decided that, although it had caused delay, it had not been critical. The first adjudicator had not confirmed the previous extension of time and so the second adjudicator had jurisdiction to decide upon the matter.

116. The court also held that it was not objectionable for the second adjudicator to consider the facts and matters considered in an earlier adjudication. In so doing he had not been invited to and nor did he, trespass on the first adjudicator's decision. Finally, it was said that the second adjudicator's jurisdiction should be restricted to considering extensions after the period considered by the first adjudicator. This was rejected because the first arbitrator had not decided that the claimant was not entitled to any extension of time.

117. It was common ground that an adjudicator must abide by a decision on a point decided in an earlier adjudication between the same parties. Here, the judge decided that a revised and more detailed extension of time claim had not already been decided; not just because the contract permitted more than one request for an extension of time, but also because the first adjudicator had not considered the extension of time because he came to the conclusion that the claim was not made out at all.

118. Crucially, what is of particular relevance here is this case demonstrates that where decisions are equivocal or where they do not deal precisely with the issue raised in the present adjudication, then they are capable of being heard within the jurisdiction of the adjudicator.

119. Therefore, it is clear that a party's ability to adjudicate a second time in relation to issues will depend largely on the wording of the first adjudicator's decision.

120. This case highlights the distinction, when adjudicating a second time, of a previous adjudication decision where a party has simply not proved its case and the adjudicator therefore does not make a finding and the case where an adjudicator does make a finding and a party, faced with an unfavourable decision against it, seeks to adjudicate again on the same point.

121. Here, EDS were able to pursue their larger extension of time claim which encompassed the first extension of time claim because the second adjudicator deliberately kept away from the narrow point decided upon by the first adjudicator.

Effect of section 111 of the HGCRA

122. The case of *Machenair Limited v. Gill & Wilkinson Limited*[27] was a dispute about a Final Account. Gill raised a Counterclaim including damages for delay. Machenair suggested that Gill were not entitled to pursue this Counterclaim at all. The reason given was that following receipt of various applications for payment, Gill failed to serve a Withholding Notice in accordance with Section 111 of the HGCRA. Machenair suggested that this meant that the Counterclaim was absolutely barred. Mr Justice Jackson sitting in Leeds disagreed. He confirmed that the effect of Section 111 of the HGCRA was to exclude the right of set-off. It did not bar for all time any otherwise valid claims which might exist against a party.

The first Court of Appeal Case from New Zealand[28].

123. On 3 June 2004 the contractor, Canam served a payment claim (PC15) on George in accordance with the CCA. Under the contract and the CCA, George was required to provide a payment schedule to Canam by 15 June 2004. On 15 June 2004 George's representative (Rider Hunt Auckland Ltd) issued a valuation report to George, which was copied to Canam. Further, by faxes dated 10 and 20 and 23 June 2004, George issued various invoices to Canam setting out its claims against Canam for alleged damage, uncompleted work and delays.

124. Canam asserted that George had until 15 June 2004 to submit a valid payment schedule under the CCA and it failed to do so, therefore George were liable to pay the amount set out in Canam's payment claim pursuant to the CCA. George contended that the valuation and the three invoices submitted by them comprised a valid payment schedule which was submitted to Canam in time. In any event, George claimed that it had until 22 June 2004 (according to its contract) to claim any deductions it was entitled do and did so.

125. At first instance, Associate Judge Christiansen in holding that the various documents submitted by George did not amount to a Payment Schedule under the CCA said:

> The Act provides for a contractor to make progress claims by way of a 'payment claim' which must be paid or responded to with a 'payment schedule'. In the absence of this, the contractor becomes entitled to a payment claim as a debt. The ' payment claim' and 'payment schedule' scheme is designed to ensure timely payment and cashflow. It follows that the scheme is not

[27] 14 March 2005.
[28] *George Developments Ltd v Canam Construction.*

designed to determine for all time whether the amount claimed is properly owed to the contractor. A principal who fails to issue a payment schedule will still be entitled to pursue an arbitration or other claim against the contractor, it must pay the contractor's claim in the meantime.

126. Judge Christiansen then set out the requirements for a valid payment schedule under the CCA as follows: A payment schedule must:

> 1. Be in writing; 2. Identify the payment claim to which it relates; and 3. Must indicate a scheduled amount.

127. He went to state:

> If the scheduled amount is less than that claimed amount, the payment schedule must indicate: 1. The manner of calculations; 2. Reasons for the difference; and 3. Reasons for withholding payment.

128. The Judge went on to state that Section 21 of the CCA (which sets out the requirement of a payment schedule), contemplates that a payment schedule should be comprised in a single document, but even if that it is not the case, then there must be a sufficiently identified relationship and cross-referencing of those composite parts to leave a contractor in no doubt about what is being addressed and the fact that those matters are appropriately being addressed in response to the payment claim.

129. Judge Christiansen also outlined the requirements of a valid payment claim. In stating that the requirements of Section 20 of the CCA (which sets out the requirement for a payment claim) were also cumulative and mandatory, he noted that:

> A payment claim must: be in writing; contain sufficient details to identify the construction contract to which the payment claim relates; identify the construction work and the relevant period to which the payment claim relates; indicate a claimed amount and due date for payment; indicate how to pay that claimed amount; and state that it is made under the Act.

130. This particular issue of whether PC-15 was a valid payment claim was went to the Court of Appeal. In particular, George argued that the claim did not identify the construction work done in the relevant period to which the payment claim related but was a cumulative claim which included claims from prior periods; and that the claim failed to indicate the manner in which the payee calculated the claimed amount.

131. The Court of Appeal dismissed George's appeal and agreed with Associate Judge Christiansen's conclusion that PC-15 was a valid and enforceable claim. It was

observed that technical quibbles should not be allowed to vitiate a payment claim that substantively complied with the requirements of the CCA.

132. The Court of Appeal noted that the purpose of the CCA was to facilitate regular and timely payments between the parties to a construction contract and that "technocratic" or "formalistic" interpretation of the CCA would undercut Parliament's intent that cash flow be maintained.

133. The *Canam* case provides a useful insight into the requirements of valid payment claims and payment schedules under the Court of Appeal in New Zealand. Parliament intended the CCA to maintain cashflow and it seems that the courts will interpret the provisions of the CCA so as to achieve its object of speeding up payments in the construction industry.

134. Payment claims which 'substantively' comply with the requirements of the CCA will not be set aside because of technical quibbles or "technocratic" interpretations. On the other hand, the onus will be on Employers/Principals to ensure that their responding payment schedules are in the correct form and on time. In particular, payment schedules need to make it absolutely clear (by means of cross referencing etc) that it is responding to a particular payment claim.

Conclusion

135. The proposals made within the Consultation Paper are modest and it is by no means likely that they will all be adopted. It is also unclear just how long the whole process will take.

136. In the interim there continue to be a steady series of decisions from the courts which need to be kept constantly under review.

9 May 2005
Jeremy Glover
Fenwick Elliott LLP