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ADJUDICATION LAW I: ENFORCEMENT AND JURISDICTION

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Introduction

The Housing Grants Construction and Regeneration Act 1996 ("the Act") has been with us now since 1998. At least 195 cases have been reported, although many of them unofficially, in respect of predominantly adjudication but also the payment mechanisms. This paper focuses on three main aspects. First, a short overview and a review of some general developments in the area. Second, issues relating to enforcement. Finally, a review of some jurisdictional challenges.

Part II of the Act came into force on 1 May 1998. Many of the standard forms were amended so that they were "Act" compliant in respect of entitlement to stage payments, identification of an amount due, the serving of withholding notices, the introduction of a right to suspend performance for non-payment, the prohibition of a pay-when-paid clause (save in respect of insolvency) and finally the incorporation of adjudication provisions. At the time that the Act was brought into force, it was adjudication that created the vast majority of interest. Initial questions about the enforceability of an adjudicator's decision were swept away in the first case of *Macob Civil Engineering Limited v Morrison*

Construction Limited (12 February 1999), but few of the early decisions dealt with payment mechanisms or the payment notices in the Act.

1. Overview and recent developments

Adjudication

Once the Act was brought into force on 1 May 1998, the key question was whether the courts would enforce a decision of an adjudicator. Section 108(3) of the Act states that the “contract shall provide that the decision of the adjudicator is binding ...”. At the time, there was some concern about the appropriate way to enforce a decision of an adjudicator, and in particular whether summary judgment would be available or whether the court would hear the matter afresh in a full trial thus defeating the purpose of adjudication. The first case of *Macob Civil Engineering Limited v Morrison Construction Limited* swept away those concerns. The Hon. Mr Justice Dyson delivered his judgment on 12 February 1999 confirming that the decision of an adjudicator is enforceable summarily regardless of any procedural irregularity, error or breach of natural justice. The judge adopted a purposive approach to the construction of the word “decision”, refusing to accept that the word should be qualified.

The judges in the majority of the cases following *Macob* adopted a similar approach, enforcing adjudicators’ decisions that had found their way to the courts. The robust and purposive approach was reinforced by the first Court of Appeal decision of *Bouygues v Dahl-Jenson (UK) Limited*. The Court of Appeal delivered its judgment on 31 July 2000, upholding the first instance decision of Mr Justice Dyson. They confirmed that the purpose of the adjudication procedure set out in section 108 of the Act was to provide the parties to a construction contract with a speedy mechanism for resolving disputes, which although not finally determinative, could and should be enforced through the courts by way of summary judgment.

More importantly, even where an adjudicator had answered the question put to him in the wrong way, the court would not interfere with that decision but would enforce it. The decision of an adjudicator was and is being treated much like the decision of an expert resulting from an expert determination. Providing that an expert, and by analogy an adjudicator, has asked the right question then the decision will be enforced regardless of any errors made along the way. Only if the expert and therefore the adjudicator were to ask the wrong question would the decision be a nullity, because the adjudicator would not have jurisdiction to answer that “wrong” question.

The robustness of the courts in dealing with a great many of the jurisdictional challenges and the court’s willingness to enforce adjudicators’ decisions by way of summary judgment must certainly have contributed to the enormous growth and widespread use of adjudication. Recent research suggests

that the number of adjudications arising from nominations by the Adjudicator Nominating Bodies (“ANBs”) amount to just over 6,000 in the UK.⁽¹⁾ This figure arises purely from ANB appointments. Many ad hoc adjudications are now taking place, and the figure may well be far in excess of 6,000, perhaps being as high as around 10,000.⁽²⁾ The courts have now heard at least 170 cases relating solely to adjudication. A simple comparison between the figures suggests that adjudication is successful and effective. In other words, arguably only 1% of the disputes referred to adjudication progress to the courts for the purposes of enforcement.

DTI Consultees on “Improving Adjudication in the Construction Industry”

On 14 August 2001 the DTI issued a proposed amendment to the Scheme for Construction Contract, and also draft guidance to adjudicators. The draft guidance had been prepared by the Construction Umbrellas Bodies Adjudication Task Group. The consultation draft guidance to adjudicators was to be “treated as suggestions to adjudicators rather than rules”. It was primarily drafted for adjudications conducted pursuant to the Scheme, but the guidance is generally applicable. The guidance note covers seven main areas:

1. Natural Justice;
2. Challenges to jurisdiction;
3. Unmanageable documentation;
4. Intimidatory tactics;
5. Reasons for the Decision;
6. The parties’ costs; and
7. Clerical mistakes or errors.

The guidance reminds adjudicators that natural justice is not a defined term, but requires that any tribunal (including an adjudication tribunal) that is acting in a judicial manner must be fair in all of the circumstances. There are two main limbs to this requirement. First, bias in that the decision-maker should not have, nor appear to have, any direct interest in the dispute.

Second, there must be a fair hearing. Basically, this means that where one party makes an allegation against the other, that other party should have a reasonable opportunity of answering the allegations made. The guidance then goes on to suggest how, in practical terms, an adjudicator might comply with the requirements of natural justice. These include, for example, using telephone conferencing to involve all of the parties should the use of the telephone be necessary, holding meetings with all of the

⁽¹⁾ Glasgow Caledonian University Reports on Adjudication No. 3/4

⁽²⁾ Miller, J. (2002) Adjudication Update Seminar, Savoy Hotel, 13 May.

parties present (unless an absent party has consented to a meeting between just one party and the adjudicator) and obtaining the views of the parties before issuing directions.

Jurisdictional challenges cannot be avoided, but adjudicators are reminded that they should investigate and reach their conclusion on the merits of any jurisdictional challenge. If the adjudicator believes that he or she does *not* have jurisdiction he or she should tell the parties and resign. If the adjudicator believes that he or she does have jurisdiction, then he or she should tell the parties and continue with the adjudication. Of more interest is the guidance in respect of intimidatory tactics. Adjudicators are reminded to recognise “bullying” tactics early on in the procedure, and deal with them “firmly but fairly”. They are reminded not to lose their temper with any of the parties.

The draft statutory instrument, the Scheme for Construction Contracts (Amendments) (England) Regulations 2001, makes three amendments to the Scheme. First, regulation 20 is to be amended. Regulation 20 is set out below, with the new wording set out in italics:

The Adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute *but shall not take into account any matter relating to the legal or other costs of the parties arising out of or in connection with the adjudication.*

The purpose of this amendment is to remove from the adjudicator’s jurisdiction the ability for the adjudicator to deal with the parties’ costs associated with bringing or defending an adjudication. The case law in the area is conflicting, and so clarification is welcome; however, the preferred view is that adjudicators do not have the jurisdiction to deal with costs.⁽³⁾ While this amendment deals with adjudications under the Scheme, other standard form adjudication procedures and perhaps more importantly bespoke adjudication procedures will not be caught by this amendment. To be truly effective, clarification in respect of legal costs would need to be included in the Act.

The second amendment in the draft SI is an amendment to regulation 22. If one of the parties requests reasons, then the adjudicator shall provide them. Alternatively, the adjudicator may set a deadline for the parties to request reasons, and any requests outside of that deadline shall be invalid.

Finally, new draft regulation 22A deals with clerical mistakes or errors. This draft regulation gives the adjudicator on his own initiative or on application of any of the parties the ability to correct his or her decision in order to remove clerical mistakes or errors “arising from an accidental slip or omission”. A party must make an application within 5 days of the date of the decision, or a shorter period specified

⁽³⁾ *Northern Developments (Cumbria) Limited v J & J Nichol* (24 January 2001)

by the adjudicator in the decision. The adjudicator is then to correct the decision “as soon as possible” after the date upon which the application for the correction was received by the adjudicator. If the correction is to be made by the adjudicator on his or her own initiative, then it is to be made as soon as possible after he or she becomes aware of the need to make such a correction.

New TeCSA Rules

A new version of the Technology and Construction Solicitors Association (TeCSA) Adjudication Rules (2002 version 2.0) was published in October 2002. The new TeCSA Rules are very similar to the 1999 (version 1.3) Rules, although there are of course some slight amendments.

In the definition section, a definition of “days” has been inserted, stating that the meaning should be the same as that contained in the Housing Grants, Construction and Regeneration Act 1996.

The commencement and appointment procedure has been amalgamated, and some amendments have been made. The application for appointment in Rule 5(i) has been simplified, merely requiring a copy of the Contract as defined, together with the Notice of Adjudication and the fee to be attached to the request for an appointment. Rule 7 now requires the adjudicator to confirm to the parties the date of receipt of the Referral Notice. Similarly, Rule 8 now requires any replacement adjudicator to give written notice of acceptance of his appointment.

In respect of the scope of the adjudication, Rule 14 now requires an adjudicator to “decide” upon his substantive jurisdiction rather than “rule” upon jurisdiction. In respect of the adjudicator’s fees the cap of £1,000 per day has been increased to £1,250 per day.

The law relating to the costs of parties in respect of adjudication has developed, and this has been reflected in a new section dealing with costs. Rule 28 states that the adjudicator can have the jurisdiction to award costs to the successful party, but only if the parties agree. This appears to reflect the general position. However, the adjudicator has no jurisdiction to require the referring party to pay the costs of the other party merely by referring the dispute to adjudication. This is notwithstanding anything to the contrary in the contract.

Finally, in respect of decisions Rule 31 has been amended to require the adjudicator to provide reasons should either party so request. Old Rule 27 stated that decisions were to be in writing, but did not include reasons. However, a request for reasons under the new rules must be made within 7 days of the date of the referral of the dispute. A request at this early stage allows the adjudicator to prepare his reasons and provide them at the same time as the decision. New Rule 32 provides the adjudicator with power to correct a clerical mistake or error arising from an accidental slip or omission. The

adjudicator may correct the mistake or error on his own initiative, or as a result of an application by either of the parties. The party must make its application within 5 days of the decision or the shorter period directed by the adjudicator. The correction is to be made as soon as possible after the application being received or as soon as the adjudicator notices the mistake or error.

The New Zealand Construction Contracts Bill

Following the repeal in 1987 of the Contractors Liens Act 1939 and the liquidation of several large development companies (which left contractors and subcontractors unable to recover substantial sums of money), the New Zealand Parliament decided it was time to overhaul the way payments operate within the construction industry. There is apparently a strong political force behind this legislation, predominantly led by the labour party who are pushing the bill through the legislative process with some speed following the introduction of the CCB prior to the 2002 election.

The New Zealand Construction Contracts Bill (CCB)⁴ is based on the United Kingdom Housing Grants, Construction and Regeneration Act 1996 and the New South Wales Building and Construction Industry Security of Payment Act 1999.

At this stage, the CCB is likely to be law in New Zealand by mid-next year. Unlike the HGCRA which had a two-year lead-in time, the CCB will become law three months after it receives Royal Assent. This does not leave the industry with much time to revise their standard form contracts to ensure compliance with the CCB.

The philosophy behind the CCB is similar to that of the HGCRA, namely to improve cash flow within the construction industry. There are some important differences in the New Zealand bill including:

- The HGCRA requires contracts to be in writing, but the CCB applies to every construction contract (whether or not governed by NZ law) that relates to the carrying out of construction working in NZ and that is entered into after the date of commencement of the Act and is written or oral or partly written and partly oral.
- The CCB will apply to residential construction contracts in relation to rendering “pay-if-paid” and “pay-when-paid” clauses void and introducing adjudication provisions.
- The CCB specifically outlaws “pay if paid” and “pay-when-paid” clauses. While this was intended to overcome the problem of contractors using these provisions to avoid paying subcontractors, the concern within the NZ construction industry is that this provision has

⁽⁴⁾ A copy of the draft bill can be downloaded at www.clerk.parliament.govt.nz/content/593/128bar2.pdf

simply increased the risk to contractors with the inevitable outcome that contractors will be forced into liquidation when a developer becomes insolvent, as the contractor is still obligated to pay the subcontractor for the work done. Despite submissions from the industry that pay if/when paid clauses remain effective in circumstances where the owner is insolvent (as in the HGCRA), the Select Committee expressly rejected this on the grounds that the risk of payment should be transferred from subcontractors to contractors arguing that contractors are better able to protect themselves.

- The CCB has taken into account the practice developing within the UK whereby the party in a superior bargaining position requires the contract to provide that the other party must bear all the adjudication costs regardless of fault or outcome. The CCB expressly provides that such clauses are ineffective.
- The CCB provides that an adjudicator may determine that costs be met by any of the parties if the adjudicator considers that the party caused these costs to be incurred unnecessarily by bad faith or allegation that are without substance or merit.
- The CCB reaches a midpoint in relation to the time within which an adjudicator is required to reach a decision. The New South Wales legislation requires a decision within 10 working days, the HGCRA within 28 days. The CCB provides that a decision must be reached within 20 working days (able to be extended by the adjudicator to 30 working days if he/she thinks necessary or longer with the consent of all parties).
- Numerous submissions were received on the first draft of the bill which suggested that the CCB include mandatory bonding provisions of approximately 10% of the contract price. The Select Committee declined to include mandatory bonding at this stage on the basis that the introduction of mandatory bonding would require further research. It did not dismiss the possibility that the legislation may be amended in the future to include mandatory bonding.
- The CCB provides that an adjudicator can use a charging order over third-party properties to secure payment in certain circumstances.

RICS Guidance Note

The RICS Guidance Note, *Surveyors Acting as Adjudicators in the Construction Industry*, was prepared after the issue of the DETR consultation paper, *Improving Adjudication in the Construction Industry*, in April 2001. The Guidance Note is intended to set out best practice for RICS members when acting as adjudicators. The members are not required to adhere to the Guidance Note, but should an allegation

of professional negligence be made against an RICS member then the court might well take into account the content of the Guidance Note when deciding whether the surveyor acted with reasonable competence.

The Guidance Note provides an overview of the role of an adjudicator and the principles of adjudication, and so does not provide a detailed consideration of all of those matters that an adjudicator will need to understand in order to practise. Part 2 of the Guidance Note deals with appointment and acceptance. The RICS nomination procedure is set out, but also the adjudicator is reminded of his responsibilities, such as the need for a decision within a limited timescale and the requirement to carry out a conflict check. In respect of the conditions of engagement, the RICS Guidance Note states that the imposition of a lien in respect of the adjudicator's fees is not an acceptable practice.

Part 3 deals with procedures and other matters. The powers available to an adjudicator are briefly set out, and the adjudicator is reminded that he or she may take legal or technical advice if necessary. While the guidance recognises that it may be appropriate to discuss substantive matters in dispute with one party alone, it reminds the adjudicator that such a course of action is "fraught with possible difficulties and one which is probably best" avoided. Practical tips in respect of establishing the procedure and establishing the facts and the law are set out. As indeed is the debate in respect of natural justice. Some of the practical tips given in the DTI draft guidance are also considered, such as dealing with excessive documentation and intimidatory tactics.

In respect of the adjudicator's decision, the adjudicator is reminded of the short timescale, but also given practical guidance as to the suggested contents, awarding of interest and the giving of reasons.

2. Enforcement

Section 108(3) of the Act states:

The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agreed to arbitration) or by agreement.

Unlike the Arbitration Act 1996, the Act does not state that the decision of an adjudicator may be enforced in the same manner as a judgment of the court or in the way that an arbitrator's award may be enforced. There was, therefore, some debate about how an adjudicator's decision may be enforced shortly after the introduction of the Act in May 1998. That debate was in part swept away by the first case of *Macob*. Since *Macob* the frequent practice of enforcing a decision of an adjudicator

has been to commence proceedings in court (usually the TCC) and then immediately apply under CPR Part 24 for summary judgment.

The grounds for summary judgment are set out in CPR Rule 24.2:

The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if -

- (a) it considers that -
 - i) that claimant has no real prospect of succeeding on the claim or issue; or
 - ii) that defendant has no real prospect of successfully defending the claim or issue; and
- (b) there is no other compelling reason why the case or issue should be disposed at trial.

The claimant, when contending that the decision of an adjudicator should be enforced summarily, therefore has to satisfy two hurdles. First, that the defendant has no real prospect of successfully defending his failure to comply with the decision, and second, that there is no other reason why the case should not go for trial. If successful then the judgment may be enforced like any other court judgment.

The prospect must be "real" in that the court will ignore arguments that are fanciful or imaginary. It essentially means that the defendant has to have a case that is better than merely arguable (*International Finance Corporation v Ute African SRPL* [2001] LTL May 16).

On the other hand, one does not need to show that the case will probably succeed at trial. The hearing of a summary judgment application is not a "mini trial" nor a "summary trial". The court only considers the merits of the case to the extent necessary to determine whether there is sufficient merit to allow the case to proceed to trial (see Lord Woolf MR in *Swain v Hillman* [2001] All ER 91). For a defendant to successfully obtain the dismissal of the application he must show that his chances of success of trial are "realistic" rather than "merely fanciful" (*Swain v Hillman*).

The large majority of cases dealing with the enforcement of an adjudicator's decision are dealt within the summary judgment procedure set out at CPR Part 24. The initial cases before the court dealt with enforcement issues in a very purposive and robust manner, and that trend has in the main continued.

In one of the early adjudication cases, *Outwing Construction Limited v H. Randell & Son Limited* (15 March 1999), His Honour Judge Humphrey LLOYD QC found that it was acceptable for a claimant to abridge time for service for acknowledgement to just two days after the return date of the summons and abridge time down to 7 days for the defendant to adduce evidence in opposition to the summons when applying for summary enforcement of an adjudicator's decision. His Honour Judge LLOYD QC made it clear that it might not be appropriate to abridge time in every case, but the practice is now frequently followed.

There may also be an express contractual provision requiring payment. For example, Lord Justice Mantell in the case of *Levolux AT Limited v Ferson Contractors Limited* [2002] EWCA Civ 11 held that the terms of the contract must be construed so as to give effect to the adjudicator's decision. In doing so he held that the determination clauses must be read as not conflicting with an adjudicator's decision, but also noted that the parties had expressly agreed to be bound by the decision of an adjudicator.

While summary judgment may be given for the whole of the claim or a particular issue, it may also be advisable to consider requesting an interim payment application at the same time as seeking summary judgment. This would only occur if there were some doubt as to the enforceability of the adjudicator's decision, and it appeared clear that in any event an amount of money should be paid because of an absence of a defence for a particular sum. Providing a request for an interim payment is made (usually at the time of applying for summary judgment), then the court may if the summary judgment is unsuccessful order a payment in any event (see *Glencot Development & Design Co. Limited v Benn Barratt & Son (Contractors) Limited* [2001] BLR 207).

Part 8 proceedings

Part 8 of the Civil Procedure Rules is described as an "alternative procedure for claims". A claimant may use the Part 8 procedure where "he seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact" (Part 8.1 (2) (a)), or a rule or practice direction requires (or omits as the case may be) the use of the Part 8 procedure. The practice of commencing proceedings under the alternative Part 8 procedure is now more common than the "regular" Part 7 claim form procedure. This is because the court is quite simply looking to see whether the adjudicator had jurisdiction to make the decision, and would generally then enforce the decision without a consideration of facts even if the adjudicator has made some *intra vires* fundamental factual or legal error. Providing that the adjudicator had jurisdiction and the appropriate procedures had been followed then the question is usually quite simply one of jurisdiction and procedure and the facts of the dispute are irrelevant.

Part 8 proceedings are now being widely used. For example, the Part 8 proceedings were found to be appropriate in *Shimuzu Europe Limited v Auto Major Limited* [2002] BLR 113. Shimuzu issued Part 8 proceedings seeking enforcement. Two issues arose. First, should the decision be enforced, and second, did Auto Major waive any objection by making a part payment. His Honour Judge Seymour QC held that the adjudicator had been asked to decide what sum should be paid, and so any mistake that might have been made by the adjudicator did not go to his jurisdiction. The adjudicator had essentially asked the right question. If a mistake had been made, then the place to correct it was in the final account or by arbitration. As a result His Honour Judge Seymour QC held that the Part 8 proceedings were appropriate. In any event, Auto Major had by making a part payment and inviting the adjudicator to correct the decision elected to treat the whole of the decision as valid and waived its objection.

Statutory demand and winding up proceedings

The Insolvency Act 1986 provides pursuant to section 122(1) (f) that a company may be wound up on the grounds that it is unable to pay its debts. The question as to whether a company can pay its debts is not made by reference to the company's accounts, but is determined by the situations listed at section 123 of the Insolvency Act 1986. Providing that one of those situations exists, then the court can accept that as evidence of an inability for a company to pay its debts. The key event is:

If a creditor (by assignment or otherwise) to whom the company is indebted in a sum exceeding £750 then due has served on the company, by leaving it at the company's registered office, a written demand (in the prescribed form) requiring the company to pay the sum so due and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor...

The written demand in the prescribed form is referred to as a "statutory demand". A statutory demand is not issued under the Civil Procedure Rules, but pursuant to the Insolvency Act 1986. The term "debt" refers to a sum payable under a contract or a judgment where the amount is clearly specified. A statutory demand should therefore not be used if the amount cannot be readily identified at the start. Adjudicators' decisions usually specify a precise amount for payment, and therefore lend themselves to the statutory demand process.

In the case of *George Parke v Fenton Gretton Partnership* (2001) CILL 1712 His Honour Judge Boggis QC in the Chancery Division had to consider whether to set aside a statutory demand served by the defendant seeking payment of an adjudicator's decision. Mr Parke was arguing that he had a valid

cross-claim exceeding the amount of the adjudicator's decision. He argued that he had commenced proceedings in the Technology and Construction Court for the recovery of the alleged overpayment.

HHJ Boggis QC had to consider whether the demand should be set aside. Rule 6.5(4) of the Insolvency Rules 1986 set out the grounds upon which a statutory demand may be set aside:

- If the Debtor has a counterclaim equalling or exceeding the debt;
- If the debt is disputed on substantial grounds;
- If the Creditor holds security in respect of the debt; or
- If the Court is satisfied on other grounds that the demand ought to be set aside.

The Judge initially made the point that the decision of an adjudicator should be enforced summarily and that the court should not consider the facts behind the decision. However, he also had to consider the competing fact that Mr Parke had commenced proceedings for a declaration that he had overpaid the Fenton Gretton Partnership.

His Honour Judge Boggis QC held that Mr Parke had a valid cross-claim which was confirmed by his claim in the Technology and Construction Court proceedings. He therefore decided that the statutory demand ought to be set aside.

The same question arose in the case of *Oakley & Anor v Airclear Environmental Limited & Anor* (4 October 2001). The parties had intended to enter into a NAM/T form of contract, but no formal contract was ever concluded. A dispute arose which was referred to adjudication. The adjudicator decided that Oakley should pay a sum of money to Airclear. Oakley refused and a statutory demand was issued by Airclear. Oakley argued that no contract was ever concluded and therefore the adjudicator did not have jurisdiction because the contract was not evidence in writing as required by section 107 of the Act.

Etherton J held that while the parties shared an assumption that the agreement was based on the NAM/T form, there was nothing to stop Oakley from disputing that assumption. He held that the contract was not based on the NAM/T form. Therefore the adjudicator had not been validly appointed (as he had been appointed under the provision of the NAM/T forms which did not apply) and so his decision was null and void. The statutory demand was therefore not based upon a debt and was set aside.

The case of *Guardia Limited v Datum Contracts* (2003) CILL 1934 concerns winding-up petitions. Datum had carried out refurbishment work to a shop. Guardia claimed that there were defects and withheld payment, but failed to serve a valid withholding notice. The dispute was referred to

adjudication. Guardia did not pay, and Datum served a statutory demand and then issued a winding-up petition.

Guardia successfully obtained an *ex parte* injunction restraining advertisement of the petition. Such injunctions are only given for a limited period, and Guardia sought continuation of the injunction on the basis that the statutory demand and petition were an abuse of process because Guardia had a cross-claim.

The insolvency rules state that the grounds for restraining advertisement of a winding-up petition are:

1. The court is satisfied that the presentation of the petition represents an abuse of process on the part of the petitioner because the debt asserted is disputed to the knowledge of the petitioner on substantial grounds and in good faith; or
2. The court is certain that the petition is bound to be dismissed.

Mr Justice Ferris in the Chancery Division held that none of these conditions were applicable. Essentially he noted that the continuing restraint of the petition would leave Guardia in the same position they would have been in if they had served a valid withholding notice. Further, Guardia had presented their cross-claim very late. He therefore refused to extend the injunction. The position in *Guardia* should be compared to that of *Parke v Fenton*, where the Court considered the counterclaim was genuine and had been commenced without delay. In *Parke v Fenton*, Parke had already commenced proceedings in the Technology and Construction Court.

Finally, there is the more recent case of *Jamil Mohammed v Dr Michael Bowles* (11 March 2003). In that case the adjudicator decided that the claimant contractor should pay the sum of £26,495.54 to Dr Michael Bowles, the employer, in respect of defective work. The contractor did not pay and Dr Bowles served a statutory demand. Jamil Mohammed applied to set the demand aside. Several grounds were raised.

First, he argued that the adjudicator did not have jurisdiction as the contract related to a residential occupier. Ms Derrens held that the Minor Works Form of Contract governing the parties' agreement contained an adjudication clause, and therefore the exception within the Act was irrelevant. She went on to say that if the applicant believed that to be the real issue then the applicant should have applied to the court for a declaration. She said that it was not for the bankruptcy court to look behind the adjudicator's decision, and that an adjudicator's decision was sufficient to form a basis for a statutory demand.

Mandatory injunction

In *Macob* Dyson J, as he was, stated that a mandatory injunction would not be the appropriate remedy in respect of payment between contracting parties. This appeared to be a retreat from the position in the pre-Act case of *Drake & Scull Engineering Limited v McLaughlin & Harvey Plc* (1992) 60 BLR 102 in which the Court granted a mandatory injunction requiring compliance with the award of a contractually appointed adjudicator. However, that case can be distinguished. In the earlier case of *Drake & Scull* the adjudicator's decision required payment of the amount to a third-party trustee stakeholder pending final determination of the dispute. The position with third parties is therefore different to that between contracting parties. Dyson J in *Macob* noted that there were other examples of situations where an injunction might still be appropriate. He cites decisions of an adjudicator ordering a party to return to site in order to continue work to provide access or inspect facilities, to open up work, or to carry out certain specified work.

3. Jurisdictional challenges

Most of the 170 or so cases arising from adjudication turn upon the specific facts of the particular case. The majority of those cases adopt the purposive and robust approach of His Hon. Mr Justice Dyson in *Macob*. But has this trend continued? Some have questioned whether the courts are now taking a more restrictive view, perhaps to "rein in" the process of adjudication and reinforce the checks and balances that one would normally expect to see operating within the dispute resolution arena. There are, of course, those jurisdictional challenges that will remove any chance of enforcing the adjudication decision. For example, the ability to demonstrate that there was no contract, that the adjudicator asked the wrong question, or rather that he did not answer a question put to him.

His Honour Judge Bowers QC in *Northern Developments (Cumbria) Limited v J & J Nichol* ([2000] BLR 158) provided a useful summary of the principles that the court should consider when deciding whether to enforce an adjudicator's decision summarily. He said:

20. The general approach to be adopted was considered by Dyson J. in *Macob Civil Engineering Limited v Morrison Construction Limited* (1999) BLR 93; *The Project Consultancy Group v The Trustees of the Gray Trust* (1999) BLR 377; *Bouygues UK Ltd v Dahl-Jensen UK Limited* (The Internet) 17 November, 1999 and by His Honour Judge Thornton Q.C. in *Sherwood & Casson Limited v Mackenzie* (unreported) 30 November 1999 and His Honour Judge Hicks in *VHE Construction plc v RBSTB Trust Co Limited* (Internet) 13 January, 2000. In *Sherwood v Casson*, Judge Thornton formulated the guiding principles as follows:

- i. A decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced;
- ii. A decision that is erroneous, even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced;
- iii. A decision may be challenged on the ground that the adjudicator was not empowered by the Act to make the decision, because there was no underlying construction contract between the parties or because he had gone outside his terms of reference;
- iv. The adjudication is intended to be a speedy process in which mistakes will inevitably occur. Thus, the Court should guard against characterising a mistaken answer to an issue, which is within an adjudicator's jurisdiction, as being an excess of jurisdiction. Furthermore, the Court should give a fair, natural and sensible interpretation to the decision in the light of the disputes that are the subject of the reference;
- v. An issue as to whether a construction contract ever came into existence, which is one challenging the jurisdiction of the adjudicator, so long as it is reasonably and clearly raised, must be determined by the Court on the balance of probabilities with, if necessary, oral and documentary evidence.

21. I agree with Judge Thornton's summary. I add that His Honour Judge Hicks said, in *VHE v RBSTB* at paragraph 44:

"It is quite clear that the court has no appellate jurisdiction over Adjudicators, even when demonstrably mistaken."

And in *Outwing Construction Limited v H Randell & Son Limited* [1999] BLR 156 at 160 His Honour Judge Humphrey LLOYD said:

"The overall intention of Parliament is clear: disputes are to go to adjudication and the decision of the Adjudicator has to be complied with, pending final determination."

22. In relation to the consideration of matters of jurisdiction it is also helpful to bear in mind the words of Lord MacFadyen in *Homer Burgess Limited v Chirex (Annan) Limited* (Internet/Scotcourts) 10 November, 1999. He said:

"In my opinion the temporarily binding quality accorded to decisions of an adjudicator by paragraph 23(2) [of the Scheme] is accorded only to decisions on matters of dispute arising under a construction contract. The question whether a particular dispute does arise under a construction contract is a preliminary issue which the adjudicator must address, but it is not itself a dispute arising under a construction

contract. I am therefore of opinion that a decision by an adjudicator as to whether a particular dispute or a particular aspect of a dispute fails within his jurisdiction is not one which is exempted by paragraph 23(2) from review in proceedings such as the present action."

However, the increasing caution recently shown by the courts has been demonstrated by a reconsideration of the application of the rules of natural justice, enforcement exceptions in respect of insolvency or "serious financial doubts", whether there was in fact a "dispute", and more recently, the restricted view taken in respect of construction contracts "in writing" by the Court of Appeal in *RJT Consulting Engineers v DM Engineering (NI) Limited* on 8 March 2002. To these four "cautionary" considerations further issues should be considered, namely, the status of an adjudicator's decision and whether the judicial review considerations of public law have any place within the current expert determination approach to enforcement adopted by the courts. There are others, and in summary this paper adopts the following categories of "challenges to enforcement" or "jurisdictional challenges":

1. contract entered into after 1 May 1998;
2. the requirement for a contract and letters of intent;
3. is there a "construction contract";
4. is there a construction contract "in writing";
5. the meaning of a "dispute";
6. natural justice;
7. Human Rights Act 1998
8. the "serious financial doubt" exception;
9. the status of an adjudicator's decision; and
10. expert determination and *Anisminic*.

1. Contract entered into after 1 May 1998

The Act received royal assent on 24 July 1996. However, Part II of the Act (that part relating to construction contracts) was not brought into force until the Scheme had been approved by Parliament. As a result, Parts II of the Act and the Scheme were brought into force until 1 May 1998 (Statutory Instrument 1998 No. 649 and Statutory Instrument 1998 No. 894). At the same time, an exclusion order reduced the scope of adjudication in relation to certain statutory provisions, contracts relating to the private finance initiative, finance agreements and also development agreements (Statutory Instrument 1998 No. 648).

The Act does not apply retrospectively, and therefore only applies to “construction contracts” as defined within the Act that have been entered into on or after 1 May 1998 (Statutory Instrument 1998 No. 649).

2. The requirement for a contract and letters of intent

The Act sets out detailed provisions identifying types of work to which the Act applies. It only applies to “construction contracts” as defined in section 104(1), which means an agreement for:

- (a) The carrying out of construction operations;
- (b) Arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise; and
- (c) Providing his own labour, or the labour of others, for the carrying out of construction operations

Further, a construction contract includes an agreement to do architectural, design or surveying works or provide advice in respect of building, engineering, interior or exterior decoration or the layout of landscaping. Therefore the Act expressly includes a range of frequently encountered professional construction services such as that of architect, engineer, surveyor, interior designer, landscape architect and so on.

For a contract to be governed by the Act there must be a “contract” or an “agreement” between the parties. It does not need to be recorded in a detailed agreement but nonetheless there must be clear evidence of an agreement. Therefore, and subject to the proviso that it must be in writing, a contract between the parties could be formed on the basis of:

- agreed written terms, whether or not those terms are signed by the parties;
- an exchange of letters;
- a meeting note, providing that it sufficiently confirms the terms of the agreement between the parties.

This list is not exhaustive, but merely demonstrates that the parties do not need to agree and sign a detailed and lengthy document in order for the Act to apply. A simple exchange of letters could amount to a construction contract for the purposes of the Act, such that the provisions in Part II of the Act are implied into the agreement between the parties. On the other hand, a failure for the exchanges between the parties to amount to a contract will mean that the Act does not apply. This scenario could be encountered where a letter of intent has been issued to the contractor by the employer, or to a subcontractor from a contractor.

Whether the letter of intent amounts to a contract or not depends upon the terms of the letter. Heading the letter "Letter of Intent" is not conclusive; it is the terms of the letter which is important. If the letter of intent merely requires a party to undertake work in return for reasonable remuneration for the work done, but does not award a defined package of work, then it will not amount to a contract. Therefore any claim brought by the party carrying out the work pursuant to that letter of intent will be on a *quantum meruit* basis, rather than a contractual one. As a result the party bringing the claim will not be able to rely upon the terms of the Act with regards to payment, neither will they be able to call upon adjudication pursuant to section 108 of the Act.

In the case of *Christiani & Nielsen Limited v The Lowry Centre Development Company Limited* (16 June 2000) the works had been commenced pursuant to a letter of intent. However, the parties had subsequently agreed detailed contractual provisions, and it was held that the contract superseded the letter of intent. Therefore the dispute later that arose, arose under the detailed construction contract which was entered into after 1 May 1998 and was therefore subject to the adjudication provisions of the Act.

The claimant had attempted to argue that the letter of intent recorded an agreement carrying out construction work before 1 May 1998, and as a result the agreement between the parties was therefore not subject to the Act. It was held that even if the pre-agreement recorded an arrangement to contract out of adjudication pursuant to the Act, then the parties could not reach such an agreement as the terms of the Act were mandatory.

3. Is there a "construction contract"?

Section 105 of the Act defines "construction operations". The definition provided by the Act is somewhat lengthy, but basically includes:

- the vast majority of professional construction appointments;
- works of construction, alteration, repair, maintenance, demolition and extension ;
- labour-only sub-contracts;
- the installation of heating, lighting, air-conditioning, power supply, drainage, water supply, security or communication systems.

On the other hand, there are some exclusions. These include:

- supply-only contracts
- contracts of employment
- contracts with a residential occupier.

The exemption in respect of a residential occupier is an attempt to exclude from the Scheme people who are carrying out works to their home, including extensions, or alternatively building their own home, providing that they intend to occupy or do occupy that building as a residence. If the residential building work or a part of it has some commercial purpose then the residential occupier exception will not apply.

In the case of *Samuel Thomas Construction Limited v Bick & (J&B) Developments* (28 January 2000, Exeter High Court) the parties had agreed to contract for work in respect of converting two barns into dwellings. One of the contracting parties was to occupy one of the barns for occupation as a residential occupier. Approximately 65% of the contract sum related to the work on that barn. The judge held that a residential occupier did not need to be in residence at the property in order for section 106 of the Act to apply.

The fact that the barn was not a “dwelling” at the commencement was not relevant. On the other hand, the construction operations needed to be categorised principally operations on a dwelling, which in this instance they were. However, the contract was not excluded from the operation of the Act. This was because the contract did not principally relate to operations on a dwelling for a residential occupier because of the existence of the second barn which the contracting party was not intending to occupy as a residential occupier.

Further exceptions are set out in section 105(2). Many of the operations set out in that section exclude items that one would normally categorise as construction operations. In other words, they are generally recognised within the construction industry, although they are excluded from the operation of the Act. In particular, notice the power generation exception set out at section 105(2)(c)(i) and much of the process engineering industry at section 105(2) (c) (ii).

A series of cases has already dealt with the difficulties created by these exclusions. First, in *ABB Power Construction v Norwest Holst Engineering Limited* (1 August 2000) the extension of an existing power station in Aberdeen included the cladding of boilers in an area of the site that was cordoned off from the main site. The fence was erected for health and safety as well as operational reasons. The judge held that the primary activity of the whole of the site was power generation, and therefore the Act did not apply.

A further power generation case is the Scottish case of *Homer Burgess Limited v Chirex* (2000 BLR 124). This case concerns the installation of pipework connecting boilers within a power station. One party argued that the installation of pipework was not assembly nor installation of “plant”, and that as a result adjudication did not apply pursuant to the Act for disputes concerning the installation of pipework. The court held that the pipework was part of the plant that was being assembled on site. In the absence of that pipework the individual items of machinery and equipment could not operate. Therefore the installation of the pipework was not operational within the scope of the exception in section 105(2)(c)(ii) and was therefore not a construction operation.

The case of *ABB Zantingh Limited v Zedal Building Services Limited* (12 December 2000) concerned the construction of a printing works that involved the erection of a separate building for the housing of standby generators. The standby generators were to cut in in the event of a power failure and therefore supply the printing works with power. The dispute related to the installation of the wiring for the standby generator. The Judge held that the “primary activity” of the site was printing, and so in this instance power generation was a secondary activity. As a result the exception did not apply, and so the Act applied, as did adjudication.

The further Scottish case of the *Petition of Mitsui Babcock Energy Services Limited* (13 June 2001, Court of Session) was a judicial review of an adjudicator’s decision. The adjudicator had decided that she did not have jurisdiction to consider a dispute in respect of the construction of two boiler plants adjacent to an oil refinery. The boiler plants were to be operated by a company supplying energy to the oil refinery, although the boilers were not in themselves directly involved in the process of producing oil.

Mitsui argued that as the installation of the boilers was within a site on land lease to a separate company the primary activity of that separate site did not come within section 105(2)(c). Lord Hardie held that on the particular facts of the case the installation of the boiler plant was to further the primary activity of processing chemicals and oil within the petrochemical complex. Therefore the installation of the boilers fell within the exclusion so were not covered by the Act. Lord Hardie therefore dismissed the petition.

4. Is there a construction contract “in writing”?

RJT Consulting was the third decision of the Court of Appeal in respect of adjudication. It is an appeal from the TCC decision of HHJ Mackay, who dismissed RJT’s claim for a declaration that the construction contract was not an “agreement in writing” within section 107 of the Act. The adjudicator had decided that the oral contract was sufficiently evidenced in writing by drawings, schedules and minutes of the meeting, etc. HHJ MacKay agreed.

However, the appeal was allowed by the Court of Appeal. Lord Justice Ward and Lord Justice Robert Walker held that all of the terms of the construction contract had to be evidenced in writing. It was not sufficient for merely the material terms, such as the identity of the parties, nature of the work and price, to be recorded in writing. Further, even if they were wrong, the documents relied upon in this particular case were described as “wholly insufficient”. Auld J considered that only the material terms of the agreement were required, and therefore trivial or unrelated issues did not need to be recorded. But his approach was not shared by the majority. So on one view, all of the terms of the contract need to be recorded in writing in order that a dispute under any contract can be referred to adjudication.

Some might consider this an unfortunate decision, perhaps opening the door to a flood of jurisdictional challenges. The industry rarely records all of the material terms in writing, indeed those terms which are material are often not recorded in writing. However, the House of Lords has refused a petition to appeal.

RJT was followed recently in the case of *Carillion Construction Limited v Devonport Royal Dockyard Limited* (27 November 2002) in the TCC before HHJ Bowsher.

In 1997 the Ministry of Defence employed Devonport Royal Dockyard (DML) as main contractor for the upgrading of a dockyard. In turn, DML employed Carillion to upgrade the No. 9 dock, provide new buildings and associated infrastructure. That contract was contained in two documents, a Subcontract and an Alliance Agreement both dated 10 March 2000. Carillion was to be paid its actual cost plus accruals and a fee. A gain share agreement provided that any overspend of the target cost would be shared between DML and Carillion. The target cost was originally £56 million, but was amended six times between September 2000 and December 2001 to a target cost of £100 million. A meeting of the Alliance Board (a board comprising two representatives of the parties with the power of authority to make decisions) met on 30 October 2001 with a view to revising the payment provisions. Carillion believed that a binding oral agreement had been reached at that meeting whereby payment was to be on a cost reimbursable basis without the gain share restrictions. However, the amount of the fee could not be agreed.

Carillion submitted application no. 33 on 16 April 2002 to DML for achieving milestone 33. Carillion claimed £121,522,511.29 less the previous certified sum of £110 million. The sum was not paid, but there was an exchange of correspondence in respect of the calculation of the figure and the basis of the figure.

This culminated in a letter from Carillion dated 25 July 2002 stating that the basis of their claim was the oral agreement reached on 30 October 2001. By further letters dated 26 and 29 July 2002 Carillion threatened adjudication proceedings. By letter dated 1 August 2002, DML wrote to Carillion stating that this was the first time that Carillion were seeking to rely upon an agreement reached on 30 October 2001, and DML asked for more detailed information in respect of that agreement. Carillion responded with a Notice of Intention to Refer the Dispute to Adjudication dated 6 August 2001.

An adjudicator was appointed on 12 August 2002. His decision dated 24 September 2002 decided that a binding agreement was concluded on 30 October 2001, the project would become cost reimbursable and that DML should pay £7,451,320 plus VAT within 18 days together with fees.

DML did not pay. They claimed that the adjudicator did not have jurisdiction for two reasons. First, the alleged oral agreement did not comply with the requirements of section 107 of the Act insofar as it was not in writing. This was irrespective of whether or not an oral agreement was in fact reached. Second, that a dispute had not crystallised between the parties as DML had not rejected Carillion's allegation that there was an oral agreement, but had merely requested further information.

HHJ Bowsher QC held that the oral agreement did not comply with section 107 of the Act, and further that there was no dispute capable of being referred to adjudication. He therefore refused to enforce the decision. In respect of the oral agreement, he considered that the agreement had not been evidenced in writing pursuant to section 107(2)(c) and had not been recorded otherwise than in writing pursuant to section 107(3) of the Act. He referred to the Court of Appeal case of *RJT Consulting v D M Engineering* [2002] 5 BLR 217 which supported his conclusion.

In respect of the "No Dispute" point he considered by analogy that the arbitration cases raise the issue of whether or not a dispute entitles a claimant to start arbitration proceedings. In particular he referred to Judge Gilliland QC in *Cruden Construction Limited v Commissioners for the Newtown* [1995] 2 Lloyds Rep 387 in which he noted that the plaintiff had requested further information but that information was not supplied until after the service of a Notice of Arbitration. He therefore took the view that there was no dispute at the time of the service of the Notice of Arbitration. HHJ Bowsher QC made the point that one should not examine the minute details of the correspondence leading up to the Notice of Adjudication, but should take a broad approach. On this basis, he still considered that DML were not aware in what respects they were alleged to have broken their obligations on the date on which the Notice of Adjudication had been served. HHJ Bowsher QC therefore held that there was no dispute, and as a result the adjudicator did not have jurisdiction.

Permission to appeal was given by HHJ Bowsher QC. His decision raises issues of some public importance, given that many construction disputes involve oral agreements, or part oral agreements

which may be material to the issues in dispute. Following the Court of Appeal case of *RJT* and this case, it appears that an adjudicator will not have jurisdiction if any of the material terms have not been recorded in writing.

Pegram Shopfitters Limited v Tally Wiefel (UK) Limited (21 November 2003, Court of Appeal, May LJ, Hale LJ, Cooper J) was an appeal from the first instance decision of His Honour Judge Thornton. In that case the Judge considered two jurisdictional challenges raised by the defendant. First, that there was no construction contract in writing, and second, if there was, then it was a different contract such that different adjudication rules applied and therefore the Adjudicator did not have any jurisdiction. The claimant argued that the contract was under the JCT Standard Form of Prime Cost Contract 1998, while the defendant contended that the contract was based upon a standard form that they had proposed. This “battle of the forms” raised the issue as to the appropriate terms that might apply to any construction contract, providing that a construction contract had of course formed.

Lord Justice May considered that this was an oversimplification of the facts, and that there was a third realistic possibility that had been advanced by the defendant, namely, that there was no contract at all, so that the claimant was due to be paid a reasonable sum. If there was no contract, then there could be no contract in writing for the purpose of the Act such that the adjudicator could not obtain jurisdiction under the Scheme. Further, the determination of the applicable terms had an effect on the amount that could be claimed pursuant to those terms.

Lord Justice May held that the Judge had based his decision on the premise that both parties had agreed that their relationship was governed by a construction contract, and therefore all that was to be done was to determine the terms of that contract. Lord Justice May considered that this was wrong and that the parties had not agreed that there was a construction contract. He stated at paragraph 32:

Mr Hyam submits that, where the factual matrix demonstrates an intention on both sides to be bound by written contractual terms of a building contract, the subject matter of which is certain and evidenced by extensive communications between the parties; where the work is complete but there remains a residual dispute as to the terms under which the work was carried out, an adjudicator or judge is entitled to conclude that there is no realistic prospect of the defendants establishing that there was no contract in existence, and thus no jurisdiction of the adjudicator to adjudicate. I agree that a judge would be entitled so to conclude in appropriate circumstances, but I do not consider that these are such circumstances. It seems to be at least arguable either that there was a contract here, but upon JCT Prime Costs Terms, or, perhaps more likely, that there was no concluded written construction contract. The judge’s recitation of the facts and the analytic contortions evidenced in paragraphs 30 and 31

of his judgment, including his characterisation of the situation as “a construction contract whose terms cannot be readily ascertained”, suggests to me a real possibility that there was no written construction contract.

He did not accept that the identification of the precise terms of the construction contract was a “matter of detail which did not impinge the existence of the contract...”. A submission that Lord Justice May considered was “palm tree contractual analysis”.

The appeal was allowed and the Judge’s order set aside. Lady Justice Hale agreed, as did Mr Justice Hooper. Lady Justice Hale added:

...my view is that the most likely analysis of the legal relationship between the parties was either a contract or a quasi-contractual claim under which, the price not having been agreed, a *quantum meruit* was payable. Neither of those analyses is a contract in writing under the Section 107, and accordingly Section 108 did not apply

5. The meaning of a “dispute”

Some suggest that the courts have adopted an esoteric legalistic approach to the consideration of whether or not a “dispute” has arisen, such that it can be referred to adjudication. In the case of *Hayter v Nelson* [1990] 2 Lloyds Rep 265, Saville J refused to give summary judgment and stayed the matter because of the existence of an arbitration clause. In his judgment, he stated that the word “dispute” should be given its ordinary meaning and went on to cite the infamous “boat race” definition of a dispute. As a general principle, any form of disagreement appears to be adequate. This approach, together with the mandatory nature of a stay of legal proceedings pursuant to section 9 of the Arbitration Act 1996, means that the court will stay legal proceedings such that the parties must pursue their differences in arbitration. So, is it the case that the courts have adopted a different approach in respect of disputes that are referred to adjudication; perhaps requiring a more stringent test?

One of the first adjudication-specific cases to touch upon this area was *Fastrack Construction Limited v Morrison Construction Limited & Anor* (4 January 2000). In that case Morrison were the main contractors for the construction of a new leisure complex in Coventry. Fastrack was the brickwork subcontractor. Delays occurred to the works and a dispute developed and as a result Morrison engaged third parties to progress some of Fastrack’s work. Fastrack considered that Morrison’s employment of others was a repudiation of the subcontract, and so accepted the repudiation and left site. Notice of Determination was then served by Morrison on Fastrack. After leaving site, Fastrack submitted Application no. 13 for the gross sum of £383,873.97. Morrison then served a notice of set-

off in respect of cost to complete in the sum of £226,177.00, which succeeded the net sum claimed by Fastrack in Application No.13. A reference was then made to adjudication, and the adjudicator awarded Fastrack the sum of £85,401.98.

Morrison refused to pay, and argued that, at the time the Notice of Adjudication was served, the only dispute in existence related to the matters set out in Application No. 13. However, the sums claimed in the adjudication were different to those claimed in the application for payment. For example, £232,815.00 was claimed in respect of measured works in the application, whilst £250,364.70 was claimed for measured works in the Notice to Adjudicate. Morrison therefore argued that the amounts set out in Application No. 13 had been superseded by a new claim that was not yet in dispute as Morrison had not had the chance to consider the new claim and respond. They went on to argue that there was therefore no dispute and the adjudicator was appointed without jurisdiction.

In the enforcement proceedings, HHJ Thornton QC noted that the Act refers to a “dispute” but not to “disputes”. He therefore considered that a referring party could only refer a single dispute, although that dispute may have several or many matters at a particular point in time and it will be a question of fact as to what constitutes the dispute. He went on to state:

Thus, “the dispute” which may be referred to adjudication is all or part of whatever is in dispute at the moment that the referring party first intimates an adjudication reference. In other words, the “dispute” is whatever claims, heads of claim, issues, contentions or causes of action that are then in dispute which the referring party had chosen to crystallise into an adjudication reference. A vital and necessary question to be answered, when a jurisdictional challenge is mounted, is what was actually referred?⁽⁵⁾

Fastrack argued that it was possible to refer a number of disputes, and the disputes referred did not need to be identical to the pre-existing dispute, providing that it was substantially the same as the pre-existing dispute. HHJ Thornton QC did not agree with either of these suggestions, stating:

The statutory language is clear. A “dispute”, and nothing but a “dispute”, may be referred. If two or more disputes are to be referred, each must be the subject of a separate reference...equally, what must be referred is a “dispute” rather than “most of a dispute” or “substantially the same dispute...”⁽⁶⁾

⁽⁵⁾ Para 20

⁽⁶⁾ Para 22

Adopting the rationale in *Halki* he went on to hold that a dispute within section 108 of the Act can only arise when a claim has been notified and rejected. However, it should be noted that a rejection can occur when a party refuses to answer the claimant.

Finally, HHJ Thornton QC stated that Fastrack would have recovered no sum at all if it had limited its Notice of Adjudication to Application 13, but as the Notice of Adjudication was expressed in extremely wide terms and so covered the matters in dispute. The Notice included such matters as: disputes that have arisen, issues as to Fastrack's right to payment, or such other sums as the adjudicator shall find payable in respect of breaches of contract, loss of profit, etc. The interim payment procedure had come to an end as a result of Fastrack's acceptance of Morrison's repudiation, and so had been replaced by an entitlement to damages of sums due as a result of the repudiation. Therefore there had been a notification and rejection of the claims forming the subject matter of the dispute which had been captured in the Notice of Adjudication.

The case of *Chamberlain Carpentry & Joinery Limited v Alfred MacAlpine Construction Limited* (25 March 2002) again considered the question of what constitutes a dispute for the purposes of adjudication. A series of issues in dispute had been set out in Chamberlain's Notice of Adjudication. All of those issues (save for one) related to the value of the subcontract, raising discrete points for the adjudicator to consider. A further point referred to in the Notice of Adjudication related to the ascertainment of the fair and reasonable costs incurred by MacAlpine during the course of adjudication. The subcontractor had included this issue as MacAlpine's bespoke rules of adjudication applied, and one of the provisions in those rules stated that the referring party should be responsible for all the costs incurred on a full indemnity basis. This was unless MacAlpine were the referring party, in which case both parties were to bear their own costs.

HHJ Seymour QC referred to Judge Thornton's analysis in *Fastrack Contractors v Morrison Construction* considering that whilst it was up to a claimant to set out the nature of the dispute in the Notice of Adjudication, the claimant was not the sole judge of whether there was in fact a single "dispute", and a series of discrete matters could be characterised as a single dispute for the purposes of adjudication. Of more interest, HHJ Seymour QC referred to the principles of interpretation recently restated by Lord Hoffman in *Investors Compensation Scheme v West Bromwich BS* (1998). In that case, Lord Hoffman said that interpretation was the ascertainment of the meaning, which the particular document would convey to a reasonable person having the background knowledge that would have been reasonably available to the parties. On this basis HHJ Seymour QC considered that the subcontractor had clearly referred to adjudication a dispute as to how much the sub-contractor should have been paid. Further, an integral part of that dispute was the ascertainment of MacAlpine's costs as the adjudication rules required Chamberlain to pay MacAlpine's costs.

Finally, MacAlpine argued that documentation submitted with the application was such that the adjudicator had to “hunt through” those documents in order to identify the payment application referred to in the Notice of Adjudication. They argued that the dispute was therefore not sufficiently identified, and as a result the adjudicator lacked jurisdiction. HHJ Seymour QC held that a difficulty locating documents did not mean that the “dispute” had not been identified with sufficient clarity. The adjudicator had identified the matters in dispute and had correctly understood what he had been asked to do.

Balfour Kilpatrick Limited v Glauser International SA Salford TCC (27 July 2000) considers the nature of a dispute in respect of the complexity of the matters.

On an application under Part 24 of the CPR to enforce the decision of an adjudicator, the defendant to the adjudication argued that the notice to refer was defective in that it sought to refer more than one dispute in a single reference. The contract between the parties incorporated the TeCSA Rules (Version 1.3), which, at Rule 3, adopts the singular word “dispute”. They also argued that the number and complexity of the disputes made it unsuitable for adjudication, and given the short timescale the process was unfair and in breach of the rules of natural justice.

Judge Gilliland held that a “dispute” under the TeCSA Rules was not confined to a single dispute, as Rule 11 stated that the dispute related to the “matters identified in the notice”, and therefore anticipated a range of matters within a single adjudication reference. He went on to hold that neither the number nor complexity of the matters made them unsuitable for adjudication, nor was there a breach of natural justice.

British Waterways Board (Judicial Review) Opinion of Lord McCluskey (5 July 2001) also considered the meaning of a “dispute” and in particular whether one had crystallised. The petitioner, British Waterways Board, sought an interim order in a petition for judicial review. The issue was whether there existed between the parties, at the time of the petition, a dispute that could properly be referred to adjudication. The petitioner contended that no “dispute” existed within the meaning of the Act. The respondents maintained that there was a dispute within the meaning of the Act, and that the definition in clause 90 of the contract (inserted by Addendum Y (UK) 2) between the parties should be disregarded.

Lord McCluskey was satisfied that the petitioner and respondent had raised substantial arguments, and as a result he could not hold that there was no issue to try. He stated that the Act and clause 90 both envisaged a speedy resolution of the matters between the parties. If the matters were not properly in dispute then the matter should be put in an appropriate form before an adjudicator. Accordingly the motion was declined.

The case of *Maxi Construction Management Limited v Mortons Rolfs Limited* (7 August 2001) highlights the dangers of failing to assert a claim. If a claim has not been submitted, then it cannot be rejected.

This case concerns the application of the payment mechanisms in the Act and the Scheme in respect of the building contract. The pursuer, Maxi Construction, contended that they were entitled to an interim payment in respect of "Application Number 10", and that the defenders, Mortons, had no relevant defence.

There was some debate about which terms had been incorporated into the contract, but ultimately the decision turned upon the nature of the contractor's submission for payment, which the judge characterised as a request for the employer's agent to value the work, rather than an application for payment. Lord MacFadyen held that the application by the contractor did not amount to a claim under the Scheme because:

1. it was an application for agreement of the contractor's valuation, and not a claim for payment at all, and
2. it did not, in any event, comply with the requirement of paragraph 12 of the Scheme as it did not specify the basis on which it had been calculated.

Edmund Nuttall Limited v. RG Carter Limited (21 March 2002) concerns the issue of what constitutes a "dispute". In that case, a breakdown of additional costs relating to delay and disruption was provided in May 2001. There were some further exchanges in correspondence before a notice of adjudication was issued on 14 December 2001. The claimant's expert prepared a report in support of the claim, but adopted different figures and relying upon several different matters in support of the claim. The defendant objected on the basis that the expert's report set out a new claim, which Carter had not seen before. They argued that, therefore, it did not relate to the dispute referred to adjudication. The adjudicator continued and nonetheless made a decision.

HHJ Seymour QC considered the authorities relating to the meaning of the words "dispute", and "claims", and came to the conclusion that a claim must be formulated, put to the other party and cannot become a "dispute" until that other party has had an opportunity to consider the claim and reject it. Failure to respond within a reasonable time will amount to a rejection. HHJ Seymour QC held that the claim advanced in the expert's report was different to the original claim referred to in the notice of adjudication. He therefore declined to enforce the award.

Care is therefore 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. A dispute in respect of the revised claim cannot crystallise until that revised claim has been rejected.

The case of *Orange EBS Limited v ABB Limited* (22 May 2003, TCC) came before HHJ Kirkham. In that case, Bovis (who were carrying out the building of the trauma centre at the John Radcliffe Hospital) sub-contracted works to the defendant, ABB. ABB then subcontracted mechanical services work to Orange based on an amended DOM/1 1980 Edition. Orange submitted, in March 2002, their penultimate application for the gross sum of £81,399.05 at a time when approximately 75% of their work had been completed. On 28 May 2002 Orange withdrew from site. ABB issued a Notice in June 2002 stating that Orange had failed to complete their work. ABB refused to give Orange further access to the site. On 5 July 2002 ABB sent a fax to Orange stating that they would pay them no further sums until a final account had been submitted and ABB had adjusted it to take account of defective and incomplete work. On 10 July Orange replied stating that a dispute existed between the companies. A final account was not provided until 2 December 2002 seeking a gross valuation of £270,417.00. Enclosed with the letter was a formal Notice of Intention to Refer to Adjudication.

A first adjudicator was appointed on 9 December 2002, but resigned on 11 December as the dispute was not referred to him. A second Notice to Refer was issued on 6 January 2003 and the Adjudicator decided that ABB's conduct in refusing Orange access to the site amounted to a repudiatory breach of contract. He concluded that the total value of Orange's claims was £155,011.22.

ABB contended that the adjudicator did not have jurisdiction to decide how much Orange should be paid in respect of the final account as no dispute existed at the time of the referral.

HHJ Kirkham referred to the recent decision of *Forbes J Beck Peppiatt Ltd v Norwest Holst Construction Ltd* [2003] EWHC H22 (TCC). In that case, Forbes J held that the decision in *Halki* binds judges in the context of adjudication and the word "dispute" should not be given some special meaning. For a dispute to have arisen it must be clear that the process of negotiation has ended and there is something that needs to be decided.

Orange argued that a dispute had arisen on or before 8 July at the latest, or alternatively on or about 2 December when the final account was delivered.

HHJ Kirkham held that a dispute arose on receipt of ABB's letter of 6 July at the latest, but that at that point Orange had not provided ABB with the detail of the amount claimed. For example, a large

proportion of the variations had not been claimed until 2 December 2002 when the final account was submitted. She therefore concluded that there was no dispute for the purposes of adjudication in July 2002 as to the amount payable to Orange. On the other hand, by the time Orange issued its Notice to Adjudicate on 6 January 2003, a dispute had arisen as sufficient time had elapsed for evaluation and discussion or negotiation of Orange's claim. Therefore, the second Adjudicator had jurisdiction and Orange was entitled to judgment.

In *Beck Peppiatt Ltd v Norwest Holst Construction Ltd* (20 March 2003, EWHC H22 (TCC), Mr Justice Forbes), Beck Peppiatt Limited sought a declaration that the adjudicator had no jurisdiction to determine the claims referred to in the second referral dated 17 February 2003. The claimant maintained that there was no dispute between the parties at that date. They submitted that the current law with regards to the requirements for a "dispute" in respect of adjudication was unsatisfactory and in conflict.

The first notification of delay was served on 22 February 2002. In April that year the claimant submitted a claim for an extension of time, and then engaged in June 2002 a claims consultant. Further requests for extensions of time were made, and in August 2002 the defendant granted a 2-week extension of time. At the same time, the claimant commenced adjudication in respect of 19 claimed variations. Further claims were made and on 1 November the defendant requested further information in order to substantiate those claims. By a letter dated 18 December 2002 Beck Peppiatt's chairman wrote to the defendant demanding payment and threatening adjudication if Beck Peppiatt were not paid by the end of January 2003. On 29 January 11 lever arch files were served on the claimant. On 7 February the defendant wrote to the claimant stating that unless the claimant agreed to the account by close of business on 12 February then they would consider that a dispute had arisen between them. On 17 February the second Referral to Adjudication was issued.

Mr Justice Forbes considered that the present case law in respect of the meaning of a dispute for the purpose of adjudication was not inconsistent with the approach in *Halki Shipping Corporation v Sopex Oils Limited* [1998] 1 WLR 727. He said that the law was satisfactorily stated by HHJ Lloyd QC in *Sindall v Solland* [June 2001]. In that case, HHJ Lloyd QC stated that:

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.

Mr Justice Forbes considered that this principle was "easily understood" and was not in conflict with *Halki*. He therefore concluded that the word "dispute" did not have any special meaning for the purposes of adjudication. He went on to hold (at para 15):

On any view, as it seems to me, a dispute came into existence from 29 January 2003, if not before, by the Defendant's rejection of the Claimant's position, as put forward in its December 2002 letter, by the service on the Claimant of the Defendant's position with regard to the various items that remained outstanding for the purposes of resolving the final account.

He concluded that a point was reached in February 2003 where the process of discussion and negotiation had ended and the thing that needed to be decided was the correct position with regards to the outstanding final account.

In summary:

- 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*.
- 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*.
- If parties are arguing about a variety of issues then it is difficult to argue that no dispute exists - *British Waterways Board*.
- 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*.
- 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*.
- Is the dispute referred the one that has been claimed and rejected? *Edmund Nuttall v Carter*.
- Has the process of discussion and negotiation had ended and the thing that needed to be decided *Fastrack v Morrison; Beck Peppiatt Ltd v Norwest Holst Construction Ltd*.

6. Natural justice

The defence of natural justice was raised in the first case of *Macob*. In that case, there was some ambiguity as to the dates for the final payment and therefore the date upon which notices to withhold should have been served. The adjudicator was unable to determine precisely what had been agreed, and therefore decided that because of the ambiguity the parties had failed to comply with section 110(1) of the Act. Section 110(1) states that the parties must provide an adequate mechanism for determining the payment dates and the date upon which withholding notices must be served.

Defendant's Counsel, Mr Furst, argued that there had been a breach of natural justice because the adjudicator should have given the parties the opportunity to make representations to him as to the question of that ambiguity before coming to his decision. That argument was entirely rejected by Dyson J at paragraph 18 of the judgment:

18. For all these reasons, I ought to view with considerable care the suggestion that the word "decision" where it appears in section 108(3) of the Act, paragraph 23(2) of Part 1 of the Scheme and clause 27 of the contract, means only a decision whose validity is not under challenge. The present case shows how easy it is to mount a challenge based on an alleged breach of natural justice. I formed the strong provisional view that the challenge is hopeless. But the fact is that the challenge has been made, and a dispute therefore exists between the parties in relation to it. Thus on Mr Furst's argument, the party who is unsuccessful before the adjudicator has to do no more than assert a breach of the rules of natural justice, or allege that the adjudicator acted partially, and he will be able to say that there has been no "decision".

The brushing aside of natural justice issues has been heavily criticised by Mr Ian Duncan Wallace QC in "*Macob: A Hard Case?*" (1999) EDRLJ 298. Mr Ian Duncan Wallace QC was basically arguing that as a result of *Macob* adjudicators would enjoy greater immunity than that provided by law to judges and arbitrators. He argued that Parliament would need to have expressly set out such an immunity within the Act.

The courts have reconsidered the role of natural justice, arguably adopting a more cautious approach. In the case of *Discairn Project Services Limited v Opecprime Development Limited* (11 April 2002), the defendant challenged the enforcement of an adjudicator's decision on the basis that the adjudicator held "private" telephone conversations relating to the issues in dispute without adequately informing the other party about the nature of those discussions. Judge Bowsher QC declined to enforce the decision as he held that the telephone calls created the appearance of bias. It was irrelevant whether there was any actual bias, the important issue was that the calls created the appearance of bias. One might assume that telephone calls would be required given the restricted timescales in adjudication, providing that the other party is given an opportunity to consider the matters discussed and comment. However, Judge Bowsher QC took the view that telephone calls should be restricted to administrative matters, and could perhaps be made by a secretary rather than the adjudicator himself.

The recent case of *Balfour Beatty Construction Limited v The Mayor & Burgesses of the London Borough of Lambeth*, 12 April 2002, before HHJ Humphrey LLOYD QC also deals with questions of natural justice. Balfour Beatty made an application under Part 24 (Summary Judgment) to enforce the decision of an adjudicator. The contract between Balfour Beatty and Lambeth was for the

refurbishment of the Falmouth House, Penwith Manor Estate, Kennington Park Road, London. The contract was made pursuant to an order, and at the time of the adjudication the contract had, apparently, not been executed, but the order incorporated the JCT Standard Form of Building Contract 1998 Edition Local Authorities Without Quantities incorporating amendments and the Contractor's Designed Portion Supplement 1998.

During the course of the works delays occurred, and on three occasions the architect awarded Balfour Beatty an extension of time. However, the architect also issued a Certificate of Non-Completion, with the result that Lambeth deducted liquidated damages totalling £355,831.71. A dispute arose in connection with the amount of damages for delay, and 5 months after practical completion the dispute was referred to adjudication. The basis of the referral was an as-built programme and analysis, but the adjudicator did not consider that it was adequate in that it did not identify each relevant event, the date of the event, the activity directly affected by the event, and the nature of that effect on the completion date. The adjudicator attempted to obtain this information from the parties, but was only partly successful and decided to prepare his own critical path analysis. He then made his decision based upon that critical path analysis.

The complaint in this case was that the adjudicator had not given the parties an opportunity to review and comment upon the critical path analysis. HHJ Lloyd QC referred to the decision of HHJ Bowsher QC in *Discaim Project Services Limited (No. 1)*, which recognised that some breaches of natural justice might be allowed in order to deal with the dispute in a restricted timescale, and that each case would turn upon its facts, but that nonetheless adjudicators must comply with the rules of natural justice. HHJ Lloyd QC confirmed this approach, recognising the importance of adjudication in the industry, not just in terms of settling minor disputes, but more recently in settling large disputes post completion. He considered that in these circumstances natural justice was all the more important.

As a result HHJ Lloyd QC held that the adjudicator had exceeded his jurisdiction by making good the material deficiencies in Balfour Beatty's claim and by not giving a party a reasonable opportunity of commenting upon the critical path analysis produced by him. The application for summary judgment was therefore dismissed.

The case of *Try Construction Limited v Eton Town House Group Limited* (28 January 2003) concerned the conversion of a London bank into a luxury hotel. Extensions of time and loss and expense claims arose which were referred to adjudication.

During enforcement of the adjudicator's decision, Eton claimed that the appointment of a programming expert by the adjudicator was outside of the adjudicator's powers, and further that Eton had not been given the opportunity to consider the methodology used by the adjudicator in order to

determine the delay issue. They therefore claimed there had been a breach of natural justice because they had not been given the opportunity to make appropriate representations.

The Judge found that at a meeting with the adjudicator, the adjudicator had suggested and the parties had agreed to the appointment of a planning expert. In addition, the parties had conferred extensive authority on the adjudicator to analyse the delay claim and, if necessary, the parties had given the expert the authority to “go beyond the strict confines of the arguments put before the parties”. His Honour Judge Wilcox followed *Balfour Beatty v London Borough of Lambeth* and agreed that transparency was a very important factor when considering natural justice. However, in this case both parties had agreed to the adjudicator appointing the expert, and had also agreed that the expert should have the autonomy to decide its own methodology. The delay analysis was therefore the consequence of that agreement. In addition, the Adjudicator’s decision was his own and not merely that of the delay expert. The adjudicator had reached his decision based on the expert’s findings.

In the case of *Amec Projects Limited v Whitefriars City Estates Limited* (27 February 2004, TCC, HHJ Toulmin CMG QC), Amec applied under Part 8 of the Civil Procedure Rules to enforce an adjudicator’s decision dated 17 December 2003. The adjudicator had decided that Whitefriars should pay Amec £597,371.78. This was the second adjudication between the parties relating to substantially the same subject matter. Amec had tried to enforce the first decision. HHJ Lloyd QC refused to enforce the decision as the contract named Mr George Ashworth as the designated adjudicator, but the adjudicator appointed was someone else. The second adjudication was referred to the same adjudicator, not Mr George Ashworth.

Whitefriars refused payment on the basis that the adjudicator had not been named or identified in the contract. They argued that the adjudicator should have been nominated by the managing partner of Davies Langdon & Everest after the sad death of Mr Geoffrey Ashworth (there being no Mr George Ashworth at DL&E). Second, they argued that the adjudicator breached the rules of natural justice in that he would simply give the same decision on the second occasion as he had given on the first: the adjudicator had obtained legal advice which was not disclosed to the parties for comment; he had had a telephone conversation with a partner at the solicitors acting for Amec that went beyond merely administrative letters, and he would be biased because Amec had put the adjudicator on notice they would be looking to him for the costs of their first adjudication. Third, they argued that the adjudicator had failed to answer the question put to him.

HHJ Wilcox CMG, QC held that the George Ashworth named in the appendix to the contract was a misnomer, and in fact the contract meant a Mr Geoffrey Ashworth. As Mr Geoffrey Ashworth had died before the matter was referred a second time and there was no machinery under the contract for appointing an adjudicator, the Scheme applied. Therefore the adjudicator had jurisdiction. In respect

of natural justice and bias he referred to the test set out in the House of Lords in *Porter v Magill* [2002] 2 AC 357. The test is whether at the time the adjudicator gave a decision fair minded and informed, an observer having considered the facts, will conclude that there is a real possibility that the adjudicator was biased.

He concluded that in respect of the re-appointment there was no bias. In respect of the adjudicator carrying forward into the second adjudication legal advice he received in respect of the first, he considered that this was a breach of natural justice. If an adjudicator sought advice for a third party, then it was essential that he informed the parties in advance, and notified the parties of how the questions had been put in order that the parties had the opportunity to evaluate the advice and comment. This did not happen. In respect of the telephone call, he believed that the conversation went beyond administrative matters, and concluded that a fair-minded observer would conclude that there was a real possibility that the adjudicator was biased. Regardless of whether the adjudicator had answered the right question, he declined to enforce the Award because of the breaches of natural justice.

7. Human Rights Act

The issue of the applicability of the Human Rights Act 1998 has been considered in several cases. *Elanay Contracts Limited v The Vestry* (13 August 2000) was the first case to consider the application of Article 6 of the European Convention on Human Rights, as applied in this country by the Human Rights Act 1998. That Article states that every party must have a reasonable opportunity of presenting its case. The judge held that Article 6 did not apply to adjudication proceedings as the adjudicator did not make a final determination. That is because all adjudicators' decisions pursuant to the Act are subject to final determination by arbitration, litigation or agreement between the parties.

The next case was *Austin Hall Building Limited v Buckland Securities Limited* (11 April 2001). In that case, it was held that an adjudicator appointed pursuant to the Act is not a public authority and so therefore is not bound by the Human Rights Act 1998 to act in a manner which is incompatible with a convention right. In addition, an adjudicator is not a "tribunal" within section 21 of the Human Rights Act. There is not a breach of the requirement for a public hearing, because the whole process including enforcement proceedings would be held at a public hearing before enforcement. Therefore Article 6 of the 1998 Act is not breached by the adjudication process.

In *Austin Hall* His Honour Judge Bowsher QC concluded that Article 6 did not apply because the adjudication proceedings were "a process design to avoid the need for legal proceedings". Human rights-based challenges surfaced again in the case of *RG Carter Limited v Edmund Nuttall* (No. 2).

Again with limited success. Human rights issues appear to have disappeared from adjudication proceedings currently however, we may not have seen the last of these human rights challenges.

8. The “serious financial doubt” exception

If the receiving party is in liquidation or receivership or there is a serious doubt about its ability to repay then a stay of execution may be granted. This principle was recognised in *Bouygues v Dahl-Jenson*, but has more recent application in the case of *Rainsford House Limited (in Administrative Receivership) v Cadogan Limited* (13 February 2001). In that case, Rainsford fell into the category of “serious doubt on the ability to repay” by the very fact that they were in administrative receivership.

HHJ Seymour QC stated that the question of whether to grant a stay on the basis of some serious doubt on the ability of the claimant to repay would need to be considered on the circumstances of each case. He stated that an applicant would need to put before the court “credible material which, unless contradicted, demonstrated that the claimant is insolvent” (at paragraph 11). However, he stated that the applicant merely needed to put evidence before the court as to the financial position of the claimant at the time of the application, and did not need to predict when the adjudicator’s decision might be challenged, nor attempt to predict the financial standing of the claimant at that time. Providing that the defendant is able to produce such evidence, then it is for the claimant to contradict the evidence.

This principle was further developed in the case of *Barry D Trentham Limited v Lawfield Investments Limited* (3 May 2002, Outer House, Court of Session). The pursuer, Barry Trentham, was a building contractor, and the defender, Lawfield Investments, was a property developer. The pursuer was claiming payment of valuation 17, which had not been paid by the developer. No valid section 111 notice was given, and so the builder sued for the sum of £364,864.49 (valuation no. 17).

The contract was the SBCC, but the payment provisions had been amended so that payment was based upon the cost of the works, plus 7½% in respect of the subcontracted works, and 5% for the builder’s costs. Money had been lent to the developer by the Dunbar Bank, and the bank’s surveyor checked the valuation in the role of fund’s monitoring surveyor.

The pursuer alleged that there was a serious risk of the defender’s insolvency because of the net liability in the audited accounts, and also because of the borrowing against that sole development. The defendant challenged that claim on the basis of the Human Rights Act, stating that it had adequate funds and referring to the published accounts.

Lord Drummond Young held that if a defender could put forward credible evidence that there was no risk of its insolvency, then the onus was placed back on the pursuer to justify the continuance of the injunction. The defendant showed by virtue of its published accounts that it was solvent with assets. However, the pursuer examined those accounts, and revealed that the published accounts were misleading. The Judge accepted those discrepancies, concluding that there was a significant risk of insolvency for 7 reasons. These included,

1. that the audited balance did not disclose surplus assets over liabilities;
2. the company was only carrying out one single development;
3. that whole development had to be sold at the prices assumed in the work in progress calculation;
4. the audited balance sheet made no allowance for bank interest payable in the future;
5. it was uncertain how a considerable loan was to be repaid to Mr Trentham;
6. the audited balance sheet included cash at the bank of £115,223, but the balance was only £20,462.40 (without explanation); and finally
7. a liability for VAT had not been taken into account. This in itself would allow the pursuer to retain the inhibitions.

The defender then argued that the valuation 17 claim was disputed, and that a withholding notice in the sum of £1 million had been served against valuation 18. The defender argued that this cancelled the present claim. The Judge recognised that the existence of a counterclaim would amount to a defence. Nonetheless, the Judge took into account the defendant's offer to settle the final account, which demonstrated that regardless of valuation 17 and 18 the defendant accepted that a "liquid" sum was accepted as owing. He therefore refused the defendant's motion to recall the inhibition (injunction).

Finally, in *Baldwins Industrial Services Plc v Barr Limited* (6 December 2002) the claimant, Baldwins Industrial Services Plc, hired a 50 tonne crane for use on a building site by Barr Limited. Barr requested that Baldwins supply, and Baldwins did supply a crane operator. Baldwins alleged that the crane had been damaged as a result of an incident on site on 19 December 2000. They claimed the cost of repairs and the value of lost hire charges. By a notice dated 20 July 2002 they referred that dispute to adjudication. The adjudicator issued a decision dated 24 August 2002 concluding that he had jurisdiction, and awarding Baldwins the sum of £149,212.52 together with transport costs, interest and £35,702.87 in respect of lost hire charges.

Joint Administrative Receivers were appointed in respect of Baldwins on 28 October 2002.

Baldwins sought to enforce the adjudicator's decision that Barr should pay £185,385.39 plus interest and costs. Barr defended on the grounds that the adjudicator did not have jurisdiction because the agreement between the parties was not a construction contract within the meaning of section 104 (i) (a) of the Act. However, as Administrative Receivers had been appointed, and the financial position of Baldwins was poor, Barr sought a stay of execution. Unlike previous cases Barr did not have a counterclaim, neither had they commenced proceedings. Barr were ordered to pay the money into court on the basis of certain conditions, one of which was the requirement for them to commence proceedings within one month of the order, failing which the money would be paid out of court to Baldwins.

9. The status of an adjudicator's decision; does it create a debt?

An issue that is not yet fully resolved is the status of an adjudicator's decision. Does an adjudicator's decision create a debt (following *VHE Construction plc v RBSTB Trust Co Limited* (13 January 2000)). Alternatively, when seeking to enforce the decision of an adjudicator, is the cause of action the right or obligation in dispute, rather than the decision itself?

In the case of *VHE Construction plc*, VHE applied for summary judgment for sums claimed by way of enforcement in respect of two adjudications. Several issues arose, the third of which were whether VHE were automatically entitled to the amount applied for, or whether RBSTB was entitled to pay a lesser amount by relying on a right of abatement or a "proper" assessment of the valuation to clause 30.1 and 30.2a of the contract in question. HHJ Hicks QC considered that this raised two questions. First, the construction and effect of the decision in this particular case, and where the adjudicator's decision gave rise to independent obligation for the payment of money, which was distinct from the contractual obligations in dispute. The second question was not merely confined to the facts of a particular case but concerned the status of adjudication decisions themselves, which required payment of monies.

In *VHE Construction*, there had been two sequential adjudications. In the first adjudication the adjudicator had accepted the defendant's submission that it was entitled to withhold money until VHE delivered a VAT invoice in accordance with the payment provisions in the contract. The delivery of a VAT invoice was a condition precedent to payment. The adjudicator decided that VHE would be entitled to payment within 28 days of receipt of the VAT invoice. The defendant argued that the decision could only amount to a declaration as to the effect of the contractual provisions. If that approach was right, then VHE would need to commence a court action under the contract in order to obtain the payment. Proceedings to enforce payment of the decision would be a waste of time. HHJ Hicks QC considered that it was implausible that the statutory purpose of section 108 of the Act would

be that “either of the parties or the adjudicator intended his decision to be vacuous”, and went on to state:

...so far from that being the case here the evidence is predominantly, if not entirely, the other way. I therefore conclude that the effect of Mr Linnett’s decision was to require RBSTB to pay the sum of £1,037,898.05 to VHE within 28 days after receipt of the appropriate VAT invoice, that is to say, in the event, by 4th November 1999.”⁷

In effect, summary judgment is given for the payment of a sum not actually due at the date of the decision because of an unfulfilled condition precedent in respect of the awaited VAT invoice. But, there had been a second adjudication. In that decision the one million pound odd had been revalued to £254,831.83. The judge therefore had to consider the effect of the second adjudicator’s decision. There were two views as to its effect. First, the amount of the first decision was reduced to the amount of the second decision, or, second, the amount of the first decision was to be paid in full, and the difference between the first decision and the second was to be immediately repaid. HHJ Hicks QC preferred the second option. This appears to be on the basis that the second adjudicator did not have any jurisdiction to revise the first adjudicator’s decision. He therefore concluded that the first adjudication decision remained valid and enforceable.

Little guidance is given in the Act as to the status of an adjudicator’s decision. Section 108(3) merely states that decisions of the adjudicator shall be binding on the parties until the dispute or difference is finally determined by arbitration or litigation or by agreement. Section 108(3) does not, therefore, deal directly with enforcement but with the relationship between adjudication, and arbitration or litigation in respect of the same dispute. It does, however, lay the ground for enforcement by use of the words “until final determination the decision is binding”. By comparison, the Arbitration Act 1996 sets out a fairly detailed code, in sections 66-71 inclusive, dealing with the powers of the court in respect of arbitral awards. Section 66 provides that “an award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court”.

In section 67(3) the court may enforce an arbitration award, vary it, or set it aside in whole or in part if there is a question of substantive jurisdiction. The Housing Grants Construction and Regeneration Act 1996 makes no such provision for enforcement. HHJ Hicks QC came to the conclusion that enforcement proceedings in respect of an adjudicator’s decision were “proceedings to enforce a contractual obligation, namely the obligation to comply with the decision”.⁸ This is of course consistent with the second approach to the analysis of the implication of the second adjudication upon

⁽⁷⁾ Para. 43

⁽⁸⁾ Para. 34

the first. Arguably, the implication of this rationale is that the decision of an adjudicator should be enforced pursuant to the contractual rights of the parties, but it is not the contractual obligations between the parties in respect of the determination of the amount due that is being reassessed and then enforced. One reading of this judgment is that the decision creates a debt that must be paid.

However, this approach has not been followed. In the case of *Glencot Developments and Design Co Limited v Ben Barrett and Son (Contractors) Limited* (2000) BLR 207, HHJ Lloyd QC held that the cause of action is the right or the obligation in dispute. The same judge had to consider this same issue again in the more recent case of *David McLean Housing Contractors Limited v Swansea Housing Association Limited* (27 July 2001). HHJ Lloyd QC was referred to the approach of HHJ Hicks QC in *VHE Construction*, and in particular to HHJ Hicks QC's statement that a residual right to set off liquidated damages does not exist against an adjudicator's decision. Adopting this rationale, the claimant argued that the adjudicator's decision created a debt, and so the cause of action was in respect of the payment of that decision pursuant to the contract. HHJ Lloyd QC did not agree, considering his approach in *Glencot* was correct and so the claim in this case was not payment for the decision, but was the unmet claim for payment application 19. Enforcement was therefore sought for the right under the contract that had not been met by the defendant, and that was the claimant's right to payment under the contract. He supports this view with five arguments:

1. An adjudicator does not have power under the Scheme to modify a contract. Therefore, the adjudicator makes a decision about the dispute under the contract, or in connection with it in respect of some rules. So the decision is about the rights and liabilities of the parties under the contract.
2. Paragraph 20 of the Scheme expressly allows the adjudicator to review certificates. Without this power the adjudicator would not be able to review those certificates, as the adjudicator would merely be making a decision about matters in dispute under the contract at a particular time.
3. The only manner in which an adjudicator can modify the contract is in respect of the time for compliance with his decision. This is because a shorter time may be appropriate in respect of payment, as the amount should have been paid.
4. Chadwick LJ's analysis in *Bougyues v Dahl-Jensen* in the Court of Appeal supports HHJ Lloyd QC's view by considering that adjudication is a "summary procedure for the enforcement of payment provisions due under a construction contract" and "an adjudication decision is capable of being re-opened in subsequent proceedings".

5. There is a distinction between arbitration and adjudication, in that the decision of an adjudicator is not an arbitration award, and does not enjoy the status of an arbitration award. Further, arbitration awards may be final in that they are usually given a long time after the work has been completed and in respect of all matters in dispute between the parties. On the other hand, adjudicator's decisions are given along the way and often in respect of discrete matters, which may continue to resurface during the project and after completion.

HHJ LLOYD QC held that the decision was not in itself a cause of action. The decision was of temporary effect and should be enforced, but the claimant may, at some future date, have to establish its rights, and cause of action pursuant to the contract in respect of its particular claim. An action to enforce an adjudicator's decision is an action to enforce the right or the liability that has been upheld by the adjudicator in the adjudicator's decision not the decision itself.⁽⁹⁾

It is respectfully submitted that this approach must be right. If one were to treat each adjudicator's decision as to be enforced without question then important issues that may come to light during the course of the progression of a project would be potentially ignored. Further, attempting to unravel the complexities of multiple decisions, all of which must be treated as enforceable, in the face of mistakes not just between the parties in respect of valuation, payment notices and withholding notices, but also in respect of the reasoning of the time of the adjudication decisions, might be difficult to unravel and perhaps would lead to unjust results. It certainly makes more sense to treat an adjudicator's decision as a highly persuasive "snapshot" of the rights and obligations between the parties at a particular time during the chronology of the project.

However, the ramifications of this approach are that a subsequent valuation (where periodic monthly valuations apply) will in effect supersede the decision of an adjudicator in respect of the previous valuation. A carefully constructed valuation and/or withholding notice might therefore effectively nullify an adjudicator's decision just in time for the paying party to avoid the effects of enforcement.

The recent Court of Appeal case of *Parsons Plastics (Research & Development) Limited v Purac Limited*, 12 April 2002, touches on this issue, although not directly. This was an appeal from the TCC, which refused to enforce an adjudicator's decision in favour of a subcontractor, and refused a stay to arbitration. The judge granted the main contractor respondent summary judgment for their money claim, and ordered an interim payment of £12,000 in their favour.

The main contractor, Purac Limited, was engaged by Anglia Water Services for the design and construction of a sewage treatment plant. Purac then engaged Parsons Plastics as a sub-contractor for

⁽⁹⁾ Para.19.

an odour control package. Sub-contract works progressed slowly. In addition and at the request of the sub-contractor, Purac paid the sum of £30,963 direct to the sub-contractor's steel supplier. On 20th December 2000 the subcontractor applied for a payment, claiming £261,749.76 in respect of a certain milestone. The main contractor declined to pay, claiming on 21 December that the works had not reached the required stage. On 11th January 2001 Purac gave notice that they were taking over the works, and employing others to complete the works. The following day the sub-contractor was ejected from site.

An issue arose in respect of the jurisdiction of the adjudicator on the ground that the work was not a "construction operation" as defined in the Act. However, Purac's solicitor confirmed that they would submit to the jurisdiction of the adjudicator, and there was therefore an ad hoc referral.

The adjudicator's decision was given on 17 May 2001. He decided that the subcontractor was entitled to a payment of 40% of the value of the completed works. In addition, he also decided that Purac's letter of 21 December 2000 was not a payment notice, nor a withholding notice within the terms of the contract. On 23 May 2001 Purac issued a notice of its intention to withhold payment of the sum awarded in the adjudicator's decision. They claimed £303,000 which had been paid to another subcontractor who had completed Parsons's work. The central issue in the Court of Appeal was whether Purac was entitled to the defence of the set-off raised after the date of the adjudicator's decision.

Lord Justice Pill (Mummery and Latham agreeing) concluded that the Judge had reached the correct conclusion. He stated that it is acceptable for the respondent to set-off against the adjudicator's decision "any other claim they have against the appellants which had not been determined by the adjudicator". The adjudicator's decision cannot be re-litigated in other proceedings but, on the wording of this subcontract, can be made subject to set-off and counterclaim. The appeal was therefore dismissed.

Care is, however, needed in respect of this case. It could be said that it turns on its own facts, in particular the terms of the contract in question. It was not a statutory adjudication, but was a contractual adjudication. Further, decisions were to be "final and binding" and so not subject to the usual potential for a fresh hearing in arbitration or litigation. Further, it was in a contract provided that set-off and abatement were always available, and so the common law rights to equitable common law set-off were quite clearly available.

The issues arose again in respect of two conflicting adjudicators' decisions in the case of *Bovis Lend Lease Limited v Triangle Development Limited* (2 November 2002). Bovis was a management contractor for Triangle Developments for the fit-out of three Victorian schools into three residential

apartments. The contract was in the form of the JCT Standard Form of Management Contract 1998 Edition. The contract contained, at clause 7.6.4.1, a clause which stated that any further payment or release of retention shall not apply as a result of the determination of those in his employment.

A dispute arose in respect of the valuation of two interim certificates, in which the architect had reduced certain sums so that each of the two certificates certified a negative value to Bovis. The architect also served a notice on Bovis to the effect that they were failing to proceed regularly and diligently with the works. Triangle then issued a withholding notice in respect of liquidated and ascertained damages following a certificate of non-completion. Bovis claimed that Triangle had repudiated the contract by engaging new contractors, and that Bovis had accepted that repudiation.

During this period three adjudications were being progressed. The first related to the negative interim certificates, the second in respect of Triangle's claim that Bovis was in breach for a requirement to provide documents and the third relating to the question as to whether the contract had been repudiated.

A variety of questions arose, but one central question related to the status of an adjudicator's decision. The first adjudicator's decision was in conflict with the third in respect of the payments of sums due. The first decision related to the interim valuation, whilst the third related to payments of sums due as a result of the counting process upon determination of the contract.

HHJ Thornton QC held:

1. That as a general rule, the decision of an adjudicator that money must be paid gave rise to a separate contractual obligation of the paying party to comply with the decision;
2. That an effective withholding notice, given before the adjudication notice was given, or in some instances before the decision was issued, would normally be required in order to withhold against an adjudicator's decision;
3. It was possible for the contractual terms between the parties to supersede or provide a right to deduct from a payment directed to be made by an adjudicator;
4. If such a superseding contractual right had existed then an earlier decision of an adjudicator would not be enforced or would be stayed;
5. In this case Triangle was entitled to rely on clause 7.6.4.1 (or the adjudicator's third decision) in order to withhold sums against the first adjudicator's decision;
6. A contention that the determination of Bovis' employment was invalid or a nullity was not sufficient to entitle Bovis to defeat Triangle's reliance on clause 7.6.4.1 unless there was an adjudicator's decision or sufficient evidence.

Finally, the Court of Appeal has considered the status of an adjudicator's decision when compared to "superseding" clauses of the contract in *Levolux AT Limited v Ferson Contractors Limited* (22 January 2003), [2002] EWCA Civ 11, Court of Appeal (Civil Division).

This was an appeal from the summary judgment decision of HHJ Wilcox on 26 June 2002 enforcing an adjudicator's decision. The question in this appeal was whether the adjudicator's decision should be enforced in the derogation of contractual rights which could be in conflict with the decision.

The defendant raised several issues by way of appeal. First, they argued that the contract had been validly terminated and so the adjudicator's decision was inconsistent with the determination. Lord Justice Mantell held that that argument was rejected, as the Judge had held that there had plainly been no valid determination. It was the adjudicator's first instance decision that payment should be made, on the basis that the withholding notice was invalid, that meant that the subcontractor had a right to suspend such that the contractor did not have a right to determine the contract for wrongful suspension.

Second, the defendant argued that there were some exceptions to the principle that an adjudicator's decision is binding and enforceable pending final resolution by arbitration or litigation. In respect of this appeal, one of those exceptions was that the terms of the contract stated that no further payment would be made as a result of the obligation to make a payment in accordance with the adjudicator's decision. This exception was based upon HHJ Thornton Q.C.'s judgment in *Bovis Lend Lease v Triangle Developments* (2 November 2002). Lord Justice Mantell considered that case and the cases upon which Bovis relied. He came to the conclusion that the logic in the cases relied upon by HHJ Thornton was insufficient to support the conclusion reached in Bovis. However, Lord Justice Mantell construed the terms of the contract so as to give effect to the adjudicator's decision, and so held that the determination clauses must be read as not applying to amounts due by reason of the adjudicator's decision. He therefore dismissed the Appeal. Lord Justice Longmore and Lord Justice Ward agreed.

In conclusion, it seems that an adjudicator's decision will be required in order to defeat an earlier decision, even where the machinery of the contract can be said to have overtaken the earlier decision.

10. Expert determination and *Anisminic*

The second Court of Appeal decision relating to adjudication, and touching on section 111 withholding notices was *C&B Scene Concept Design Limited v Isobars Limited*, 31 January 2002. The case concerned the jurisdiction of the adjudicator, and appeared to focus on appendix 2 of the JCT WCD. In the absence of the selection of either payment alternative A or B, the judge decided that the

payment mechanism fell away and was replaced with the Scheme. The result was that the decision was not enforced.

At the summary judgment application in the TCC, three reasons for non-compliance with the adjudicator's decision had been advanced. First, since the parties had failed to select alternative A or B, the whole of clause 30 fell away, the provisions requiring the employer to give notice also fell away, and the provisions of the Scheme applied. Second, failure to give notice does not preclude the employer from arguing that sums are not "due under the contract". Third, the adjudicator had asked the wrong legal question by failing to appreciate that clause 30 had been superseded by the Scheme.

Sir Murray Stuart Smith considered that the real question was whether the error on the part of the adjudicator went to his jurisdiction. He applied the law which has developed in respect of expert determination, citing the test set out by Knox J in *Nikko Hotels (UK) Limited v MEPC plc* [1991] 2 EGLR 103: "If he answered the right question in the wrong way, his decision will be binding. If he had answered the wrong question, his decision will be a nullity."

Sir Murray Stuart Smith concluded that the adjudicator was asked to decide the amount of the interim application number 6. Within the scope of that referral the adjudicator may have made some errors of law along the way, but he had not exceeded his jurisdiction. He had decided the matter put to him and the decision would be enforced.

The Court of Appeal simply avoids the issue by referring to the law on expert determination and making its decision on that basis. The question of whether clause 30 of the contract, or the payment provision of the Scheme, were to apply (and so a consideration of whether a valid withholding notice had been given) was not considered. Instead, the adjudicator had jurisdiction to consider which terms were to apply, and whether right or wrong, his decision would be enforced.

How "wrong" must a decision be before the court will intervene, if indeed the court would intervene at all? For example, if the parties delete the clause from the standard form in its entirety such that the only sensible conclusion must be the Scheme applies. However, the adjudicator nonetheless bases his decision on the terms of the deleted provision. Can that "wrong" decision be one that is within the adjudicator's jurisdiction, or is it a decision that no reasonable adjudicator would make, such that a court would invoke the public law *Anisminic* principles? In the case of *Anisminic Limited v The Foreign Compensation Commission* [1969] 2 AC 147, Lord Reid said:

It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the

narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

The courts have at first instance given some consideration to the applicability of the public law principals to adjudication. Lord Reed in the case of *Ballast plc v The Burrell Company (Construction Management) Limited* (21 June 2001) considered that Lord Reid's principles were applicable to adjudication, and provided some useful guidance for determining when an adjudicator might be able to make a decision that was both wrong in law and in fact, but should nonetheless be upheld, and those situations where the line had been crossed such that the decision was in excess of jurisdiction and unenforceable. However, HHJ Seymour QC in the more recent case of *Shimizu Europe Limited v Automajor Limited* (17 January 2002) rejected the public law approach of *Anisminic* or the *Wednesbury* principles.⁽¹⁰⁾ This appears to be on the basis that the judicial review principles, whilst applicable in Scots law, were not applicable in English law.

Another case considering judicial review is *London & Amsterdam Properties Limited v Waterman Partnership Limited* (18 December 2003, TCC, HHJ David Wilcox). The Waterman Partnership Limited had been engaged by a deed of professional appointment dated 2 November 1998 to act as LAP's structural and civil engineers and traffic consultants for the development of Mid-Summer Shopping Centre in Milton Keynes. LAP maintained that Waterman failed to release substantial design information by specific dates and therefore had caused critical delay to the works. LAP claimed that Waterman were professionally negligent. The matter was referred to adjudication, and on 6 May 2003 the adjudicator decided that Waterman were to pay the sum of £708,796.95 (including interest), together with the fees of the adjudicator.

⁽¹⁰⁾ *Wednesbury* unreasonableness relates to "a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." Per Lord Diplock in *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 734 House of Lords referring to *Associated Provincial Picture House Limited v Wednesbury Corporation* [1948] 1 KB 223.

Waterman applied under CPR Part 8 for a declaration that the adjudicator did not have jurisdiction or exceeded his jurisdiction. LAP applied under Part 24 for summary judgment for the full amount of the adjudicator's decision.

On 21 February 2003 Waterman stated that it did not accept the adjudicator's jurisdiction for a variety of reasons:

1. He had previous knowledge gained in a previous adjudication which may contain confidential information.
2. He was a chartered surveyor not a suitably qualified professional engineer.
3. He purported to direct a response when the referral had at that stage not been made.
4. The referral was not to exceed 20 single sides of A4 pages in accordance with clause 16.3 of the deed, but the reference exceeded 1,000 pages.
5. That within the time required Waterman did not have any reasonable opportunity of responding properly to the case.
6. The terms of the adjudicator's remuneration were inconsistent with paragraph 25 of the Scheme.

The adjudicator proposed to charge for each hour engaged in the adjudication. The Scheme did not explicitly recognise charging by the hour. However, paragraph 25 of the Scheme entitled an adjudicator to "such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him". An hourly charge-out rate was not in conflict with the Scheme and so HHJ Wilcox rejected this challenge.

The contract considered that it might be desirable for an adjudicator to have some previous knowledge of matters to be adjudicated. Waterman submitted that prior knowledge was a breach of natural justice. If the adjudicator had been in possession of some prior knowledge, he was obliged to tell the parties. If he had access to confidential information and he was unable to tell the parties then he should have excused himself. In this case the adjudicator considered the risk and could not identify any confidential information. The submission was therefore rejected.

The parties can agree in advance to limit the number of pages which may be considered in an adjudication. LAP clearly ignored the provision requiring only 20 pages by submitting in excess of

1,000 pages. However, the 20-page Referral Notice was a summary, and provided that it sufficiently identified the dispute the adjudicator was entitled to refer to the other documents under paragraph 30(a) of the Scheme.

Waterman argued that there was no dispute at the time of the reference, or that the dispute decided was not the same dispute that existed at the time of the reference. Further, there was a breach of natural justice because Waterman were not given a reasonable opportunity to deal with the quantum claim. Waterman had for some time been seeking to obtain quantum information, and an amended version of the information and progress analysis was provided during the course of the adjudication on 21 March 2003. A range of authorities relating to whether a dispute had crystallised were considered. HHJ Wilcox said that there was a dispute concerning both liability and quantum in respect of the claim.

In respect of natural justice the issue of information resurfaced, as on 11 April a supplemental statement was served in order to deal with deficiencies in the original quantum statement. This was despite the production of in excess of 1,000 pages in the referral. The Judge considered this an evidential ambush that was “clearly deliberate”. Nonetheless, a mere ambush “however unattractive” did not amount to procedural unfairness. In this case the adjudicator should have precluded the supplemental evidence or given Waterman a reasonable opportunity of dealing with it. If there was insufficient time for Waterman to deal with it, then the adjudicator should have excluded the evidence. The adjudicator did not appear to appreciate that distinction, and there was, therefore, a substantial relevant breach of the rules of natural justice. As a result Waterman had demonstrated a live and triable issue for the purpose of Part 24.

Finally, Waterman argued that the adjudicator did not appreciate the distinction between an error and a finding of professional negligence. They argued that the judicial review cases of *Anisminic*, *O’Reill v Mackman* and *ex parte Page* demonstrated that the adjudicator’s decision should be reviewed. What other purpose would there be in the adjudicator ascertaining the relevant law if he were empowered to ignore it and then decide the decision on the basis of his own ideas? Waterman argued that the approach of *Macob* and the Court of Appeal cases (including *Bouygues v Dahl-Jensen*) were inconsistent with the House of Lords, decisions in respect of judicial review, which were of higher authority. HHJ Wilcox considered that it was not within his power to interfere with the adjudicator’s finding as he was bound by *Bouygues (UK) Limited v Dahl-Jensen (UK) Limited* [2000] BLR 522. Neither was he prepared to come to a final view on this matter. He noted that “a review as to the working of the Act in practice is perhaps now timely”.

Gillies Ramsay Diamond and Gavin Ramsay and Philip Diamond v PJW Enterprises Limited (24 December 2003, Second Division, Inner House, Court of Session, Clerk LJ, MacFadyen L, Caplan L) is

interesting because Lord MacFadyen has by this stage changed his mind about *Homer Burgess Limited v Chirex (Annam) Limited*. This was a reclaiming motion from an interlocutor of Lady Paton (27 June 2002) in a petition for judicial review of an adjudicator's decision. The petitioners, Gillies Ramsay Diamond, were a firm of building surveyors. They had been employed by the respondents, PJW Enterprises Limited, as contract administrators for a building contract at 40 Stanley Street, Glasgow. PJW had entered into a building contract with R&R Construction (Scotland) Limited, the contractor.

During the course of the works there were five adjudications. As a result, PJW became liable to the contractor for additional payments. PJW alleged that this was caused by a breach of contract on the part of Gillies Ramsay Diamond. PJW commenced an adjudication, and the adjudicator found against Gillies Ramsay and awarded PJW damages in the sum of £29,119.80.

Gillies Ramsay raised five challenges:

1. there was no construction contract;
2. an adjudicator could not award damages in Scotland;
3. PJW had in fact suffered no loss;
4. the adjudicator had failed to take into account material consideration during the course of the making of his decision; and
5. a court can review an error of law even if it is *intra vires*.

The opinion was delivered by Lord Justice Clerk. By reference to the Act it was clear that "surveying work" was covered by the Act and therefore the contract was a construction contract. The words "dispute arising under the contract" in section 108(1), and paragraph 1 of the Scheme, were wide enough to cover the remedy of damages. The authorities on the "no loss point" were irrelevant because the appropriate way to challenge an adjudicator's decision is to rehear it in arbitration, litigation or settle it by agreement. In that respect an adjudicator's decision, although provisional, was immediately enforceable.

While the adjudicator's reasons for his decision were unintelligible, and he had failed to give proper and adequate reasons for his findings of the breach of contract, his errors were *intra vires* errors of a law that he was able to make. The adjudicator had understood and asked the right question, but his reasons for the decision were unsatisfactory.

Finally, he considered the question as to whether the court could review those errors. Reference was made to the judicial review case of *Anisminic v Foreign Compensation Commission* [1969] 2 AC 682 and other related cases. He considered that those authorities were irrelevant as they lay in the field of public law, and adjudication was not an aspect of public law but was a contractual dispute resolution

process. Therefore, the Adjudicator had asked himself the correct question and his decision was not reviewable (*Bouygues (UK) Limited v Dahl-Jensen (UK) Limited* [2001] 1 All ER 1041). He noted that the decision was obviously wrong but that there was no redress in the present proceedings, so that the legislation had created a new set of problems.

Lord Caplan agreed, as had Lord MacFadyen. Lord MacFadyen added with interest that he was wrong in *Homer Burgess Limited v Chirex (Annam) Limited* 2000 SLP 277 to treat an adjudicator as being in a similar position to that of a statutory decision-maker and thus apply judicial review considerations.

Conclusion

The status of an adjudicator's decision may not yet be entirely resolved. However, it is respectfully submitted that HHJ Lloyd QC's view in *David McLean* that the decision does not itself create a cause of action but that the cause of action arises out of the rights and obligation set out in the contract between the parties is the preferred approach. On more settled ground is the approach to enforcement of the court, by way of analogy to the test in expert determination. Provided that the adjudicator has asked the right question, then the adjudicator has the jurisdiction to reach an enforceable decision even where that decision is wrong in fact or law. While this approach allows the court to simply assess the jurisdiction of the dispute in question and come to a conclusion about its enforceability, it does not provide an opportunity for the courts to address some of the wider issues.

The courts have in some instances adopted a more cautious approach to the enforcement of adjudication. However, it must be right that both parties understand the subject matter of the dispute that is to be referred to adjudication, and can expect the "natural justice" safeguards to apply to the process of adjudication as one would expect those proper checks and balances to apply to any dispute resolution process. Nonetheless, the case of *RJT Consulting* may provide many opportunities for jurisdictional challenges on essentially technical grounds. As indeed *Levolux* means that one must cross-adjudicate in order to defeat a decision relating to interim contractual processes, such as interim valuations. It remains to be seen whether future Court of Appeal cases will adopt such a restrictive approach or whether we will see a return to the purposive approach originally pioneered by His Hon. Mr Justice Dyson.

August 2004
Nicholas Gould
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Appendix A

Adjudication - an overview

Introduction

- Disputes in the construction industry
- Latham Report 1994 - called for a fast, binding decision
- Contractual adjudication
- The term "adjudication"

Statutory adjudication

- Housing Grants, Construction and Regeneration Act 1996
- In force, 1 May 1998
- The Scheme SI 1998 No. 649
- Exclusion Order SI 1998 No. 648

Part II of the Act

- Section 104 to 107: introductory provisions
- Section 108: adjudication
- Section 109 to 113: payment and suspension
- Section 114 to 117: supplementary provisions
- Section 146 to 151: general provisions

Section 108

- Right to refer a "dispute at any time"
- Notice
- Appoint adjudicator within 7 days
- Decision within 28 days (14 further days)
- Act impartially
- Take initiative (facts and law)
- Binding decision, until...
- Immunity (bad faith)

Complying with s.108

- Implied
- Non-compliant contract
- Express contract term
 - Minimum 8 requirements
 - Detailed (but compliant)
 - Clause referring to separate rules

Adjudication rules

- The Scheme
- TeCSA
- CIC
- CEDR
- ICE
- JCT

Adjudication: the process

- Notice of Adjudication
- Referral
- Appointment of adjudicator (within 7 days)
- Initial directions/timetable
- Submissions
- Meeting
- Investigation
- Decision (within 28 days of referral)
- Enforcement

Appendix B

Payment provisions in the context of adjudication

Payment and Notices

Section 110 is set out as follows:

- 110 (1) Every construction contract shall -
- (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
 - (b) 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 five 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.

The first subsection of section 110 merely requires the parties to a construction contract to set out a mechanism for determining what payments become “due under the contract” and the mechanism for identifying when those payments become due and a final date for payment of that sum. The parties can agree on the detail of the mechanism, and those standard forms that are commonly encountered within the industry appear to comply with the requirements of this section. Subsection 1 merely sets out the framework within which the parties to a construction contract must operate. If parties do not include a payment mechanism within their construction contract, then the relevant provisions of the Scheme will apply by virtue of subsection 3.

Quite what constitutes an “adequate mechanism” under section 110(1)(a) is unclear. Lord MacFadyen in *Maxi Construction Management Limited v Mortons Rolls Limited* (7 August 2001) 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.

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 New Engineering and Construction 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.

The approach of the traditional JCT forms was that the architect or contract administrator was responsible for certifying an amount due, based upon a gross valuation of the work which was then subject to deduction for retention and sums already paid. The architect would most commonly ask the quantity surveyor to prepare the valuation, and quite often this was preceded by an application for payment from the contractor. So, despite the terms of contract, a contractor would prepare an application, clearly because it was in the contractor’s interest to maximise the valuation and attempt to see that it was paid. The contractor’s application would then be “checked” by the quantity surveyor, who would then adopt the amended application as his or her valuation before making a recommendation, most usually in writing, to the architect of the amount to be certified for payment to the contractor. The architect then issued the interim certificate, which in most cases will amount to the payment notice anticipated by section 110(2).

However, the Act does not appear to make any provision for a failure to issue this payment notice. Wallace QC considers that the absence of any sanction is a significant lacuna in the legislation, which leads him to question the legislative intention in requiring such a notice.⁽¹¹⁾ The absence of any sanction has also been commented upon by Lord MacFadyen in the case of *SL Timber Systems Limited v Carillion Construction Limited* [2001] BLR 516: "Section 111(1), unlike section 110(2), did impose a sanction for failure to serve a notice..."⁽¹²⁾ and then again at paragraph 19:

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. In my opinion Mr Howie was correct in his submissions that 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. Section 110(3) deals with the case of a construction contract that does not contain the provision required by section 110(2) by making applicable in that case the relevant provision of the Scheme, namely paragraph 9 of Part II. By one or other of these routes every construction contract will require the giving of the sort of notice contemplated in section 110(2). 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 of the 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 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.⁽¹³⁾

This is of interest as some had thought that the absence of a section 110(2) notice meant that the claimant (at least in an adjudication) was relieved of the usual burden of proving entitlement and should be awarded the sum claimed.

One of the first decisions which considered that nature of a section 110(2) payment notice was *VHE Construction plc v RBSTB Trust* (2000) BLR 187. RBSTB employed VHE Construction to carry out remediation work. The contract was a JCT Standard Form with Contractor's Design (1981) edition.

⁽¹¹⁾ Wallace, I.N.D QC (2002) 'The HGCRA: A Critical Lacuna?' 18 Const. L J 2, page 117

⁽¹²⁾ Para. 14

⁽¹³⁾ Para. 19

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.

HHJ John Hicks QC reviewed these clauses, compared them to section 110(2) and stated at paragraph 33 of the judgment:

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 go somewhat further than the requirements of the Act, in that failure of the employer to give a written notice means that the employer is then obliged to pay the contractor the amount of the contractor's application, regardless of 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 case of *Northern Developments (Cumbria) v J&J Nichol* [2000] BLR 158 was reported very shortly after *VHE Construction*. In *Northern Developments* HHJ Bowsher QC referred to section 110 and stated:

"The only direct force of section 110 is to make the Scheme apply if the contract does not comply with the Act, and it was so effective in this case. But it also sets the context for section 111 which refers back to it"⁽¹⁴⁾.

He then goes on to state, at paragraph 29:

"The intention of the statute is clearly that if there is to be a dispute about the amount of the payment required by section 111, that dispute is to be mentioned in a notice of intention to withhold payment not later than 5 days after the due date for payment. Equally it is clear from the general scheme of the Act that this is a temporary arrangement which does not prevent the presentation of other set-offs, abatements, or indeed counterclaims at a later date by litigation, arbitration, or adjudication. For the temporary striking of balances which

⁽¹⁴⁾ Page 163

are contemplated by the Act, there is to be no dispute about any matter not raised in a notice of intention to withhold payment. Accordingly, in my view, the Adjudicator had no jurisdiction to consider any matter not raised in the notice of intention to withhold payment in this case.”

There is of course some slight confusion in this passage, in that it is a section 110(2) notice that is to be given 5 days after the due date for payment, but clearly HHJ Bowsher QC is referring to the operation of section 111 in respect of withholding notices. HHJ Bowsher QC does go on to cite HHJ Hicks QC in *VHE Construction* noting that they agreed upon the effect of a withholding notice under the Act. In any event, little can be gleaned from either of these decisions in respect of the section 110 payment notice. It is of course difficult to escape consideration of the nature of the section 110 notice, without referring to the perhaps more important section 111 withholding notice. Section 111 is set out as follows:

- 111 (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 give 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 amounts 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.

The distinction between a payment notice and a withholding notice was again referred to by HHJ Gilliland QC in the case of *Millers Specialist Joinery Company Limited v Nobles Construction Limited* [2001] CILL September 1770-1773 where he states at paragraph 15:

“The notices under the two sections are however directed to different aspects of a payment. Under section 110 the Act is directed to making clear what is being paid and how that sum has been calculated, whereas under section 111 the notice is directed to the amount which is being withheld and the reasons for withholding payment.”

While then the section 110(2) payment notice is concerned with the valuation of work done, section 111 is concerned with contra-charges arising under the contract or other claims arising out of other contracts which are being claimed by way of set-off against the contract in question. Keating on Building Contracts, 7th Edition, paragraph 15-15H appears to consider that a purposive construction of the section demands that a withholding notice is required for any cross-claim whatsoever, and in the absence of a withholding notice the claimant should be paid the sum *claimed*:

There has been some debate as to the precise meaning of this section [section 111]. The problem arises because the section envisages that there is a “sum due under the contract”. An equitable set-off amounts to a discharge of the sum due, to the extent of the set-off, and a common law abatement denies that moneys are due or owing. Thus, it is said, that there is no sum due in those two instances and no need to serve the relevant notice. This would appear to leave the section largely devoid of content. It is submitted that a court would construe the section in a purposive manner to meet the mischief intended, so that, in the absence of notice, the payee would be entitled to claim payment, ignoring any set-off or abatement. In the event that a withholding notice is given, this may be the subject of challenge by way of adjudication.

In respect of this point His Honour Judge Bowsher QC, in *Whiteways Contractors (Sussex) Limited v Impresa Castelli Construction UK Limited* (9 August 2000, unreported), said at paragraph 32:

It is common for a party to a building contract to make deductions from sums claimed on the Final Account (or on earlier interim applications) on account of overpayments on previous applications and it makes no difference whether those deductions are by way of set-off or abatement. The scheme of the [1996 Act] is to provide that, for the temporary purposes of the Act, notice of such deductions is to be made in manner complying with the requirements of the Act. In making that requirement, the Act makes no distinction between set-offs and abatements. I see no reason why it should have done so, and I am not tempted to try to strain

the language of the Act to find some fine distinction between its applicability to abatements as opposed to set-offs. Of course, in considering a dispute, an Adjudicator will make his own valuation of the claim before him and in doing so, he may abate the claim in respects not mentioned in the notice of intention to withhold payment. But he ought not to look into abatements outside the four corners of the claim unless they have been mentioned in a notice of intention to withhold payment.

HHJ Bowsher QC considers that there is no difference between set-off and abatement for the purposes of considering the effect of the notices. However, when an adjudicator carries out his own valuation he may reduce (abate) the amount claimed in respect of items that are not properly "due under the contract" even though they are not specifically mentioned in the section 111(1) withholding notice. This is of course because both a section 110 and section 111 notice relate to "sums due under the contract" and if an item is not properly due under the contract in question then an adjudicator can still abate the sum claimed, but only in respect of elements making up the claim. So, if the claim includes 400m² of brickwork and 50m² is defective, then the adjudicator can base his decision on an amount in respect of 350m² even in the absence of a section 111 notice.

More recently Lord MacFadyen in *S L Timber* makes the important distinction between a "sum claimed" and a "sum due under the contract":

The more significant issue in the present case, in my opinion, is whether the defenders' failure to give a timeous notice under section 111 had the effect that there could be no dispute at all before the adjudicator as to whether the sums claimed by the pursuers were payable. The section provides that a party "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". In my opinion the words "sum due under the contract" cannot be equated with the words "sum claimed". The section is not, in my opinion, concerned with every refusal on the part of one party to pay a sum claimed by the other. It is concerned, rather, with the situation where a sum is due under the contract, and the party by whom that sum is due seeks to withhold payment on separate ground. Much of the discussion of the section in the cases has been concerned with what circumstances involve "withholding" payment and therefore require a notice. *Without the benefit of authority I would have been inclined to say that a dispute about whether the work in respect of which the claim was made had been done, or about whether it was properly measured or valued, or about whether some other event on which a contractual liability to make payment depended had occurred, went to the question of whether the sum claimed was due under the contract, therefore did not involve an attempt to "withhold.. a sum due under the contract", and therefore did not require the giving of a notice of intention to withhold payment.* On the other hand, where there was no dispute that

the work had been done and was correctly measured and valued, or that the other relevant event had occurred, but the party from whom the payment was claimed wished to advance some separate ground for withholding the payment, such as a right of retention in respect of a counterclaim, that would constitute an attempt to “withhold...a sum due under the contract”, and would require a notice of intention to withhold payment.⁽¹⁵⁾

The important point is that a “sum claimed” is distinct from a “sum due”, and so once a sum is due under the contract a withholding notice is required in order that the payor can reduce the amount of the payment of the sum due. He then sets out some examples of cross-claim that might not require a withholding notice as the dispute focused on whether the sum claimed was due under the contract. Lord MacFadyen considered that failure to serve a valid withholding notice did not relieve the claimant of the ordinary burden of proving that he should be awarded the sum claimed. This merely confirms the ordinary burden of proof - that he who asserts must prove on the balance of probabilities - and so one then turns to the words in the contract in order to ascertain that which is due. In respect of a failure to serve a valid section 111 withholding notice Lord MacFadyen stated:

In my opinion, the absence of a timeous notice of intention to withhold payment does not relieve the party making the claim of the ordinary burden of showing that he is entitled under the contract to receive the payment he claims. It remains incumbent on the claimant to demonstrate, if the point is disputed, that the sum claimed is contractually due. If he can do that, he is protected, by the absence of a section 111 notice, from any attempt on the part of the other party to withhold all or part of the sum which is due on the basis that some separate ground justifying that course exists.⁽¹⁶⁾

The adjudicator was concerned that the Act would be ineffective if he were able to ignore the failure of the defendants to serve a withholding notice and take the defendants’ cross-claims into account. Those concerns failed to consider the distinction between abatement within the scope of the claim (which did not need a withholding notice) and other cross-claims such as an equitable set-off for liquidated damages, which would need to be referred to in a timeous withholding notice. If the claimant can show what he is due under the contract then the defendant must serve a withholding notice in respect of those matters for which he does not intend to pay. In the absence of a withholding notice (but dependent on the terms of the contract) a defendant can still argue that a sum is not due under the contract, and included within that category is abatement for defective works.

In *S L Timber*, Lord MacFadyen came to the conclusion that the adjudicator’s view as to how section 111 operated was wrong. However, that error was in answer to the adjudicator asking himself the

⁽¹⁵⁾ Para. 20

⁽¹⁶⁾ Para. 22

right question, and so the decision was enforced on the frequently cited expert determination rationale:

Error of fact or law on the part of the adjudicator will not afford ground for refusal of enforcement, unless the error was of such a nature that the adjudicator's decision was, as a result, one which he had no jurisdiction to make⁽¹⁷⁾

The error was one that the adjudicator had the power to make. The error was *intra vires*, rather than rendering the decision *ultra vires*.

Rupert Morgan Building Services Ltd v David Jervis & Harriett Jervis (12 November 2003, Court of Appeal, Schiemann LJ, Sedley LJ, Jacob LJ) is a brief but important case from the Court of Appeal concerning the meaning of s111 of the HGCRA. Jervis withheld payment of part of an interim certificate, but failed to issue a withholding notice as prescribed by the Act. The defendants said that it was open to them to prove that items of work that went to make up the unpaid balance were not done, were duplicated or represented snagging for work that had already been paid for.

Although Jacob LJ made reference to the numerous authorities on this question, he felt that they concentrated on the "unspoken but mistaken assumption...that the provision is dealing with the ultimate position between the parties". He turned to the actual contract in question, which was in the standard form provided by the Architecture and Surveying Institute. Clause 6.22 said that "the Employer shall pay the Contractor the amount certified within 14 days of the date of the certificate". Thus it was not the amount of work done that defined the sum which was due but the sum stated in the certificate. Jacob LJ continued:

In the absence of a withholding notice, s111(1) operates to prevent the client withholding the sum due. The contractor is entitled to the money right away. The fundamental thing to understand is that s111(1) is a provision about cash flow. It is not a provision which seeks to make any certificate, interim or final, conclusive.

If, as in *SL Timber v Carrillion Construction*, the contract did not provide for a system of certificates and a contractor simply presented a bill for payment then that bill would not make any sums due. Therefore, no withholding notice would be necessary in respect of work not done as payment would not be due. LJ Jacob set out the following five advantages of this approach:

- (i) It draws a line between claims for set-off which do no more than reduce the sum due and claims which go further such as abatement;

⁽¹⁷⁾ Para. 18

- (ii) It provides a fair solution that safeguards cash flow but does not prevent a party from raising disputed items in adjudication or litigation;
- (iii) It requires the client who is going to withhold to be specific in his notice about how much he is withholding and why. This limits the amount of withholding to specific points, which must be raised early;
- (iv) It does not preclude the client who has paid from subsequently showing he has overpaid. If he has overpaid on an interim certificate the matter can be put right in subsequent certificates. Otherwise he can raise the matter by way of adjudication or if necessary arbitration or legal proceedings; and
- (v) It is directed at the mischief which s.111(1) was aimed at - namely, payment (or non-payment) abuses.

It was conceded that the principle disadvantage was the risk of insolvency. However, as the Court of Appeal said, this risk can be minimised if certificates are carefully checked and any withholding notice is given within time.

Interestingly, Jacob LJ flagged up the possibility that there may be a duty on architects (and presumably other contract administrators) to ensure that a lay client is aware of the possibility of serving a notice in sufficient detail and good time. Given the clarity of this Court of Appeal ruling, even if there is no legal responsibility for failing to advise this it is surely good practice even if the client has some experience of the construction industry.

Therefore this judgment has gone a long way to clarifying the position where no withholding notice has been given. Thus, where an interim certificate has been issued, the absence of a notice in accordance with section 111 of the HGCRA, will mean that it is not permissible to withhold from the payment due (in respect of items of work already paid for or work not in fact carried out). The issue here related to interim certificates. A party will not be left without a remedy as the matters can be rectified by way of issue of the next interim certificate or even the final certificate. With a final certificate the situation may be different and a party will commence litigation or arbitration to cover any overpayment.

Prohibition of conditional payment provisions

Section 113 of the Act makes payment provisions that are conditional on the payer receiving payment from a third person, unless that third person is insolvent, ineffective. Keating has referred to this as a

partial exclusion of “pay-when-paid” clauses.⁽¹⁸⁾ One question that arose in respect of the operation of this provision, was whether it only applies where the relevant party is insolvent at the time that the construction contract was entered into, or whether the clause is effective if the relevant party becomes insolvent during the project. While the question may not be entirely resolved, HHJ Lloyd QC in the case of *Durabella Limited v J Jarvis & Sons Limited* (19 September 2001) considered the operation of this section, and stated that if a contractor was not guaranteeing the employer’s solvency, then it was right that the risk of the employer’s insolvency “may legitimately be shared”. The implication of this approach, arguably, is that the exception applies at the point in time at which the payment is to be made under the contract, and not upon entering into the contract.

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⁽¹⁸⁾ Keating on Building Contracts, 7th edition, paragraph 15-15J