



**TECBAR Adjudication Course
Saturday, 21 May 2011**

IDRC, 70 Fleet St

Programme

Session 1: The Law

- 9.00 Registration and Coffee
9.15 Welcome and introduction – Chair, Rachel Ansell
9.20 Natural Justice: General Principles and Update – Alexander Nissen QC
10.00 Natural Justice: The Practicalities (appointment, conflicts, bias, case management) – Matt Molloy

10.45 Tea & Coffee

11.00 Jurisdiction: General Principles and Update - Andrew Bartlett QC
12.00 The New Construction Act – Alex Hickey

12.45 [*short break for delegates to help themselves to the buffet lunch*]

13.00 Coulson J: Giving a Decision that will be Enforced (over lunch)

Session 2: The Nuts & Bolts (2 ½ hours)

- 14.00 Eric Mouzer
- Appointment: terms, fees, nominating bodies
- Adjudication Rules and Procedures
- Directions: timetabling, case management
14.45 Q&A session

15.00 Dr Franco Mastrandrea
- Adjudication hearings
- Writing & publishing the decision
- Costs, liens, getting paid
16.00 Q&A session

16.15 Closing comments

Housing Grants, Construction and Regeneration Act 1996

Part II

Construction Contracts

Introductory provisions

104 Construction contracts

- (1) In this Part a "construction contract" means an agreement with a person for any of the following--
- (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;
 - (c) providing his own labour, or the labour of others, for the carrying out of construction operations.
- (2) References in this Part to a construction contract include an agreement--
- (a) to do architectural, design, or surveying work, or
 - (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape,

in relation to construction operations.

(3) References in this Part to a construction contract do not include a contract of employment (within the meaning of the Employment Rights Act 1996).

(4) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1), (2) or (3) as to the agreements which are construction contracts for the purposes of this Part or are to be taken or not to be taken as included in references to such contracts.

No such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

(5) Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations.

An agreement relates to construction operations so far as it makes provision of any kind within subsection (1) or (2).

- (6) This Part applies only to construction contracts which--
- (a) are entered into after the commencement of this Part, and
 - (b) relate to the carrying out of construction operations in England, Wales or Scotland.

(7) This Part applies whether or not the law of England and Wales or Scotland is otherwise the applicable law in relation to the contract.

NOTES

Initial Commencement

To be appointed

To be appointed: see s 150(3).

Appointment

Appointment (for certain purposes): 11 September 1996: see SI 1996/2352, art 2(2).

Appointment (England and Wales, for remaining purposes): 1 May 1998: see SI 1998/650, arts 1(2), 2.

Transfer of Functions

Functions of the Secretary of State, so far as exercisable in relation to Wales, transferred to the National Assembly for Wales, by the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1.

UK Parliament Acts/H/HO-HT/Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)/Part II Construction Contracts (ss 104-117)/105 Meaning of "construction operations"

105 Meaning of "construction operations"

(1) In this Part "construction operations" means, subject as follows, operations of any of the following descriptions--

- (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);
- (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, [electronic communications apparatus], aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;
- (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;
- (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;
- (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;
- (f) painting or decorating the internal or external surfaces of any building or structure.

(2) The following operations are not construction operations within the meaning of this Part--

- (a) drilling for, or extraction of, oil or natural gas;
- (b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;
- (c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is--
 - (i) nuclear processing, power generation, or water or effluent treatment, or

- (ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;
 - (d) manufacture or delivery to site of--
 - (i) building or engineering components or equipment,
 - (ii) materials, plant or machinery, or
 - (iii) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems,except under a contract which also provides for their installation;
 - (e) the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature.
- (3) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1) or (2) as to the operations and work to be treated as construction operations for the purposes of this Part.
- (4) No such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

NOTES

Initial Commencement

To be appointed

To be appointed: see s 150(3).

Appointment

Appointment (for certain purposes): 11 September 1996: see SI 1996/2352, art 2(2).

Appointment (England and Wales, for remaining purposes): 1 May 1998: see SI 1998/650, arts 1(2), 2.

Amendment

Sub-s (1): in para (b) words "electronic communications apparatus" in square brackets substituted by the Communications Act 2003, s 406(1), Sch 17, para 137.

Date in force (for the purpose only of enabling the networks and services functions and the spectrum functions to be carried out by the Director General of Telecommunications and the Secretary of State respectively, during the transitional period (as provided for by the Communications Act 2003, s 408(6)): 25 July 2003-29 December 2003: see SI 2003/1900, arts 2(1), 3(1), Sch 1 and the Communications Act 2003, ss 406(6), 408, Sch 18, para 2.

Date in force (for the purpose of conferring the networks and services functions and the spectrum functions on OFCOM): 29 December 2003: by virtue of SI 2003/3142, art 3(2).

Transfer of Functions

Functions of the Secretary of State, so far as exercisable in relation to Wales, transferred to the National Assembly for Wales, by the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1.

UK Parliament Acts/H/HO-HT/Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)/Part II
Construction Contracts (ss 104-117)/106 Provisions not applicable to contract with residential occupier

106 Provisions not applicable to contract with residential occupier

- (1) This Part does not apply--
- (a) to a construction contract with a residential occupier (see below), or
 - (b) *to any other description of construction contract excluded from the operation of this Part by order of the Secretary of State.*

- (2) A construction contract with a residential occupier means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence.

In this subsection "dwelling" means a dwelling-house or a flat; and for this purpose--

"dwelling-house" does not include a building containing a flat; and

"flat" means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally.

- (3) The Secretary of State may by order amend subsection (2).
- (4) No order under this section shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

NOTES

Initial Commencement

To be appointed

To be appointed: see s 150(3).

Appointment

Appointment (for certain purposes): 11 September 1996: see SI 1996/2352, art 2(2).

Appointment (England and Wales, for remaining purposes): 1 May 1998: see SI 1998/650, arts 1(2), 2.

Amendment

Sub-s (1): para (b) and word "or" immediately preceding it repealed by the Local Democracy, Economic Development and Construction Act 2009, ss 138(1), (2), 146(1), Sch 7, Pt 5; for savings see s 149 (3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2).

Transfer of Functions

Functions of the Secretary of State, so far as exercisable in relation to Wales, transferred to the National Assembly for Wales, by the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1.

Subordinate Legislation

UK

Construction Contracts (England and Wales) Exclusion Order 1998, SI 1998/648 (made under sub-s (1)(b)).

Public Audit (Wales) Act 2004 (Consequential Amendments) (Wales) Order 2005, SI 2005/757 (made under sub-s (1)(b)).

Scotland

Construction Contracts (Scotland) Exclusion Amendment Order 2006, SSI 2006/513 (made under sub-s (1)(b)).

UK Parliament Acts/H/HO-HT/Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)/Part II Construction Contracts (ss 104-117)/[106A Power to disapply provisions of this Part]

[106A Power to disapply provisions of this Part]

[(1) The Secretary of State may by order provide that any or all of the provisions of this Part, so far as extending to England and Wales, shall not apply to any description of construction contract relating to the carrying out of construction operations (not being operations in Wales) which is specified in the order.

[(2) The Welsh Ministers may by order provide that any or all of the provisions of this Part, so far as extending to England and Wales, shall not apply to any description of construction contract relating to the carrying out of construction operations in Wales which is specified in the order.

[(3) The Scottish Ministers may by order provide that any or all of the provisions of this Part, so far as extending to Scotland, shall not apply to any description of construction contract which is specified in the order.

[(4) An order under this section shall not be made unless a draft of it has been laid before and approved by resolution of--

- (a) in the case of an order under subsection (1), each House of Parliament;
- (b) in the case of an order under subsection (2), the National Assembly for Wales;
- (c) in the case of an order under subsection (3), the Scottish Parliament.]

NOTES

Amendment

Inserted by the Local Democracy, Economic Development and Construction Act 2009, s 138(1), (3); for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2).

UK Parliament Acts/H/HO-HT/Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)/Part II Construction Contracts (ss 104-117)/107 Provisions applicable only to agreements in writing

107 Provisions applicable only to agreements in writing

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

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

(2) *There is an agreement in writing--*

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

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

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

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

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

NOTES

Initial Commencement

To be appointed

To be appointed: see s 150(3).

Appointment

Appointment (England and Wales): 1 May 1998: see SI 1998/650, arts 1(2), 2.

Amendment

Repealed by the Local Democracy, Economic Development and Construction Act 2009, ss 139(1), 146(1), Sch 7, Pt 5; for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2),

UK Parliament Acts/H/HO-HT/Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)/Part II Construction Contracts (ss 104-117)/108 Right to refer disputes to adjudication

Adjudication

108 Right to refer disputes to adjudication

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

For this purpose "dispute" includes any difference.

- (2) The contract shall [include provision in writing so as to]--
- (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
 - (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
 - (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
 - (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
 - (e) impose a duty on the adjudicator to act impartially; and
 - (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

(3) The contract shall provide [in writing] 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 agree to arbitration) or by agreement.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

[(3A) The contract shall include provision in writing permitting the adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission.]

(4) The contract shall also provide [in writing] that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.

(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.

(6) For England and Wales, the Scheme may apply the provisions of the Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate.

For Scotland, the Scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator's decision.

NOTES

Initial Commencement

To be appointed

To be appointed: see s 150(3).

Appointment

Appointment (for certain purposes): 11 September 1996: see SI 1996/2352, art 2(2).

Appointment (England and Wales, for remaining purposes): 1 May 1998: see SI 1998/650, arts 1(2), 2.

Amendment

Sub-s (2): words "include provision in writing so as to" in square brackets inserted by the Local Democracy, Economic Development and Construction Act 2009, s 139(2)(a); for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2).

Sub-s (3): words "in writing" in square brackets inserted by the Local Democracy, Economic Development and Construction Act 2009, s 139(2)(b); for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2).

Sub-s (3A): inserted by the Local Democracy, Economic Development and Construction Act 2009, s 140; for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2).

Sub-s (4): words "in writing" in square brackets inserted by the Local Democracy, Economic Development and Construction Act 2009, s 139(2)(b); for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2).

See Further

See further, in relation to the disapplication of this section to authorised works: the Edinburgh Tram (Line Two) Act 2006, ss 79(2), 81.

See further, in relation to the disapplication of this section to authorised works: the Edinburgh Tram (Line One) Act 2006, ss 80(2), 82.

See further, in relation to the disapplication of this section, for the purpose of any dispute in respect of any provision of the Network Rail (Waverley Steps) Order 2010, SSI 2010/188: the Network Rail (Waverley Steps) Order 2010, SSI 2010/188, art 40(3).

Transfer of Functions

Functions of the Minister, so far as exercisable in relation to Wales, transferred to the National Assembly for Wales, by the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1.

Subordinate Legislation

Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649 (made under sub-s (6)).

UK Parliament Acts/H/HO-HT/Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)/Part II Construction Contracts (ss 104-117)/[108A Adjudication costs: effectiveness of provision]

[108A Adjudication costs: effectiveness of provision]

[(1) This section applies in relation to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract.

[(2) The contractual provision referred to in subsection (1) is ineffective unless--

(a) it is made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties, or

(b) it is made in writing after the giving of notice of intention to refer the dispute to adjudication.]

NOTES

Amendment

Inserted by the Local Democracy, Economic Development and Construction Act 2009, s 141; for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2).

UK Parliament Acts/H/HO-HT/Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)/Part II Construction Contracts (ss 104-117)/109 Entitlement to stage payments

Payment

109 Entitlement to stage payments

- (1) A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless--
- (a) it is specified in the contract that the duration of the work is to be less than 45 days, or
 - (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.
- (2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.
- (3) In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.
- (4) References in the following sections to a payment *under the contract* [provided for by the contract] include a payment by virtue of this section.

NOTES

Initial Commencement

To be appointed

To be appointed: see s 150(3).

Appointment

Appointment (England and Wales): 1 May 1998: see SI 1998/650, arts 1(2), 2.

Amendment

Sub-s (4): words "under the contract" in italics repealed and subsequent words in square brackets substituted by the Local Democracy, Economic Development and Construction Act 2009, s 143(1); for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2).

UK Parliament Acts/H/HO-HT/Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)/Part II
Construction Contracts (ss 104-117)/110 Dates for payment

110 Dates for payment

- (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.

[(1A) The requirement in subsection (1)(a) to provide an adequate mechanism for determining what payments become due under the contract, or when, is not satisfied where a construction contract makes payment conditional on--

- (a) the performance of obligations under another contract, or
- (b) a decision by any person as to whether obligations under another contract have been performed.

(1B) In subsection (1A)(a) and (b) the references to obligations do not include obligations to make payments (but see section 113).

(1C) Subsection (1A) does not apply where--

- (a) the construction contract is an agreement between the parties for the carrying out of construction operations by another person, whether under sub-contract or otherwise, and
- (b) the obligations referred to in that subsection are obligations on that other person to carry out those operations.]

[(1D) The requirement in subsection (1)(a) to provide an adequate mechanism for determining when payments become due under the contract is not satisfied where a construction contract provides for the date on which a payment becomes due to be determined by reference to the giving to the person to whom the payment is due of a notice which relates to what payments are due under the contract.]

(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.

NOTES

Initial Commencement

To be appointed

To be appointed: see s 150(3).

Appointment

Appointment (England and Wales): 1 May 1998: see SI 1998/650, arts 1(2), 2.

Amendment

Sub-ss (1A)-(1C): inserted by the Local Democracy, Economic Development and Construction Act 2009, s 142(1), (2); for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2)).

Sub-s (1D): inserted by the Local Democracy, Economic Development and Construction Act 2009, s 142(1), (3); for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8) 149(1), (2).

Sub-s (2): repealed by the Local Democracy, Economic Development and Construction Act 2009, ss 143(2)(a), 146(1), Sch 7, Pt 5; for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2).

Sub-s (3): words "or (2)" in italics repealed by the Local Democracy, Economic Development and Construction Act 2009, ss 143(2)(b), 146(1), Sch 7, Pt 5; for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2).

UK Parliament Acts/H/HO-HT/Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)/Part II Construction Contracts (ss 104-117)/[110A Payment notices: contractual requirements]

[110A Payment notices: contractual requirements]

[(1) A construction contract shall, in relation to every payment provided for by the contract--

(a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or

(b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.

(2) A notice complies with this subsection if it specifies--

(a) in a case where the notice is given by the payer--

(i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and

- (ii) the basis on which that sum is calculated;
- (b) in a case where the notice is given by a specified person--
 - (i) the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and
 - (ii) the basis on which that sum is calculated.
- (3) A notice complies with this subsection if it specifies--
 - (a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and
 - (b) the basis on which that sum is calculated.
- (4) For the purposes of this section, it is immaterial that the sum referred to in subsection (2)(a) or (b) or (3)(a) may be zero.
- (5) If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme for Construction Contracts apply.
- (6) In this and the following sections, in relation to any payment provided for by a construction contract--
 - "payee" means the person to whom the payment is due;
 - "payer" means the person from whom the payment is due;
 - "payment due date" means the date provided for by the contract as the date on which the payment is due;
 - "specified person" means a person specified in or determined in accordance with the provisions of the contract.]

NOTES

Amendment

Inserted by the Local Democracy, Economic Development and Construction Act 2009, s 143(3); for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2).

UK Parliament Acts/H/HO-HT/Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)/Part II Construction Contracts (ss 104-117)/[110B Payment notices: payee's notice in default of payer's notice]

[110B Payment notices: payee's notice in default of payer's notice]

- [(1) This section applies in a case where, in relation to any payment provided for by a construction contract--
 - (a) the contract requires the payer or a specified person to give the payee a notice complying with section 110A(2) not later than five days after the payment due date, but
 - (b) notice is not given as so required.

(2) Subject to subsection (4), the payee may give to the payer a notice complying with section 110A(3) at any time after the date on which the notice referred to in subsection (1)(a) was required by the contract to be given.

(3) Where pursuant to subsection (2) the payee gives a notice complying with section 110A(3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the date referred to in subsection (2) that the notice was given.

(4) If--

(a) the contract permits or requires the payee, before the date on which the notice referred to in subsection (1)(a) is required by the contract to be given, to notify the payer or a specified person of--

(i) the sum that the payee considers will become due on the payment due date in respect of the payment, and

(ii) the basis on which that sum is calculated, and

(b) the payee gives such notification in accordance with the contract,

that notification is to be regarded as a notice complying with section 110A(3) given pursuant to subsection (2) (and the payee may not give another such notice pursuant to that subsection).]

NOTES

Amendment

Inserted by the Local Democracy, Economic Development and Construction Act 2009, s 143(3); for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2).

UK Parliament Acts/H/HO-HT/Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)/Part II Construction Contracts (ss 104-117)/111 Notice of intention to withhold payment [111 Requirement to pay notified sum]

111 Notice of intention to withhold payment [111 Requirement to pay notified sum]

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

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

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

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

(b) if there is more than one ground, each ground and the amount attributable to it,

and must be given not later than the prescribed period before the final date for payment.

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

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

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

- (a) *seven days from the date of the decision, or*
- (b) *the date which apart from the notice would have been the final date for payment,*

whichever is the later.

[(1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.

(2) For the purposes of this section, the "notified sum" in relation to any payment provided for by a construction contract means--

- (a) in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
- (b) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
- (c) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2), the amount specified in that notice.

(3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.

(4) A notice under subsection (3) must specify--

- (a) the sum that the payer considers to be due on the date the notice is served, and
- (b) the basis on which that sum is calculated.

It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.

(5) A notice under subsection (3)--

- (a) must be given not later than the prescribed period before the final date for payment, and
- (b) in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.

(6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).

(7) In subsection (5), "prescribed period" means--

- (a) such period as the parties may agree, or
- (b) in the absence of such agreement, the period provided by the Scheme for Construction Contracts.

(8) Subsection (9) applies where in respect of a payment--

- (a) a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract (and no notice under subsection (3) is given), or

(b) a notice under subsection (3) is given in accordance with this section,

but on the matter being referred to adjudication the adjudicator decides that more than the sum specified in the notice should be paid.

(9) In a case where this subsection applies, the decision of the adjudicator referred to in subsection (8) shall be construed as requiring payment of the additional amount 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.

(10) Subsection (1) does not apply in relation to a payment provided for by a construction contract where--

(a) the contract provides that, if the payee becomes insolvent the payer need not pay any sum due in respect of the payment, and

(b) the payee has become insolvent after the prescribed period referred to in subsection (5)(a).

(11) Subsections (2) to (5) of section 113 apply for the purposes of subsection (10) of this section as they apply for the purposes of that section.]

NOTES

Initial Commencement

To be appointed

To be appointed: see s 150(3).

Appointment

Appointment (England and Wales): 1 May 1998: see SI 1998/650, arts 1(2), 2.

Amendment

Substituted by the Local Democracy, Economic Development and Construction Act 2009, s 144(1); for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2).

UK Parliament Acts/H/HO-HT/Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)/Part II Construction Contracts (ss 104-117)/112 Right to suspend performance for non-payment

112 Right to suspend performance for non-payment

(1) Where a sum due under a construction contract is not paid in full by the final date for payment and no effective notice to withhold payment has been given, [Where the requirement in section 111(1) applies in relation to any sum but is not complied with,] the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of [any or all of] his obligations under the contract to the party by whom payment ought to have been made ("the party in default").

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

(3) The right to suspend performance ceases when the party in default makes payment in full of *the amount due* [the sum referred to in subsection (1)].

[(3A) Where the right conferred by this section is exercised, the party in default shall be liable to pay to the party exercising the right a reasonable amount in respect of costs and expenses reasonably incurred by that party as a result of the exercise of the right.]

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

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

NOTES

Initial Commencement

To be appointed

To be appointed: see s 150(3).

Appointment

Appointment (England and Wales): 1 May 1998: see SI 1998/650, arts 1(2), 2.

Amendment

Sub-s (1): words from "Where a sum" to "has been given," in italics repealed and subsequent words in square brackets substituted by the Local Democracy, Economic Development and Construction Act 2009, s 144(2)(a); for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2).

Sub-s (1): words "any or all of" in square brackets inserted by the Local Democracy, Economic Development and Construction Act 2009, s 145(1), (2); for saving see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2).

Sub-s (3): words "the amount due" in italics repealed and subsequent words in square brackets substituted by the Local Democracy, Economic Development and Construction Act 2009, s 144(2)(b); for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2).

Sub-s (3A): inserted by the Local Democracy, Economic Development and Construction Act 2009, s 145(1), (3); for savings see s 149(3), (4) thereof.

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss 148(8), 149(1), (2).

Sub-s (4): words ", or in consequence of the exercise of," in square brackets inserted by the Local Democracy, Economic Development and Construction Act 2009, s 145(1), (4); for savings see s 149(3), (4).

Date in force: to be appointed: see the Local Democracy, Economic Development and Construction Act 2009, ss148(8), 149(1), (2).

UK Parliament Acts/H/HO-HT/Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)/Part II Construction Contracts (ss 104-117)/113 Prohibition of conditional payment provisions

113 Prohibition of conditional payment provisions

(1) A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.

(2) For the purposes of this section a company becomes insolvent--

[(a) when it enters administration within the meaning of Schedule B1 to the Insolvency Act 1986,]

(b) on the appointment of an administrative receiver or a receiver or manager of its property under Chapter I of Part III of that Act, or the appointment of a receiver under Chapter II of that Part,

(c) on the passing of a resolution for voluntary winding-up without a declaration of solvency under section 89 of that Act, or

(d) on the making of a winding-up order under Part IV or V of that Act.

(3) For the purposes of this section a partnership becomes insolvent--

(a) on the making of a winding-up order against it under any provision of the Insolvency Act 1986 as applied by an order under section 420 of that Act, or

(b) when sequestration is awarded on the estate of the partnership under section 12 of the Bankruptcy (Scotland) Act 1985 or the partnership grants a trust deed for its creditors.

(4) For the purposes of this section an individual becomes insolvent--

(a) on the making of a bankruptcy order against him under Part IX of the Insolvency Act 1986, or

(b) on the sequestration of his estate under the Bankruptcy (Scotland) Act 1985 or when he grants a trust deed for his creditors.

(5) A company, partnership or individual shall also be treated as insolvent on the occurrence of any event corresponding to those specified in subsection (2), (3) or (4) under the law of Northern Ireland or of a country outside the United Kingdom.

(6) Where a provision is rendered ineffective by subsection (1), the parties are free to agree other terms for payment.

In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.

NOTES

Initial Commencement

To be appointed

To be appointed: see s 150(3).

Appointment

Appointment (England and Wales): 1 May 1998: see SI 1998/650, arts 1(2), 2.

Amendment

Sub-s (2): para (a) substituted by SI 2003/2096, art 4, Schedule, Pt 1, para 30.

Date in force: 15 September 2003 (except in relation to any case where a petition for an administration order was presented before that date): see SI 2003/2096, arts 1(1), 6.

UK Parliament Acts/H/HO-HT/Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)/Part II Construction Contracts (ss 104-117)/114 The Scheme for Construction Contracts

Supplementary provisions

114 The Scheme for Construction Contracts

(1) The Minister shall by regulations make a scheme ("the Scheme for Construction Contracts") containing provision about the matters referred to in the preceding provisions of this Part.

(2) Before making any regulations under this section the Minister shall consult such persons as he thinks fit.

(3) In this section "the Minister" means--

- (a) for England and Wales, the Secretary of State, and
- (b) for Scotland, the [Secretary of State].

(4) Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned.

(5) Regulations under this section shall not be made unless a draft of them has been approved by resolution of each House of Parliament.

NOTES

Initial Commencement

To be appointed

To be appointed: see s 150(3).

Appointment

Appointment (for certain purposes): 11 September 1996: see SI 1996/2352, art 2(2).

Appointment (England and Wales, for remaining purposes): 1 May 1998: see SI 1998/650, arts 1(2), 2.

Amendment

Sub-s (3): in para (b) words "Secretary of State" in square brackets substituted by virtue of SI 1999/678, art 2(1), Schedule.

Date in force: 19 May 1999: see SI 1999/678, art 1.

Transfer of Functions

Functions of the Secretary of State, so far as exercisable in relation to Wales, transferred to the National Assembly for Wales, by the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1.

Subordinate Legislation

Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649.

UK Parliament Acts/H/HO-HT/Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)/Part II Construction Contracts (ss 104-117)/115 Service of notices, &c

115 Service of notices, &c

- (1) The parties are free to agree on the manner of service of any notice or other document required or authorised to be served in pursuance of the construction contract or for any of the purposes of this Part.
- (2) If or to the extent that there is no such agreement the following provisions apply.
- (3) A notice or other document may be served on a person by any effective means.
- (4) If a notice or other document is addressed, pre-paid and delivered by post--
 - (a) to the addressee's last known principal residence or, if he is or has been carrying on a trade, profession or business, his last known principal business address, or
 - (b) where the addressee is a body corporate, to the body's registered or principal office,

it shall be treated as effectively served.

- (5) This section does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court.
- (6) References in this Part to a notice or other document include any form of communication in writing and references to service shall be construed accordingly.

NOTES

Initial Commencement

To be appointed

To be appointed: see s 150(3).

Appointment

Appointment (England and Wales): 1 May 1998: see SI 1998/650, arts 1(2), 2.

UK Parliament Acts/H/HO-HT/Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)/Part II
Construction Contracts (ss 104-117)/116 Reckoning periods of time

116 Reckoning periods of time

- (1) For the purposes of this Part periods of time shall be reckoned as follows.
- (2) Where an act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.
- (3) Where the period would include Christmas Day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 is a bank holiday in England and Wales or, as the case may be, in Scotland, that day shall be excluded.

NOTES

Initial Commencement

To be appointed

To be appointed: see s 150(3).

Appointment

Appointment (England and Wales): 1 May 1998: see SI 1998/650, arts 1(2), 2.

UK Parliament Acts/H/HO-HT/Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)/Part II
Construction Contracts (ss 104-117)/117 Crown application

117 Crown application

- (1) This Part applies to a construction contract entered into by or on behalf of the Crown otherwise than by or on behalf of Her Majesty in her private capacity.
- (2) This Part applies to a construction contract entered into on behalf of the Duchy of Cornwall notwithstanding any Crown interest.
- (3) Where a construction contract is entered into by or on behalf of Her Majesty in right of the Duchy of Lancaster, Her Majesty shall be represented, for the purposes of any adjudication or other proceedings arising out of the contract by virtue of this Part, by the Chancellor of the Duchy or such person as he may appoint.
- (4) Where a construction contract is entered into on behalf of the Duchy of Cornwall, the Duke of Cornwall or the possessor for the time being of the Duchy shall be represented, for the purposes of any adjudication or other proceedings arising out of the contract by virtue of this Part, by such person as he may appoint.

NOTES

Initial Commencement

To be appointed

To be appointed: see s 150(3).

Appointment

Appointment (England and Wales): 1 May 1998: see SI 1998/650, art 2.

**Scheme for Construction Contracts (England and Wales) Regulations 1998
(SI 1998/649)**

SCHEDULE

THE SCHEME FOR CONSTRUCTION CONTRACTS

Regulations 2, 3 and 4

**Part I
Adjudication**

Notice of Intention to seek Adjudication

1

- (1) Any party to a construction contract (the "referring party") may give written notice (the "notice of adjudication") of his intention to refer any dispute arising under the contract, to adjudication.
- (2) The notice of adjudication shall be given to every other party to the contract.
- (3) The notice of adjudication shall set out briefly--
 - (a) the nature and a brief description of the dispute and of the parties involved,
 - (b) details of where and when the dispute has arisen,
 - (c) the nature of the redress which is sought, and
 - (d) the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices).

2

- (1) Following the giving of a notice of adjudication and subject to any agreement between the parties to the dispute as to who shall act as adjudicator--
 - (a) the referring party shall request the person (if any) specified in the contract to act as adjudicator, or
 - (b) if no person is named in the contract or the person named has already indicated that he is unwilling or unable to act, and the contract provides for a specified nominating body to select a person, the referring party shall request the nominating body named in the contract to select a person to act as adjudicator, or
 - (c) where neither paragraph (a) nor (b) above applies, or where the person referred to in (a) has already indicated that he is unwilling or unable to act and (b) does not apply, the referring party shall request an adjudicator nominating body to select a person to act as adjudicator.
- (2) A person requested to act as adjudicator in accordance with the provisions of paragraph (1) shall indicate whether or not he is willing to act within two days of receiving the request.
- (3) In this paragraph, and in paragraphs 5 and 6 below, an "adjudicator nominating body" shall mean a body (not being a natural person and not being a party to the dispute) which holds itself out publicly as a body which will select an adjudicator when requested to do so by a referring party.

3

The request referred to in paragraphs 2, 5 and 6 shall be accompanied by a copy of the notice of adjudication.

4

Any person requested or selected to act as adjudicator in accordance with paragraphs 2, 5 or 6 shall be a natural person acting in his personal capacity. A person requested or selected to act as an adjudicator shall not be an employee of any of the parties to the dispute and shall declare any interest, financial or otherwise, in any matter relating to the dispute.

5

(1) The nominating body referred to in paragraphs 2(1)(b) and 6(1)(b) or the adjudicator nominating body referred to in paragraphs 2(1)(c), 5(2)(b) and 6(1)(c) must communicate the selection of an adjudicator to the referring party within five days of receiving a request to do so.

(2) Where the nominating body or the adjudicator nominating body fails to comply with paragraph (1), the referring party may--

- (a) agree with the other party to the dispute to request a specified person to act as adjudicator, or
- (b) request any other adjudicator nominating body to select a person to act as adjudicator.

(3) The person requested to act as adjudicator in accordance with the provisions of paragraphs (1) or (2) shall indicate whether or not he is willing to act within two days of receiving the request.

6

(1) Where an adjudicator who is named in the contract indicates to the parties that he is unable or unwilling to act, or where he fails to respond in accordance with paragraph 2(2), the referring party may--

- (a) request another person (if any) specified in the contract to act as adjudicator, or
- (b) request the nominating body (if any) referred to in the contract to select a person to act as adjudicator, or
- (c) request any other adjudicator nominating body to select a person to act as adjudicator.

(2) The person requested to act in accordance with the provisions of paragraph (1) shall indicate whether or not he is willing to act within two days of receiving the request.

7

(1) Where an adjudicator has been selected in accordance with paragraphs 2, 5 or 6, the referring party shall, not later than seven days from the date of the notice of adjudication, refer the dispute in writing (the "referral notice") to the adjudicator.

(2) A referral notice shall be accompanied by copies of, or relevant extracts from, the construction contract and such other documents as the referring party intends to rely upon.

(3) The referring party shall, at the same time as he sends to the adjudicator the documents referred to in paragraphs (1) and (2), send copies of those documents to every other party to the dispute.

8

- (1) The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on more than one dispute under the same contract.
- (2) The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on related disputes under different contracts, whether or not one or more of those parties is a party to those disputes.
- (3) All the parties in paragraphs (1) and (2) respectively may agree to extend the period within which the adjudicator may reach a decision in relation to all or any of these disputes.
- (4) Where an adjudicator ceases to act because a dispute is to be adjudicated on by another person in terms of this paragraph, that adjudicator's fees and expenses shall be determined in accordance with paragraph 25.

9

- (1) An adjudicator may resign at any time on giving notice in writing to the parties to the dispute.
- (2) An adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication.
- (3) Where an adjudicator ceases to act under paragraph 9(1)--
 - (a) the referring party may serve a fresh notice under paragraph 1 and shall request an adjudicator to act in accordance with paragraphs 2 to 7; and
 - (b) if requested by the new adjudicator and insofar as it is reasonably practicable, the parties shall supply him with copies of all documents which they had made available to the previous adjudicator.
- (4) Where an adjudicator resigns in the circumstances referred to in paragraph (2), or where a dispute varies significantly from the dispute referred to him in the referral notice and for that reason he is not competent to decide it, the adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.

10

Where any party to the dispute objects to the appointment of a particular person as adjudicator, that objection shall not invalidate the adjudicator's appointment nor any decision he may reach in accordance with paragraph 20.

11

- (1) The parties to a dispute may at any time agree to revoke the appointment of the adjudicator. The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.
- (2) Where the revocation of the appointment of the adjudicator is due to the default or misconduct of the adjudicator, the parties shall not be liable to pay the adjudicator's fees and expenses.

Powers of the adjudicator

12

The adjudicator shall--

- (a) act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract; and
- (b) avoid incurring unnecessary expense.

13

The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication. In particular he may--

- (a) request any party to the contract to supply him with such documents as he may reasonably require including, if he so directs, any written statement from any party to the contract supporting or supplementing the referral notice and any other documents given under paragraph 7(2),
- (b) decide the language or languages to be used in the adjudication and whether a translation of any document is to be provided and if so by whom,
- (c) meet and question any of the parties to the contract and their representatives,
- (d) subject to obtaining any necessary consent from a third party or parties, make such site visits and inspections as he considers appropriate, whether accompanied by the parties or not,
- (e) subject to obtaining any necessary consent from a third party or parties, carry out any tests or experiments,
- (f) obtain and consider such representations and submissions as he requires, and, provided he has notified the parties of his intention, appoint experts, assessors or legal advisers,
- (g) give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with, and
- (h) issue other directions relating to the conduct of the adjudication.

14

The parties shall comply with any request or direction of the adjudicator in relation to the adjudication.

15

If, without showing sufficient cause, a party fails to comply with any request, direction or timetable of the adjudicator made in accordance with his powers, fails to produce any document or written statement requested by the adjudicator, or in any other way fails to comply with a requirement under these provisions relating to the adjudication, the adjudicator may--

- (a) continue the adjudication in the absence of that party or of the document or written statement requested,
- (b) draw such inferences from that failure to comply as circumstances may, in the adjudicator's opinion, be justified, and
- (c) make a decision on the basis of the information before him attaching such weight as he thinks fit to any evidence submitted to him outside any period he may have requested or directed.

16

(1) Subject to any agreement between the parties to the contrary, and to the terms of paragraph (2) below, any party to the dispute may be assisted by, or represented by, such advisers or representatives (whether legally qualified or not) as he considers appropriate.

(2) Where the adjudicator is considering oral evidence or representations, a party to the dispute may not be represented by more than one person, unless the adjudicator gives directions to the contrary.

17

The adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute and shall make available to them any information to be taken into account in reaching his decision.

18

The adjudicator and any party to the dispute shall not disclose to any other person any information or document provided to him in connection with the adjudication which the party supplying it has indicated is to be treated as confidential, except to the extent that it is necessary for the purposes of, or in connection with, the adjudication.

19

(1) The adjudicator shall reach his decision not later than--

- (a) twenty eight days after the date of the referral notice mentioned in paragraph 7(1), or
- (b) forty two days after the date of the referral notice if the referring party so consents, or
- (c) such period exceeding twenty eight days after the referral notice as the parties to the dispute may, after the giving of that notice, agree.

(2) Where the adjudicator fails, for any reason, to reach his decision in accordance with paragraph (1)

- (a) any of the parties to the dispute may serve a fresh notice under paragraph 1 and shall request an adjudicator to act in accordance with paragraphs 2 to 7; and
- (b) if requested by the new adjudicator and insofar as it is reasonably practicable, the parties shall supply him with copies of all documents which they had made available to the previous adjudicator.

(3) As soon as possible after he has reached a decision, the adjudicator shall deliver a copy of that decision to each of the parties to the contract.

Adjudicator's decision

20

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. In particular, he may--

- (a) open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive,

(b) decide that any of the parties to the dispute is liable to make a payment under the contract (whether in sterling or some other currency) and, subject to section 111(4) of the Act, when that payment is due and the final date for payment,

(c) having regard to any term of the contract relating to the payment of interest decide the circumstances in which, and the rates at which, and the periods for which simple or compound rates of interest shall be paid.

21

In the absence of any directions by the adjudicator relating to the time for performance of his decision, the parties shall be required to comply with any decision of the adjudicator immediately on delivery of the decision to the parties in accordance with this paragraph.

22

If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision.

Effects of the decision

23

(1) In his decision, the adjudicator may, if he thinks fit, order any of the parties to comply peremptorily with his decision or any part of it.

(2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties.

24

Section 42 of the Arbitration Act 1996 shall apply to this Scheme subject to the following modifications--

(a) in subsection (2) for the word "tribunal" wherever it appears there shall be substituted the word "adjudicator",

(b) in subparagraph (b) of subsection (2) for the words "arbitral proceedings" there shall be substituted the word "adjudication",

(c) subparagraph (c) of subsection (2) shall be deleted, and

(d) subsection (3) shall be deleted.

25

The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.

26

The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and any employee or agent of the adjudicator shall be similarly protected from liability.

**Part II
Payment**

Entitlement to and amount of stage payments

1

Where the parties to a relevant construction contract fail to agree--

- (a) the amount of any instalment or stage or periodic payment for any work under the contract, or
- (b) the intervals at which, or circumstances in which, such payments become due under that contract, or
- (c) both of the matters mentioned in sub-paragraphs (a) and (b) above,

the relevant provisions of paragraphs 2 to 4 below shall apply.

2

(1) The amount of any payment by way of instalments or stage or periodic payments in respect of a relevant period shall be the difference between the amount determined in accordance with sub-paragraph (2) and the amount determined in accordance with sub-paragraph (3).

(2) The aggregate of the following amounts--

- (a) an amount equal to the value of any work performed in accordance with the relevant construction contract during the period from the commencement of the contract to the end of the relevant period (excluding any amount calculated in accordance with sub-paragraph (b)),
- (b) where the contract provides for payment for materials, an amount equal to the value of any materials manufactured on site or brought onto site for the purposes of the works during the period from the commencement of the contract to the end of the relevant period, and
- (c) any other amount or sum which the contract specifies shall be payable during or in respect of the period from the commencement of the contract to the end of the relevant period.

(3) The aggregate of any sums which have been paid or are due for payment by way of instalments, stage or periodic payments during the period from the commencement of the contract to the end of the relevant period.

(4) An amount calculated in accordance with this paragraph shall not exceed the difference between--

- (a) the contract price, and
- (b) the aggregate of the instalments or stage or periodic payments which have become due.

Dates for payment

3

Where the parties to a construction contract fail to provide an adequate mechanism for determining either what payments become due under the contract, or when they become due for payment, or both, the relevant provisions of paragraphs 4 to 7 shall apply.

4

Any payment of a kind mentioned in paragraph 2 above shall become due on whichever of the following dates occurs later--

- (a) the expiry of 7 days following the relevant period mentioned in paragraph 2(1) above, or
- (b) the making of a claim by the payee.

5

The final payment payable under a relevant construction contract, namely the payment of an amount equal to the difference (if any) between--

- (a) the contract price, and
- (b) the aggregate of any instalment or stage or periodic payments which have become due under the contract,

shall become due on the expiry of--

- (a) 30 days following completion of the work, or
- (b) the making of a claim by the payee,

whichever is the later.

6

Payment of the contract price under a construction contract (not being a relevant construction contract) shall become due on

- (a) the expiry of 30 days following the completion of the work, or
- (b) the making of a claim by the payee,

whichever is the later.

7

Any other payment under a construction contract shall become due

- (a) on the expiry of 7 days following the completion of the work to which the payment relates, or
- (b) the making of a claim by the payee,

whichever is the later.

Final date for payment

8

(1) Where the parties to a construction contract fail to provide a final date for payment in relation to any sum which becomes due under a construction contract, the provisions of this paragraph shall apply.

(2) The final date for the making of any payment of a kind mentioned in paragraphs 2, 5, 6 or 7, shall be 17 days from the date that payment becomes due.

Notice specifying amount of payment

9

A party to a construction contract shall, not later than 5 days after the date on which any payment--

- (a) becomes due from him, or
- (b) would have become due, if--
 - (i) the other party had carried out his obligations under the contract, and
 - (ii) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,

give notice to the other party to the contract specifying the amount (if any) of the payment he has made or proposes to make, specifying to what the payment relates and the basis on which that amount is calculated.

Notice of intention to withhold payment

10

Any notice of intention to withhold payment mentioned in section 111 of the Act shall be given not later than the prescribed period, which is to say not later than 7 days before the final date for payment determined either in accordance with the construction contract, or where no such provision is made in the contract, in accordance with paragraph 8 above.

Prohibition of conditional payment provisions

11

Where a provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective as mentioned in section 113 of the Act, and the parties have not agreed other terms for payment, the relevant provisions of--

- (a) paragraphs 2, 4, 5, 7, 8, 9 and 10 shall apply in the case of a relevant construction contract, and
- (b) paragraphs 6, 7, 8, 9 and 10 shall apply in the case of any other construction contract.

Interpretation

12

In this Part of the Scheme for Construction Contracts--

"claim by the payee" means a written notice given by the party carrying out work under a construction contract to the other party specifying the amount of any payment or payments which he considers to be due and the basis on which it is, or they are calculated;

"contract price" means the entire sum payable under the construction contract in respect of the work;

"relevant construction contract" means any construction contract other than one--

- (a) which specifies that the duration of the work is to be less than 45 days, or

(b) in respect of which the parties agree that the duration of the work is estimated to be less than 45 days;

"relevant period" means a period which is specified in, or is calculated by reference to the construction contract or where no such period is so specified or is so calculable, a period of 28 days;

"value of work" means an amount determined in accordance with the construction contract under which the work is performed or where the contract contains no such provision, the cost of any work performed in accordance with that contract together with an amount equal to any overhead or profit included in the contract price;

"work" means any of the work or services mentioned in section 104 of the Act.

NOTES

Initial Commencement

Specified date

Specified date: 1 May 1998: see reg 1(1).

Natural Justice: General principles and Update

ALEXANDER NISSEN QC

Ridge v Baldwin [1964] AC 40
AMEC Capital Projects Ltd v Whitefriars City Estates Ltd [2005] BLR 1
Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93
Discain Services v Opecprime Developments Ltd [2001] BLR 287
Carillion Construction Limited v Devonport Royal Dockyard Ltd [2006] BLR 1
CRJ Services Ltd v Lanstar Ltd [2011] EWHC 972
The Dorchester Hotel Ltd v Vivid Interiors Ltd [2009] Bus LR 1026
Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth [2002] BLR 288
Cantillon Ltd v Urvasco [2008] BLR 250
In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 70
Nye Saunders v Alan Bristow (1987) 37 BLR 92
Laker Airways v FLS Aerospace Limited [1999] 2 Lloyd's Rep 45
Fileturn Ltd v Royal Garden Hotel Ltd [2010] BLR 512
Makers UK Limited v London Borough of Camden [2008] BLR 470
RG Carter Ltd v Edmund Nuttall Ltd [2002] BLR 359
Michael John Construction Ltd v Richard Henry Golledge and others [2006] TCLR 3
AWG Construction Services Ltd v Rockingham Motor Speedway Ltd [2004] TCLR 6
CIB Properties Ltd v Birse Construction Ltd [2005] WLR 2252
HS Works Ltd v Enterprise Managed Services Ltd [2009] BLR 378
Amec Group Ltd v Thames Water Utilities [2010] EWHC 419
Enterprise Managed Services v Tony McFadden Utilities Ltd [2010] BLR 89
Bovis Lend Lease Ltd v The Trustees of the London Clinic [2009] 123 Con LR 15
Glencot Development v Ben Barrett [2001] BLR 207
Woods Hardwick Ltd v Chiltern Air-Conditioning Ltd [2001] BLR 23
Dean & Dyball Construction Ltd v Kenneth Grubb Associates Ltd [2003] 100 Con LR 92
Kier Regional Ltd (t/a Wallis) v City & General (Holborn) Ltd [2006] BLR 315
Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) [2009] CILL 2660
CJP Builders Ltd v William Verry Ltd [2008] BLR 545
Pilon Ltd v Breyer Group plc [2010] BLR 452
PC Harrington v Tyroddy Construction [2011] EWHC 813
RSL (Southwest) Ltd v Stansell Ltd [2003] CILL 2012
Try Construction Ltd v Eton Town House Group Ltd [2003] CILL 1982
GPS Marine Contractors v Ringway [2010] BLR 337

Natural Justice: The Practicalities

Matt Molloy
TECBAR Adjudication Course
21/05/2011



1
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Areas Covered

- Appointment
- Conduct during the process
- Post Decision



2
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Appointment

- Should I take the job?
 - Workload
 - Involvements
 - Parties
 - Representatives
 - Experts
 - Colleagues
 - Serial appointments
- Published opinions/work



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Conduct during the process (1)

- Communications
- Meetings
 - Within the adjudication
 - Outside the adjudication
- Jurisdiction
- Timetabling
 - Availability
 - Paper heavy/complex disputes



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Conduct during the process (2)

- New information
- Late information
- Using your expertise
- Taking advice
- Bullying



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Post decision

- Communications
- Slips/errors
- Confidentiality?



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Concluding remarks

- Follow your instinct
- Transparency is key
- Consider how your actions will be viewed by a tribunal



7
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The New Construction Act 2009

Alexander Hickey, 4 Pump Court.

1. The New Construction Act, to give its official title, is Part 8 of the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA). The New Act gives a 'make-over' to the old Construction Act otherwise known as Part II of the Housing Grants Construction and Regeneration Act 1996 (the Act). The New Act is not yet in force and will not come into force until the Scheme itself has been amended. The Act was widely expected to come into force back in April 2011 but did not, and there is no news on when it will be brought into force. Even though the consultation on proposed changes to the Scheme closed in June 2010, the Government has yet to respond with a decision on what changes to make to the Scheme. You may recall the original 1996 Act took some time before it came into force in May 1998. The amendments - talked about since 2005 have taken even longer. In this talk I will set out the changes brought about by the New Act, and in so doing hopefully this will highlight some of the challenges that lie ahead for you. The challenges can be summarised in one word: re-drafting! The amended Act will only apply to contracts entered into after the date it is brought into force so the lack of definite timetable is unwelcome.
2. To remind you the 1996 Act was introduced to end the problems within the construction industry of widespread payment abuses, such as 'pay if/when paid', delayed payments and large deductions from payments due to the contractors lower in each link of the chain, self-interested contract administration in favour of the employer, coupled with extremely slow and expensive dispute resolution by arbitration or Court, usually conducted at the back-end of a project on a whole festering kitchen sink of disputes. These problems were creating a bad working environment and, worst of all was making the UK construction industry too expensive and non-competitive.
3. To solve these problems the two main aims of the Act were
 - to ensure prompt cash flow by regulating certain aspects of contractual payment provisions; and
 - to allow swift resolution of disputes by way of adjudication
4. The Act sought to achieve this by providing

- that parties to construction contracts in writing have a right to refer disputes to adjudication at any time to obtain a decision within 28 days¹ which would be binding unless and until finally determined by legal proceedings or arbitration [section 108];
- a right to interim, periodic or stage payments [section 109];
- that contracts should include a mechanism to determine what payments become due and when, and a final date for payment [section 110(1)];
- a system of notices in relation to payment:
 - requiring the payer to give the payee a 'payment notice' of the amount he has paid or proposes to pay [section 110(2)];
 - precluding a payer from withholding money from the 'sum due' unless he has first given an effective 'withholding notice' [section 111];
- the payee the right to suspend performance where a sum due is not paid in full by the final date for payment [section 112];
- that pay when paid clauses (linking payment to payments received by the payer under a separate contract) were prohibited [section 113].

5. It was envisaged that payment practices would become predictable, transparent, to a certain extent standardised, and that as and when disputes arose on a project (particularly disputes about how much should be paid) adjudication an independent decision maker (either appointed by agreement or by various nominating bodies) would parachute in to give a quick, relatively inexpensive, temporary and provisional decision during the course of the project, so that the parties could get on with the works. If they wanted they could argue about the result later either in Court or Arbitration.

6. Although in the main the Act has worked, the results were not quite as expected. One cannot deny the massive take-up of adjudication by the construction industry. It is now the main method of formal dispute resolution. There were some 15,000 adjudications in the decade since the introduction of the Act in 1998. A clear trend emerged over the past decade: as demand for adjudication increased there was a corresponding reduction in the number of trials in the TCC. For example, in 1997 (before adjudication) there were 721 proceedings issued in the TCC. Compare that with a decade on, in 2007 when there only were 407 new cases. Some of those cases were themselves adjudication enforcement proceedings. It is reckoned that the number of large arbitrations declined too.

¹ 42 days if extended by the referring party, or a longer period if the parties agreed.

7. But although adjudication is undeniably quicker (some might say rushed), it is resource-heavy and often expensive, and encourages serial hydra-headed disputes. It is not uncommon for some final account disputes to involve legal/expert costs of over £100,000, especially if enforcement proceedings in the TCC afterwards are involved. Results can be hit and miss and so much depends upon the quality and type of adjudicator and the type of dispute. There is also a great deal of tactical manoeuvring and distraction caused by jurisdictional challenges, with an eye on preventing the enforceability of the adjudicator's decision and an extra layer of expense in enforcement proceedings in the TCC: the last decade has seen several hundred reported decisions on adjudication enforcement. It is fair to report however that only about 5% of adjudications actually end up in enforcement proceedings.
8. Despite the Act parties still tend to resort to dispute resolution at the end of a project rather than during it - apart from simple payment and withholding claims. It may be that dispute situations do not really become substantial pinch points until the end of the project. More likely it is because commercial interests dictate a non-confrontational approach during the project and there is no desire to incur the cost and time involved in the adjudication process on points that may turn out to be of little significance to the overall commercial interests of the parties to the project.
9. In practice, there is a growing tendency for adjudications to be used mainly as the final dispute resolution process. Parties are, by and large, not taking disputes further than a decision on adjudication at least where the adjudicator has not completely made obvious mistakes in reaching his decision on the merits. This may be because the parties have incurred costs of adjudication and don't have the stomach for a full scale trial or arbitration. It may be because, absent an obvious mistake, the parties realise that if an adjudicator has decided the dispute one way, albeit on a rough and ready basis, it gives them an early warning that a more detailed, time-consuming and costly procedure in front of an Arbitrator or Judge is likely to end up with a similar result.
10. And what of the Act's aim of improving cash flow? Some might say it is a qualified success for parties wanting to be paid. The familiar standard forms have broadly incorporated compliant payment mechanisms. Payment terms have undoubtedly become more standardised, more transparent, and (because of staged instalments) more regular. Older problems were replaced by ones with different names: working out what was an adequate payment mechanism, and what on earth was the sum properly due. But the critical question

is: has this improved actual cash flow? It is difficult to say whether this has really improved. Clearly payers have a few further hoops to jump through but I suspect that the underlying problem of deductions has not gone away but instead become systemised. It is tempting to suggest that the demand for adjudication is in part fuelled by continued dissatisfaction about prevailing payment practices, rather than because it is a popular and cherished form of dispute resolution.

11. The dissatisfaction was sufficient to prompt the Chancellor's announcement in the Budget in March 2004 of a Review of the Construction Act:

"Following concerns raised by the construction industry about unreasonable delays in payment, the government will review the adjudication and payment provisions of the Housing Grants Construction and Regeneration Act in order to identify what improvement can be made.

12. The Government asked Sir Michael Latham to review the legislation. His September 2004 report concluded that the Act was generally working well but there was room for improvement. A DTI consultation paper called *Improving Payment Practices in the Construction Industry*, followed in March 2005 which considered improvements to clarify payment mechanisms and reduce disincentives to referring disputes to adjudication. Then there was a second consultation in 2007 before the Construction Bill arrived in 2008.

The amendments in summary

13. Part 8 of the LDED Act comprises eight sections, sections 138-145, which amend the relevant sections of the 1996 Act.
 - Section 138 gives the Secretary of State (or as appropriate ministers for Scotland and Wales) a new and wide power to disapply any or all of the provisions of the Act by Order. This amendment becomes s106A of the 1996 Act. Previously the Secretary of State had an all-or nothing power to exempt certain contracts from the Act. It will be interesting to see to what extent this new power is used and whether there will be a divergence of approach in Scotland, Wales and England. It will be eagerly awaited to see if the Government use the new powers to disapply the provisions of the Act to PFI sub-contracts, bringing it into line with PFI contracts which are already excluded. I don't propose to say anything more about it in this paper.

- Section 139 deletes s107 of the 1996 Act. It removes the requirement for the construction contract to be entirely in writing. This is one of the more important provisions to be discussed.
- Section 140 introduces a 'slip-rule' provision to facilitate the correction of clerical or typographical errors in an adjudicator's decision. This will have more effect in Scotland than in England because the Courts in England had permitted this already but the scope of what is proposed may be slightly different.
- Section 141 makes the parties' agreement about the allocation of the costs of adjudication ineffective, unless certain conditions apply. The old Act was silent on the question of costs. This new provision, expressly dealing with costs becomes s108A of the 1996 Act. My prediction is that this provision will generate a lot of debate because s108A is not well drafted.
- Section 142 amends the Act by outlawing cross-contractual payment mechanisms. There is not an adequate payment mechanism if the timing and amount of payment is dependent upon the performance of obligations by others in a different contract;
- Section 143 provides a new system of payment notices which can emanate from either side, and a payer's counter-notice to establish the notified sum which should be paid.
- Section 144 introduces (in most cases) a statutory requirement to pay sums specified in these notices;
- Section 145 improves the right of an unpaid contractor to suspend.

Repealing the requirement in s107 for construction contracts to be in writing

14. As originally enacted, section 107 of the 1996 Act provided that Part 2 of the 1996 Act only applied to contracts which were "in writing" (there was a complicated definition of what that meant). The rationale was that only contracts in writing were sufficiently certain and clear for adjudicators to make speedy decisions about the parties' entitlements under those contracts.
15. But the provision as to what constituted 'in writing' was a mess. The problem was caused when the draftsmen of the Act plagiarised the formulation used in the Arbitration Act 1996 to define the requirements of a simple arbitration agreement: the rationale for which was to make sure that there indeed an agreement to arbitrate. The formulation was ill-suited to covering complex construction contracts where it is a counsel of perfection to expect all terms to be set out in writing (and remain in that form throughout a project).

16. In 2002 the Court of Appeal in *RJT Consulting v DM Engineering*² by a majority ruled that under s107 all of the terms of construction contracts had to be in writing for the Act to apply. If there was some other term not in writing no matter how trivial or immaterial to the issue in dispute, the Act could not apply. Ward LJ explained that certainty was the key especially when adjudication was to take place under a demanding timetable. '*The adjudicator has to start with some certainty as to what the terms of the contract are*'.
17. This ruling, which surprised many in the industry led to the problem that encouraged many jurisdictional challenges to be made in an attempt to escape from a particular adjudication. It was easy enough to argue that one or more terms of the contract were made orally and were not evidenced in writing. Other challengers sought to argue, with some success, that a written contract originally within the Act was taken out of the Act's scope when there was an oral variation to the terms: *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*.³
18. The idea gained ground that a number of construction contracts were being disenfranchised from the benefits of the Act because of the s107 problem. However, to my mind the s107 problem was overstated and frequently misunderstood. For many contracting parties in the construction industry it was still possible to adjudicate on a purely contractual basis without being concerned with the *RJT* problem. The Courts had made clear that contractual adjudications would be enforceable in the same way as adjudications under the Act. So for those with standard form contracts there was no jurisdictional problem since those contract forms already incorporated adjudication agreements and payment terms that complied with the requirements of the legislation. The same was true of many bespoke contracts which also incorporated payment terms and for adjudication whether or not the Act applied.
19. Now, as a result of the new amendments brought in by section 139 of the New Act, section 107 has been repealed, and the payment provisions and adjudication under 1996 Act will apply to all construction contracts – whether wholly in writing, partly in writing or wholly oral. This is a major change of direction for the Act. It appears to be the result of a broad consensus that the s107 requirements should be swept away. The Government's analysis of the 2nd Consultation, published in July 2008 reported that 90% of respondents to the consultation supported the removal of the requirement in writing. But interestingly, in 2004

² [2002] EWCA Civ 270 [2002] BLR 217

³ [2003] BLR 79.

during the Latham review of 2004, just after *RJT*, those responding only wanted the Act to apply to contracts wholly or partly in writing - not stretching as far as wholly oral contracts.

20. Is the removal of s107 a good or a bad thing? There was a real concern throughout the last decade that adjudicators were involved in a summary procedure on a tight timescale, one which essentially done on paper, and they might not be able to do their job in the time available if called upon to decide upon what were the terms of the contract. Their job was to decide the 'dispute' referred to them not to spend time first having to decide what the contract is. It is one thing to allow them to decide the 'dispute' in a rough or ready way, right or wrong, leaving it to be corrected later on by final determination if necessary, but it was felt to be quite a different thing to allow adjudicators to decide their own parameters by ruling upon what the parties' contract was.

21. There was also a concern about whether adjudication is a suitable mechanism for deciding what the terms of the contract are. For example as a TCC Judge said in an early case on adjudication in 2000 *Grovedeck v Capital Demolition*

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

22. At the Public Bills Committee on 18 June 2009, Stewart Jackson MP summarised the concerns felt by the Construction Federation representing main contractors about the removal of s107: *'It will undermine industry 'best practice' of encouraging contracts to be in writing...It will inevitably lead to the examination of who agreed what with whom, with each party making representations to the adjudicator...It raises the question as to how such a procedure (which will inevitably require oral representation and examination during the course of an adjudication) can be incorporated within what is already the short statutory timescale for adjudication....Swift adjudication remains the most effective way to tackle non-payment. Introducing oral or part oral contracts within its scope will increase costs and delay the process.'*

23. Now that we have the new Act, there are four main questions:

- Are there going to be many more adjudications?
- Is a decision on the terms of the contract capable of being made within the short timescale for adjudication?
- If it is to be done, what should be the procedure?

- Will this significantly increase costs?

And there is the unspoken question: Will it all be a disaster?

24. In answering these questions a sense of perspective is needed about the future. A great many adjudication disputes will not turn on the existence or otherwise of a disputed contractual term. For most contractors, particularly those with standard form contracts, or those with predominantly written contracts, life will go on as before, although there will be fewer jurisdictional distractions because disagreements about the terms of the contract which are non-material to the dispute will in future be unlikely to arise. That is to be welcomed. Parties will only notice a difference if a claim is based on a disputed oral term or an oral variation of the written contract.
25. In theory since more contracts will be within the scope of the Act one might expect a rise in the number of adjudications, particularly the obviously rare cases where the terms are completely oral, and perhaps in letter of intent cases which are then informally extended into a contractual relationship. But I do not share the view that there will be a substantial rise in extra adjudications in practice. Many of the contracts that were not s107 compliant were nonetheless amenable to purely contractual adjudications.
26. In some jurisdictional challenges the problem is not so much the existence of a term but whether a contract was formed at all. It is likely that jurisdictional challenges will still arise in cases where the real issue is whether there is a contract at all. The removal of s107 will not solve the problem of dealing with cases where there is arguably no contract at all - e.g. many letter of intent/battle of form cases.
27. We will all have to face up to the reality that adjudicators are going to have to decide what the terms of the contract are where there is conflict between the parties. Is this such a large step? It should not be forgotten that already adjudicators are called upon to decide issues of disputed fact some of which are not recorded in writing: they are likely to approach disputed contractual facts in the same way. Currently an adjudicator frequently has to decide what the contract is in the context of deciding whether he or she has jurisdiction to decide the dispute. It is unlikely that the TCC Judges will entertain the submission that a dispute about the contractual terms is not something capable of being fairly decided by an adjudicator.

28. The more significant impact of the removal of s107 will be the procedure which adjudicators are going to adopt in having to decide disputed contractual terms within the constraints of the existing tight timetable, and the TCC Judges' reaction to their approach in enforcement proceedings.
29. There are, I think two nagging worries which may be troubling the lawyers, and possibly will come to cause concern to the Judiciary: the first is the appropriate way to decide the dispute over the contractual terms. The second (longer term) concern is how adjudicators are going to apply the substantive English law of formation of contract.
30. There appears to be an assumption that an adjudicator faced with a dispute about the contractual terms will necessarily have to hold an oral hearing and allow cross-examination of witnesses but this will be difficult to achieve in the short timescale and lead to poor results: see the passage I quoted from Stewart Jackson MP above. In similar vein it is interesting to note Mr Justice Coulson's observation in paragraph 4.09 of Construction Adjudication 2nd Edition OUP (2010) on what is expected to happen:

'In a complex case, with assertion and counter-assertion as to what was agreed at meetings that may have been scantily minuted, and potentially complex arguments about contract/no contract, the adjudicator will probably have to hold a hearing, with oral evidence and cross-examination (because otherwise there will be no way of satisfactorily testing whether or not there has been an oral agreement) and reach a conclusion as to the existence or otherwise of a contract and its terms, before then going on to assess the actual claim made. In some cases it may be impossible to undertake that task fairly within the 28-day timetable'.

31. When a Court or Arbitral tribunal is asked to resolve a dispute about oral contractual terms it involves a trial with live evidence and cross-examination of witnesses. Perhaps the thing the lawyers especially dislike or fear most is the scenario where an adjudicator reaches a decision on disputed oral contractual terms without the benefit of live examination of the witnesses to test who is right: it cuts against the common-law grain. In other words the adjudicator who reads two witness statements and chooses which side to prefer, A's statement over B's. One might say this is calling for the wisdom of Solomon. Some adjudicators (especially seasoned lawyers and arbitrators) may feel uncomfortable about it. Those that do are at least likely to adopt an inquisitorial if not a mini-trial procedure first.

32. It is becoming more common for adjudicators to hold a hearing (normally no more than a day) at which there is a discussion between the adjudicator and witnesses about their evidence where there are disputed issues of fact. Those I have done, involved the adjudicator conducting an inquisitorial question and answer session involving the various witnesses of fact and experts in order to reach a view on whose account he believed. My prediction is that an inquisitorial practice is more likely to develop rather than the adversarial method favoured by the Court and in arbitration. That procedure is likely to be easier for the adjudicator to arrange and to control and is likely to be less time-consuming and expensive for the parties. I doubt that many adjudicators will attempt to emulate in full the approach traditionally taken by a Court or Arbitrator
33. But I think that inevitably there will be many adjudicators who will decide what the contract is simply upon the papers. When I gave a similar talk to the Institution of Civil Engineers in January 2011, many of whom were adjudicators with an engineering background, I took a straw poll on how many of the attending adjudicators would hold an oral hearing and allow cross-examination, and how many would deal with it on paper. The vast majority indicated that they would deal with it on paper, as they do now. Only a few would consider an oral hearing. The view was expressed that if they as adjudicators get it wrong the parties can have the luxury of deciding the point in the traditional way in a final determination.
34. It will be a culture shock but we had better get used to it. It will be interesting to see how the TCC Judges react to an adjudicator who decides to adopt a paper only approach. Arguably the Court cannot interfere because to do so would be to question the adjudicator's findings of fact. It will be interesting to see if the Court takes the view that an adjudicator who fails to hold a hearing and test the evidence commits a breach of natural justice.
35. There is also a nagging worry that over time adjudicators (particularly those who are non-lawyers) might adopt a different approach to contractual formation and certainty of terms from the English common law as applied in the Courts (for instance looking at inadmissible earlier negotiations, and construing the meaning of terms etc). While it is open to the parties to correct the contractual analysis during final determination proceedings, there could be a longer term concern if adjudication practice develops a different approach over time especially if adjudication becomes in practice a form of final dispute resolution.

36. Will the costs of adjudication increase? It is obvious that the costs of an adjudication where the contract terms are in issue are always going to be more expensive but in most cases I doubt whether they will prove substantially different from the costs involved in adjudications before the new Act. Often the same contractual points are currently deployed as jurisdictional points in the adjudication. And in practice, adjudicators are already frequently called upon to resolve disputed terms in the jurisdictional context. Where the terms are in dispute it usually will end up involving the Court. If that is the situation, particularly where a party's claims are dependent upon controversial contractual terms that party might be well advised to have the terms (if not the substantive dispute) resolved by the Court.
37. What practical steps can parties take where they have adjudications where there are disputed contractual terms? Parties should be encouraged if they are concerned about not having an oral hearing to urge the adjudicator to adopt at least an inquisitorial approach and have an oral hearing where there is a dispute about the contract terms. In cases where the contract is generally in writing with an adjudication clause it might be sensible to provide for a hearing in any situation where a dispute about terms arises.
38. Apart from that a party needs to give the adjudicator all the right tools to find for your case rather than the other side's. That means making sure that their submissions and evidence give proper particulars of their case in favour of an oral term and - how it was agreed by whom, to whom, what was said, when etc and other corroborative evidence- this will stand a better chance than generalised assertions from the other side. Equally pinning the other side down very early with requests for particulars can also be effective in highlighting the strengths and weaknesses of the parties' respective positions.
39. Finally it should not be forgotten that certain important contractual provisions required by the Act, such as provisions relating to a contractual adjudication scheme, will continue to need to be in writing if they are to have contractual force. For example the contractual adjudication regime will need to provide for the adjudicator to have the power to make corrections under the slip rule in what will be s108(3A) You will need to be aware of this when drafting amendments to comply with the new requirements of the Act otherwise the whole of the contractual provisions in respect of adjudication will fall away in their entirety and the Scheme will apply, thus defeating the intention of the parties: see *Yuanda v WW Gear*⁴.

⁴ *Yuanda v WW Gear* [2010] BLR 435; cf the payment provisions where the Scheme will only fill the gaps.
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Section 140 - Adjudicator's power to make corrections

40. This section inserts new subsection (3A) into section 108 of the 1996 Act and has the effect of requiring the parties to a construction contract to provide in their contract that the adjudicator has the power to correct a '*clerical or typographical error in his decision arising by accident or omission*'. The provision concerned must be in writing but imposes no timescale for making the correction which is unfortunate. The new Scheme which will apply by default will include such a provision and, according to the consultation proposals is likely to require corrections to be made within 7 days⁵.
41. During consultation for the new Act it was argued that this rule was only needed in Scotland and no such requirement was needed in England and Wales because the problem had been solved in 2000 by *Bloor Construction v Bowmer & Kirkland* [2000] EWHC 183 [2000] BLR 314. In *Bloor* it was held that there was an implied term of the contract that an adjudicator could correct '*an error arising from an accidental error or omission or to clarify or remove any ambiguity in the decision...providing this is done within a reasonable time and without prejudicing the other party*'. A reasonable time, in this context, means promptly. In *Bloor* the adjudicator had accidentally forgotten to deduct interim payments already made when deciding what sum should be paid.
42. It is open to question whether the new amendment which is restricted to clerical or typographical errors would include the sort of error in *Bloor*. It is arguable that the statutory provision would not include errors of logic or arithmetic. Certainly the new Act does not extend to removing ambiguity in the decision and it remains to be seen whether such a term would now be implied in the light of the New Act.
43. Because the Act together with the Scheme will allow a period for correcting slips, this will have an impact on the date for compliance with the decision. Under the current system the decision is immediately to be implemented although in practice parties will normally wait a week before enforcement proceedings are issued. In the consultation for the amended Scheme the Government suggested it might allow 8 days to comply with the decision. This would preclude enforcement proceedings from commencing before that grace period. And it whether it would mean 8 days grace from the date of the corrected decision is not clear. This

⁵ The Adjudication Society suggested 5 days was sufficient
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is likely to delay payment and is likely to have been resisted by the consultees. There is no grace period for compliance in arbitration.

Section 141 - Adjudication cost

44. The 1996 Act was silent on the question of costs of the parties and of the adjudicator's fees. Section 141 inserts new section 108A into the 1996 Act which now addresses the point explicitly. Apart from two exceptions agreements about costs of the adjudication are ineffective.

45. The aim of the amendments according to the DTI consultation was to remove the disincentive to adjudication caused by contract provisions that imposed the costs on one party - particularly Tolent clauses after *Bridgeway Construction Ltd v Tolent Construction Ltd*⁶, where the referring party was always required to pay the respondent's costs and the adjudicator's fees whatever the decision of the adjudicator. Last year, after the new Act was enacted it was held in *Yuanda v WW Gear*⁷ that such clauses did not comply with the 1996 Act because it acted as a fetter on the right to adjudicate: an appeal to the Court of Appeal was settled.

46. The conventional view is that the finding in *Yuanda* is consistent with the situation under the New Act and that such clauses are outlawed. But is that correct?

47. Section 108A is not happily drafted. It says

(1) This section applies in relation to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract.

(2) The contractual provision referred to in subsection (1) is ineffective unless—

(a) it is made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties, or

(b) it is made in writing after the giving of notice of intention to refer the dispute to adjudication.

⁶ (2000) CILL1662

⁷ *Yuanda v WW Gear* [2010] BLR 435

48. The first exception is intended to allow the parties to confer power on the adjudicator to allocate his fees and expenses as between the parties. The second is an agreement between the parties on costs which is made in writing after the dispute has been referred to adjudication - the parties are free to agree anything they like after the adjudication has started, which is consistent with agreements about costs in the Arbitration Act 1996.
49. At first sight, and given the consultation background, one might be forgiven for thinking that all the parties were permitted to do in their contract was to agree to allow the adjudicator to allocate his fees and expenses before the dispute, but that any other agreement as to costs would be ineffective unless it was an agreement made during the adjudication. That is clearly what was intended.
50. However, the little unambiguous word 'or' between the exceptions in (2)(a) and (b) suggests that Parliament intended parties to have a choice. In my view it will not be long before the first exception will swallow up and make the second disappear. So long as the construction contract includes in writing a term which allows the adjudicator to allocate his fees and expenses between the parties the parties are able to make any other agreement on costs they like without having to wait until after the dispute has been referred to adjudication. In his new book *Construction Adjudication 2nd Edition* OUP (2010) Mr Justice Coulson's suggests at paragraph 4.14 that this is indeed one view of the section although he goes on to observe that such an argument is '*perhaps contrary to the original aim of the legislation, which was apparently to outlaw the parties' ability to pre-allocate costs*'.
51. It will come as no surprise that the first exception was introduced at a very late stage of the Bill. Various consultees with the Government warned of this circumvention but it fell on deaf ears. The point was raised during the House of Commons report stage on 13 October 2009⁸ parliamentary debates of the Bill. The former construction minister Nick Raynsford MP had intended to table some amendments to avoid that very problem but was talked out of it. He said

'I have heard some representations made that it could still leave a lacuna whereby a contract could be devised that included exactly such a provision for the adjudicator to be entitled to payment of reasonable expenses but that might separately seek to impose a condition about

⁸ col 180.

other costs, including the legal costs of the parties...being met by one party. I am assured that that is not the case, but I would welcome reassurance from the Minister that there is no scope for such a lacuna in the provisions which would allow the good intentions of the Governments' provisions to be bypassed. I hope that she will be able to give me that assurance.'

The Minister gave the assurance⁹. It remains to be seen whether the Court can have regard to that assurance if the point ever arises on the effect of s108A, since the words of the Act are clear and not ambiguous. Parties will need to be on guard for the circumvention and to make sure that appropriate amendments are made to the terms. Unfortunately Nick Raynsford MP was correct in fearing the potential lacuna and it is undoubtedly an issue which is likely to be raised in the future.

52. If I am right about the effect of s108A it is doubtful is whether *Yuanda* will remain good law for adjudication under the (amended) Act. It could legitimately be argued that now that the Act is no longer silent on costs and expressly permits a Tolent-style agreement.

Section 142 - cross-contract provisions are no longer an adequate payment mechanism

53. Under s110(1) of the 1996 Act every construction contract had to provide an “adequate mechanism” for determining what and when payments become due under the contract. The Act left it to the parties to decide when payments became due. The problem was that in many sub-contracts the payment was agreed to be due when the main (or superior) contract payment was certified by a third party and this was held to be an adequate mechanism. Yet a sub-contractor may not be aware that a certificate has been issued in a superior contract and, where such a certificate covers work undertaken by other sub-contractors, payment to the sub-contractor is often delayed until all of the other work has been completed.
54. Section 142 inserts new subsections into section 110 of the 1996 Act, to become s110(1)(1A) to (1D). The drafting approach is a little oblique. New section 110(1A) provides that it is not an adequate mechanism if the determination of what payments are due, or when, are dependent upon the performance of obligations in a different contract (for example, in a superior contract) or upon someone’s decision as to whether obligations have been performed in a different contract. This will be welcome news to sub-contractors.

⁹ *ibid* col 185.

55. New Sections (1B) and (1C) provide limited exceptions to this rule. The exception at (1C) is aimed at preserving the management contracting form. I find the purpose of (1B) more difficult to understand. It excludes from the prohibitions those which are conditional on 'obligations' to make payments under a different contract. But this is largely outlawed by s113 anyway.
56. New Section 110(1D) also makes clear that the service of a payment notice is not an adequate payment mechanism for deciding the date when payment is due and will be ineffective.

Section 143-144 Notices relating to payment

57. Section 143 repeals the original legislation in s110(2) relating to "payment notices" and has brought in a new system of payment notices by s110A and s110B. In default of compliance the relevant provisions of the Scheme apply. There are some radical changes to payment notices and withholding notices which will need an overhaul of the standard forms.
58. The most radical change on payment notices is that the contract can either require the payment notice to emanate from
- the payer [s110A(1)] or a 'specified person' i.e. someone identified in the contract usually the CA or Engineer [s110A(2)]; or
 - the payee [s110A(3)] - effectively this will be a payee's application for payment.

In each case the payment notice is to be given at most 5 days after the date the sum has become payable and the payment notice must identify

- the sum the person giving the notice believes is payable on the date it became payable
- the basis on which that sum is calculated.

S110A(4) makes clear that even a zero sum requires a payment notice. Parties will be expected to explain why no sum is believed to be payable in the notice (e.g. due to set-off or abatement).

59. Section 110B applies where the contract provides that the payer¹⁰ shall give the payment notices but the payer fails to give an effective notice on time. In this situation the payee is entitled to give the payer a 'payment notice' instead, which may be given 'at any time'. The

¹⁰ or 'specified person'.

final date for payment will be postponed by the same number of days the payee served its notice after the payer's notice was due, so there are clearly incentives on the payee to issue the payee notice sooner rather than later.

60. However, note subsection 110B(4). If the contract also permits contractor's payment notices (as many contracts do in the guise of contractor's payment applications), if an application has been made such application is deemed to be a notice given pursuant to new section 110B(2) and, indeed, the payee cannot give a further notice.

Section 144 - Requirement to pay notified sum

61. Section 111 of the 1996 Act provided that a party could not withhold payment after the "final date for payment" of a sum due under the contract unless that party had given a notice of the intention to do so.
62. Section 144 substitutes a new section 111. Its starting point is that the payer must pay the sum notified in the appropriate payment notice under s110A or s110B on or before the final date for payment. This means that a payer who ignores the contractual mechanisms or ignores a payee's notice will do so at his peril: a payee's notice or application for payment will become payable - even if it is exaggerated (unless a counter-notice has been given - see below). The concept of the notified sum being payable is intended to facilitate cash flow by determining what is provisionally payable although what is properly and ultimately payable as a matter of the parties' contract is unaffected (see the decision of the Court of Appeal in *Rupert Morgan Building Services (LLC) Limited v Jervis* [2003] EWCA Civ 1563).
63. But subsection 111(3) allows, in effect, the payment notice to be challenged or revised by the payer by giving a type of counter-notice, where the payer (or a specified person) gives a notice of his intention to 'pay less than the notified sum' (for convenience 'a counter-notice'). The payer can even do this to revise a payer's notice because, for instance, he subsequently discovers that the work in question was unsound. By s111(4) the payer must state what sum he considers to be due on the date of that notice, and how he has calculated it (again a zero number still requires such a notice). Like the old withholding notices the notice must be given within the 'prescribed period' - under the Scheme it is likely to be not less than 7 days before the final date for payment.

64. By subsection 111(6) the amount set out in a counter-notice becomes the “notified sum” which the payer must pay.
65. Subsections 111 (8) and (9) provide that if the requisite notices have been given, and in an adjudication the adjudicator decides that more money is owed than stated in the relevant notice the additional amount must be paid either within 7 days of the decision or the date which would have been the final date for payment, whichever is later. In most cases it will be 7 days after the decision.
66. Section 111(10) is a response to the decision of the House of Lords in *Melville Dundas Limited (in receivership) and others v George Wimpey UK Limited and others*[2007] UKHL 18. In that case, the House of Lords decided that the payer could legitimately withhold money notwithstanding that no “withholding notice” under current section 111 of the 1996 Act had been given, in a case where the parties’ contract had provided that further money need not be paid in the event of the payee’s insolvency. The key to that decision was the fact that the insolvency occurred *after* the period for giving a “withholding notice” had expired i.e. it was impossible for the payer to have given such a notice beforehand.
67. The new provision is intended to limit the *Melville Dundas* decision to insolvency situations (and is not interpreted to include other events which the parties may have specified in their contract) - the amendment is consonant with the effect of *Pierce Design International v Mark Johnston* [2007] EWHC 1691 TCC [2007] BLR 381. Section 111(10) provides that there is no requirement to pay the “notified sum” where the contract allows the payer to withhold money upon the payee’s insolvency and the payee becomes insolvent after the expiry of the period for giving a counter-notice. Subsection (11) applies the existing definitions of “insolvent” in the 1996 Act (section 113).

Section 145 - Suspension of performance for non-payment

68. Section 112 of the 1996 Act permits a contractor to stop carrying out work under the contract in the event of non-payment by the other party. Section 145 amends s112 to put it beyond doubt that a contractor may stop carrying out some, and not simply all, of the work in such a case. It also makes the remedy of suspension more attractive to payees and more onerous to payers. A new subsection (3A) into section 112 makes the “party in default” (the non paying party liable to pay to the suspending party a reasonable amount by way of the costs and expenses for demobilisation and remobilisation).

69. Section 112(4) is also amended. In the 1996 Act it was originally enacted provided that any period during which the contractor stopped work in pursuance of this right to do so in a non-payment situation was to be disregarded in calculating any time period prescribed in the contract. The amendment extends this to any period in which the contractor stops work “in consequence of the exercise of” this right; with the effect that extra time is allowable – for instance, the time which the payee requires to remobilise staff or return plant and equipment to the relevant site.

Alexander Hickey

May 2011



Adjudication – The Nuts and Bolts

Presented by Eric J Mouzer FRICS FCIARB

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Adjudication – The Nuts and Bolts

- Appointment: terms, fees, nominating bodies
- Adjudication Rules and Procedures
- Directions: timetabling, case management

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Appointment

- Named
- Agreed
- ANB
- Acceptance
- Initial Actions
- Terms
- Adjudicator Agreements

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● ● ● | **Adjudication Rules & Procedures**

- The Scheme
- TECBAR
- TeCSA
- “JCT”
- ICE
- NEC
- CIC
- Bespoke

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● ● ● | **Adjudication Rules & Procedures**

Common Features

- Requirements of Notice
- Appointment Procedure
- Requirements for Referral (and other submissions)
- Scope of Reference
- Timing of Submission of Referral
- Timing for submission of any reply

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● ● ● | **Adjudication Rules & Procedures**

Common Features

- Powers
- Ascertaining the facts and the law
- Obtaining Advice
- Reaching and communication of Decision
- Reasons
- Costs
- Apportionment of Fees

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Adjudication Rules & Procedures

Some Differences

- TeCSA
 - Power to decide own jurisdiction
 - Cap on fees
 - Confidentiality
- CEDR
 - Provides for mediation
 - Third Party Indemnity

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Adjudication Rules & Procedures

Some Differences

- NEC
 - Two different procedures
 - Contract and Agreement need to be read together
- ICE/TeCSA/CIC/CEDR
 - Correction of slips

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Directions

- Timetabling
 - Initial
 - Subsequent
 - Time Periods
 - Additional Time

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● ● ● | Directions

- Case Management
 - Meetings
 - Late Information
 - Raising Queries
 - Obtaining Advice
 - Testing Evidence

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● ● ● | The Future -Adjudication

Oh no I didn't,
Oh yes you did!



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● ● ● | Adjudication – The Nuts and Bolts

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TECBAR Adjudication Course

Sitting as adjudicator

1. Adjudication hearings

- Holding an oral hearing.
 - Complex issues of law.
 - **Fenice Investments Inc. v. Jerram Falkus Construction Ltd. [2009] EWHC 3272 (TCC)**
 - Complex contested facts.
 - Credit of particular witnesses.
 - Experts
 - Delay: methodology; baseline programme; as-built programme, critical paths through each.
 - Quantum: how much was spent; what on; was it reasonable?
 - The parties' day in court.
- Format and procedure at hearings.
 - Tribunal-led.
 - Hot-tubbing.
 - Cross-examination.
- Controlling the meeting.
 - Agenda.
 - Chess clock?
- Covering the ground in the available time.
 - Deal only with items that are unresolved in the adjudicator's mind.
 - Expert Joint statements.
 - Alternately:
 - One party summarise its understanding of the other party's case on a particular point.
 - The same party identifies what's wrong with it.
 - The other party responds.

2. Writing and publishing the decision

- Writing the decision.
 - Electronic copies of submissions, statements, experts' reports and associated schedules.
 - Agreement on the issues.
 - Start writing as early as possible.
 - Summarise the issues in a convenient form in the Decision.
 - Replicate and answer the issues in the operative part of the Decision.
 - Clarity and consistency.
 - Editing.
- Natural justice and jurisdiction again
 - Publish particular views.
 - Making a parties' case or getting to the issues/facts?
 - **Cantillon Ltd. v. Urvasco [2008] EWHC 282 (TCC)**
- Timing of the publication of the decision.
- Costs orders.

3. Costs, liens, getting paid

- Exercise of a lien over the Decision.
 - **Mott MacDonald Ltd. v. London & Regional Properties Ltd. [2007] EWHC 1055 (TCC)**
 - Rules 12(a) and 19(3) of the Scheme.

- Express agreement to a lien.
- Getting paid.
 - Agreement to terms.
 - Is liability to the individual or to the adjudicator's employer?
 - Time to pay.
 - Interest for late payment.
 - Joint and several liabilities.
 - Sue in the TCC.

Franco Mastrandrea
21 May 2011