Chapter 5
The Secondary Legislation

The Scheme for Construction Contracts

The Scheme for England and Wales was introduced on 6 March 1998 as was the Scheme for Scotland. This was the required secondary legislation to make Part II of the Act operative. With this secondary legislation in place the whole of the adjudication and payment provisions could then be applied to construction contracts. Commencement Order 1998 No.649 made the Act and the Scheme operative from 1 May 1998. There was an equivalent Order in Scotland. On the same date an Exclusion Order was made under the powers conferred on the secretary of state to exclude certain types of contract from the definition of construction contracts in the Act.

The Scheme and the whole of the legislation for Northern Ireland became operative on 1 June 1999.

The Scheme is the default position where the parties have failed to address the requirements for construction contracts in the primary legislation. In the Act section 114 states:

> (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.

The terms of the Scheme are applied as if they were part of the contract. It has been argued that the Scheme does not actually comply with the Act. It does not have to; these are substitute provisions that stand in their own right.

The industry had adequate notice to change its contracts prior to the date of commencement of the legislation. Despite this many of the standard contract writing bodies were late in providing appropriate compliant amendments. It comes as no surprise therefore that in the first 40 months of the legislation the majority of the adjudications were carried out under the Scheme.[1] The authors suspect that this situation has not changed. Despite the publicity the legislation has had, there are still many who are ill-informed. Another possible explanation is that the industry is notoriously poor at addressing contractual relationships.

It has been argued that there should be a single set of rules for the industry and the way to do this is to adopt the Scheme wholesale. The JCT has recently adopted the Scheme as its adjudication provisions in the Major Projects Form. The authors do not agree with this. Where legislation is to be imposed, as is the case here, there must be a balance between freedom of contact and imposition. The legislation has addressed the balance correctly. Contract writing bodies should take the lead in providing compliant rules in their contracts.

Where there is a dispute as to whether the terms of a standard contract or the Scheme rules apply, the courts may well enforce an adjudicator's decision where the process has been

[1] *Adjudication – The First Forty Months.* A Report on Adjudication under the Construction Act. Construction Industry Council, 2002.

conducted under the Scheme despite it being argued that if the standard contract applied there would be no jurisdiction[2].

The Scheme is in two parts. There are provisions covering adjudication and provisions covering payment. This follows the pattern of the Act. If the contract does not comply fully with all of section 108(1) to (4) of the Act, Part I – Adjudication under the Scheme applies.

The payment provisions are not quite so straightforward. The Scheme applies on a section by section basis. Where the parties have failed to reach agreement under one or more of sections 109, 110, 111 or 113 of the Act, the Scheme will apply to each individual section where there is non-compliance. The Scheme imposes its own time periods where there has been failure to agree such time periods in accordance with the Act.

Parties can wholly avoid the Scheme by making contracts that comply with the Act. Experience has shown that adjudications which fall under the Scheme are those contracts made using simple orders, by exchange of letters, or work by small contractors, whose terms and conditions do not comply with the Act or do not refer to other terms which provide compliant clauses for both adjudication and payment.

The Exclusion Order regularises the definition of construction contracts and takes outside the regime of the Act certain arrangements that would have been unsuitable for the application of both the adjudication and payment provisions. The whole of the legislation now sets the minimum criteria for construction contracts. There is nothing to prevent any construction contract going beyond the minima required. What the legislation is doing is creating contractual terms either by voluntary amendments to the contracts or by imposition through the secondary legislation. If the parties include more in their contracts than is needed to comply with the legislation the courts will enforce those terms. There is no opportunity to opt back to the legislation when there is a dispute that falls to be adjudicated or the payment terms offer an improved position to that required by the Act.

The Scheme Part I – Adjudication

Notice of intention to seek adjudication

Paragraph 1

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).

Paragraph 1 deals with the notice of intention to refer any dispute arising under the contract to adjudication. It describes the basic requirements of the notice itself. If the notice does not comply with the minimum requirements it may be void. A notice that gives less than the

[2] *Pegram Shopfitters Limited* v. *Tally Wiejl (UK) Limited* (14 February 2003).

minimum requirements of the Scheme could give rise to arguments on jurisdiction when the adjudicator is appointed. The party seeking the adjudication is called the referring party. It will not be necessary to use this terminology in any decision made by an adjudicator; terms such as applicant or contractor, sub-contractor or employer should be adequate to describe the parties and will be more appropriate in the contractual context. The adjudicator becomes part of this contractual machinery. The importance of the notice is that it must be served on every other party to the contract. This envisages a situation where there can be more than two parties involved with the contract.

Paragraph 1(3) lists the minimum criteria for a valid notice. Brevity in the notice is envisaged. The matters to be listed really ought to be common sense. Even where notice is issued under adjudications that are not subject to the Scheme, it would be sensible to provide this minimum information. The details of the dispute and the nature of the redress sought are fundamental in any notice of adjudication.

The jurisdiction of the adjudicator comes from the notice. The notice has been described as the four corners of the claim[3]. It is important therefore to draft the notice carefully to identify properly the dispute to be decided and also to comply with any minimum criteria. This was explored in *K & D Contractors* v. *Midas Homes*[4]:

> 'In the context of any notice of adjudication it is essential to inform the other party and the adjudicator of the basis upon which such a claim is being made and which justifies these invoices, i.e. the statement of the nature of the redress, as required by the Scheme.'

Where the notice is inadequate it is possible that there is no dispute identified and therefore no jurisdiction to decide anything. There will therefore be nothing to enforce should the matter proceed through adjudication to a decision.

Paragraph 2

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.

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[3] *Whiteways Contractors (Sussex) Limited* v. *Impresa Castelli Construction UK Limited* (9 August 2000).

[4] *Ken Griffin & John Tomlinson, t/a K & D Contractors* v. *Midas Homes Limited* (21 July 2000).

Paragraph 1 deals with 'the notice'. This paragraph deals with 'the request' for the adjudicator to act.

Paragraph 2(1) envisages that the parties may agree on who shall act as adjudicator. Sub-paragraph (a) deals with the position where there is an adjudicator named in the contract. Although the provisions of the contract may not comply with the Act, and therefore the Scheme applies, the naming of the adjudicator in the contract is recognised by the Scheme. The naming of the adjudicator in the contract may not survive where the scheme for adjudication in the contract is non-compliant[5].

While the Scheme envisages the naming of an adjudicator in the contract, this ought to be used with caution. There is always a question as to the possibility of bias where an adjudicator is named widely across a number of contracts by the party proposing the contract. It is wise to name an individual rather than a practice or some other form of collective. Although not doing so is not fatal, it may be a cause of difficulty at a time when the adjudicator is needed[6].

The referring party requests the adjudicator to act. It should be noted that where an adjudicator is named in the contract, the request to that adjudicator is a mandatory requirement.

Sub-paragraph (b) deals with two situations. If no person is named in the contract, this sub-paragraph applies. It also applies if there is a person named in the contract but, for whatever reason, that person has already indicated that he is unwilling or unable to act.

This sub-paragraph applies where a nominating body is named in the contract. The Scheme seeks to preserve those aspects of the contract where the parties have reached agreement, notwithstanding the fact that the contract clause itself does not comply with the Act and therefore the Scheme applies by default. The request to the nominating body is mandatory in this situation.

Sub-paragraph (c) covers the situation where no nominating body is named in the contract. The referring party can then request any adjudicator nominating body to select a person to act. In the earlier drafts of the Scheme adjudicator nominating bodies had a different status. There were 16 bodies who were to be designated as adjudicator nominating bodies and who were to be named in the legislation. This was dropped at a late stage on the grounds of avoiding the need to take the legislation back to parliament each time it was necessary to add further names or to remove names from the list.

Paragraph 2(2) requires that a person requested to act as adjudicator shall indicate whether or not he is willing to act within two days of receiving the request. This request can come from one of the parties, usually the referring party, or from the nominating body. Days include non-working days such as weekends but exclude bank holidays. This duty on the prospective adjudicator or nominating body is therefore onerous.

Paragraph 2(3) gives the definition of an adjudicator nominating body. The body cannot be a natural person or a party to the dispute but firms, companies and partnerships will fit the definition. The body simply needs to hold itself out publicly as a body that will select an adjudicator when requested to do so by a referring party.

This leaves the task open to any commercial concern that wishes to enter the market place to make money from such a selection. It has no regard to any training, quality or indeed whether the body holds a list or has any adjudicators of its own. They could almost be a labour agency-type arrangement. This total lack of control must be unsatisfactory. Having

[5] *R.G. Carter Limited* v. *Edmund Nuttall Limited* TCC Judge Thornton (21 June 2000).
[6] *John Mowlem & Company Plc* v. *Hydra-Tight Ltd (t/a Hevilifts)*, TCC Judge Toulmin (6 June 2000).

said this, there are non-professional bodies who act as adjudicator nominating bodies (ANBs) who are reputable. At least in the original proposals the organisations selected had been vetted, had given undertakings as to their practice and procedure and were to be monitored.

This monitoring process has taken place independently to a limited degree. The Construction Industry Council has monitored ANBs in order that it may form its own panel of adjudicators. Some of the professional institutions have carried out examination of other ANBs in order to allow exemptions on training courses. Unfortunately none of the findings of any monitoring have been published.

Paragraph 3

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

A copy of the notice referred to in paragraph 1 must accompany the request for a person to act. This is only the notice referred to in paragraph 1. There are two notices required in the adjudication process under the Scheme: the notice of adjudication referred to in paragraph 1 and the notice that refers the dispute to the adjudicator under paragraph 7. These are known as the 'notice of adjudication' and the 'referral notice'. Most of the standard form contracts also make the distinction between the notice of adjudication and the notice that refers the dispute to the adjudicator.

Paragraph 4

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.

This paragraph requires that the adjudicator is an individual, acting in his personal capacity, and thus bars companies from being adjudicators under the Scheme. It does not bar the employee of a company from acting as an adjudicator providing he acts in his personal capacity. However he cannot be an employee of any of the parties to the dispute.

If a company were to be named in a contract as the adjudicator or as the provider of an adjudicator by agreement and subsequently it was found that the contract did not comply with the Act, that company could not act as adjudicator under the Scheme.

It must be questionable in any event as to whether there are any benefits in naming a company as an adjudicator in a contract. The risks must be high that you will be provided with a person from that company to carry out the adjudication purely on the grounds of availability with no regard to their suitability. This must be compared with the lists of adjudicators of professional institutions that are the basis for selection on the grounds of suitability as well as availability.

The declaration required in the last part of this paragraph would appear not to bar a person with an interest, financial or otherwise, in any matter relating to the dispute from acting as adjudicator, providing such interest was declared. In such circumstances the independence and possibly the impartiality of the individual must be questionable. If the declaration is made, it must be open to one or both of the parties to refuse the proposed adjudicator. What happens if one party seeks to refuse the proposed adjudicator and the other wants him to proceed? Paragraph 10 would not permit any objection by a party to

invalidate an appointment or the decision made by the adjudicator. The adjudicator can resign at any time under the provisions of paragraph 9. This is unsatisfactory. A potential adjudicator should consider carefully his relationship with either party and/or the dispute at the time of the original enquiry and before saying he is willing to act. If there is a remote possibility that the acceptance may lead to the possibility of having to resign if there is an objection, the appointment should not be taken. The option to resign at any time should not be taken lightly. Adjudicators who are too ready to resign at the first difficulty will bring the whole system into disrepute.

Paragraph 5

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.

This paragraph refers to a nominating body and an adjudicator nominating body to cover the differentiation in paragraphs 2 and 6. We shall refer to a 'nominating body' for the purposes of discussion where the Scheme uses these two alternate terms. This paragraph deals with the timing of a nomination. The selection of an adjudicator must be communicated to the referring party within 5 days of receiving the request to do so. This is not difficult with modern means of communication. The requirement in the Scheme is only to communicate to the referring party. This illustrates the point that adjudication is a process that can be commenced unilaterally. In practice the nominating bodies communicate their selection to the responding party as well as the referring party.

It is the general practice of nominating bodies not to proceed with a selection until an application form is completed and received accompanied by the fee that they require for making the nomination. The Scheme obviously does not take account of any rules that the nominating bodies may have or of the procedures they adopt before they make a selection. The request can therefore be received before the fee and as far as the Scheme is concerned this is the starting point of the five days. The five days could be lost before the fee is received but in practice it appears rare that the nominating body exceeds the allotted five days except for good reason, probably because the referring party generally pays the fee on making the application.

The forms required for a nomination of an adjudicator will often contain much more information than just the notice of adjudication. This information is useful to the nominating body in determining a suitable adjudicator. It is also useful to the adjudicator in deciding whether the dispute is within his experience, and where it contains full contact information he will have all the necessary data he needs to make contact as soon as he is nominated.

Paragraph 5(2) covers the situation if there is a failure on the part of the nominating body to comply with paragraph 5(1). It requires that the parties almost start again. This must be frustrating for a referring party. Paragraph 5(2)(a) is unhelpful because the odds are that

there already has been a failure to reach an agreement on the name of an adjudicator and it is therefore unlikely that agreement will be reached at this stage. It is more likely that help will have to be sought from another nominating body as envisaged in paragraph 5(2)(b). It is however of little use to make a fresh application if a reason that the first nominating body has not nominated anyone is the failure to provide the fee.

Paragraph 5(3) requires that the person requested to act as adjudicator confirms whether or not he is willing to act within two days of receiving the request. Clearly the periods of five and two days equal the seven days envisaged by the Act. However there can be a gap between the expiry of five days and the commencement of the two days where the adjudicator confirms his willingness or otherwise to act. This could simply be caused by postal communications. It would not invalidate the selection of an adjudicator. Unusually the governing date is receipt of the request and not the date on which the request was made.

Paragraph 6

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.

Paragraph 6 simply deals with the eventuality of an adjudicator named in the contract confirming that he is unwilling to act or failing to respond in accordance with paragraph 2(2).

Paragraph 6(1)(a) contemplates the possibility that there could be more than one adjudicator named in the contract.

Paragraphs 6(1)(b) and (c) follow a similar pattern to paragraph 5(2), the first choice being to seek selection from a nominating body if named in the contract, and where there is none to seek selection from an adjudicator nominating body.

As with paragraphs 2 and 5 the person selected to act as the replacement for the adjudicator named in the contract must indicate whether or not he is willing to act within two days of receiving the request. In practice the request will be the standard form of enquiry from the nominating body to the potential adjudicator. This enquiry must seek to eliminate any conflicts of interest. Notwithstanding the liberal rules of the Scheme, the nominating body can impose such rules as it wishes on those it is prepared to nominate.

In practice the nominating bodies have all the matters required by the scheme off to a fine art. The telephone and facsimile are used widely at this stage.

Paragraph 7

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.

The referral notice required by paragraph 7(1) sets the whole process in motion. The adjudicator is selected or where named in the contract confirms willingness to act. The adjudication is then under way. The notice referred to here must not be confused with the notice in paragraph 1. The notice in paragraph 1 is the notice of adjudication. The notice required by paragraph 7 is the referral notice. It must be issued not later than seven days from the date of the notice of adjudication. It must be issued to the adjudicator. This could be difficult if there is a breakdown of the procedures envisaged in paragraphs 2, 5 and 6 and no adjudicator is selected within seven days of the notice of adjudication. This may lead to an argument from a reluctant responding party that the adjudication cannot proceed because the referral notice was too late. This may result in the referring party having to commence the whole process again. It is likely that many adjudicators will ignore these technicalities and proceed until a substantial point on jurisdiction is raised. What is certain is that the referring party must really have everything in place before the notice of adjudication is issued. This almost invites the 'ambush' situation that many of the pundits in the trade press feared.

Disappointingly there has been no reported case law on the use of the mandatory language 'shall' in paragraph 7(1). This is stronger than 'with the object of' in section 108(2)-(b) of the Act. It is thought the courts will not apply this technicality strictly in the absence of sanction when faced with an action to enforce a decision.

Paragraph 7(2) requires that copies of all relevant extracts from the construction contract shall accompany the referral notice, together with such other documents as the referring party intends to rely upon. There may be some difficulty here having regard to section 107 of the Act. That section gives a very wide definition of what constitutes a construction contract that is in writing. Among other matters an oral contract which refers to terms which are in writing makes an agreement in writing. The referring party will have to do the best it can in these circumstances.

At the same time that the documents are sent to the adjudicator by the referring party, they must also be sent to every other party to the dispute.

Paragraph 8

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.

During the consultation period on the Scheme there was a question as to whether there should be any provision for joinder. There is always an argument with multi-party disputes

that decisions will be inconsistent if more than one person examines the same facts and matters across the disputes with differing parties. This paragraph has not really assisted in achieving true joinder provisions.

Paragraph 8(1) permits the adjudicator to deal with more than one dispute under the same contract. It requires consent of the parties. The other disputes therefore are not those contained within the original notice of adjudication. This paragraph is not needed at all where a number of matters are included in the original notice. The adjudicator would in any event have the jurisdiction to deal with all of the disputes in the original notice. See Chapter 3 for the debate on single and multiple disputes under section 108(1) of the Act.

Paragraph 8(2) is an attempt at joining related disputes. This could apply where there is a dispute between the main contractor and a sub-contractor and a related dispute on the same facts between the main contractor and the employer. However what is needed for this to apply is the consent of all the parties to the related disputes. All parties will see the benefit of this procedure but unless the contractor (for example) persuades the sub-contractor that it is not a delaying tactic, it is unlikely that this will be readily achieved. The sub-contractor will no doubt consider that he can get an adjudicator's decision in less time than it takes to sort out the joinder.

There will inevitably be a difficulty with the timescales where more than one dispute is being adjudicated or disputes are added to an adjudication which has already commenced.

The provisions of paragraph 8(2) have proved problematical in practice. They were first examined in *Grovedeck* v. *Capital Demolition*.[7] The comments by the judge were remarks he made without making a decision on what was a second line of defence in the case. Judge Bowsher's remarks are as follows:

> '**One contract, not more than one to be referred.**
> It is not necessary for me to make any decision on the second line of defence. However, it is a matter of practical importance so I shall say something about it.
> In part II of the Act, wherever there is reference to contract it is in the singular, ''a contract'' or ''the contract''. Mr Royce relies on sections 5 and 6 of the Interpretation Act 1978, ''Unless the contrary intention appears, 'words in the singular include words in the plural' ''. So does a contrary intention appear? I do not think that a contrary intention does appear from the Act. Reading the Act alone, I see nothing to prevent more than one contract being included in one referral. If there is to be any restriction on the number of contracts, or the number of disputes under one contract, to be referred, one has to look to the terms of the contract or the statutory scheme. But the restriction, if any, is to be derived from the contract or the statutory scheme. The statute is not to be construed by reference to the statutory instrument made under it.
> Paragraph 8 of the statutory scheme indicates that it is only with the consent of the parties that an adjudicator can adjudicate at the same time on more than one dispute under the same contract or adjudicate at the same time on related disputes under different contracts. (What is one dispute may raise interesting philosophical questions. In *Fastrack Construction* v. *Morrison Construction* (unreported, 4 January 2000) Judge Thornton at paragraph 20 said that ''the dispute which may be referred to adjudication is all or part of whatever is in dispute at the moment that the referring party first intimates an adjudication reference''.) So where the statutory scheme applies, that is the position. But I see no reason why a construction contract in writing which sufficiently complied with section 108 of the Act as to avoid the application of the Scheme should not provide for the referral of more than one dispute or more than one contract without the consent of the other party. Parties might be unwise to agree to such a term, but I do not see why they should not do so. Section 108(2)(a)

[7] *Grovedeck Limited* v. *Capital Demolition Limited* [2001] BLR 181.

> of the Act requires that a construction contract shall ''enable a party to give notice at any time of his intention to refer *a* dispute to adjudication'' but I do not read that as showing any intention that the singular does not include the plural.
> In the present case, if the Act had applied to the contracts, the Scheme would have applied and the claimants would have had no right to refer more than one dispute or more than one contract except with the consent of the defendants. That is another ground for refusing to enforce this adjudication.'

This was revisited in *Pring & St Hill* v. *Hafner*[8]:

> '15. It was thus submitted that the purpose of paragraph 8(2) was to ensure that the parties knew that the adjudicator might acquire knowledge or hear submissions in relation to the instant dispute which would have to be considered in the light of what he might learn or be told or find out, carrying out his investigative powers, on the other dispute.
> 16. This is a risk which the parties might well wish to take. As the adjudicator himself pointed out in the correspondence, and as suggested by Mr Scott Holland, that risk is minimised by conducting the proceedings not in parallel but in tandem, or by ensuring in some way that what is learnt in the one is not revealed in the other. Of course, that latter course cannot take place without the consent of all the parties involved. In my judgment paragraph 8(2) is intended to cover, and does cover, a variety of circumstances. It is intended to cover all the situations in which there may be related disputes under different contracts, whether or not the parties are the same and whether or not there may be [sic] permissibly be consolidation of the two proceedings. It applies whenever where one party needs to know or may need to know, before allowing the adjudication to proceed in that way, whether the adjudicator is going to have to pass on information or may acquire information which would not be available in the other adjudication to which it is not a party. In other words they are all circumstances where, as a matter of principle, a party's rights to the resolution of a dispute, privately and confidentially, would or might be infringed by the introduction of a third party, either in the same proceedings or by having the dispute determined by a person who would or could acquire knowledge from the other proceedings but which could not be used in the resolution of the dispute, yet might either consciously or unconsciously influence its outcome. A party must give a real and informed consent to any reduction in such rights.'

The courts are expecting conscionable effort on the party or the parties to agree to any joinder or consolidation. The conduct of the parties may not be sufficient; where a party does not object to the consolidation during the currency of the adjudication this is one of the few instances where the right to object on grounds of want of jurisdiction may be preserved. The situation envisaged in *Pring & St Hill* could cover four different parties under two separate contracts with disputes that are nevertheless related.

Paragraph 8(3) attempts to deal with this situation but requires agreement of all parties involved in the disputes to agree to an amended timetable. It is unlikely that all parties will agree a timetable where they all have separate but connected disputes. The disputes may be based on the same facts but the parties' needs and expectations all differ. The adjudicator should therefore agree the timetable with the parties before he is willing to take on the related disputes. This will ensure there is no difficulty with the 28-day period for reaching a decision.

Paragraph 9

9. (1) An adjudicator may resign at any time on giving notice in writing to the parties to the dispute.

[8] *Pring & St Hill Limited* v. *C.J. Hafner t/a Southern Erectors*, TCC, Judge Humphrey Lloyd QC (31 July 2002).

(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.

The whole of paragraph 9 deals with circumstances under which an adjudicator can or should resign.

The first premise in paragraph 9-(1) is that an adjudicator may resign at any time on giving notice in writing to the parties to the dispute. Generally speaking this is undesirable. Adjudicators should only take on work which is within their competence and that they can carry out within the time-frame required by the legislation. Having regard to the primary intent of the adjudication process, to expedite cash flow, an adjudicator should not consider resignation lightly.

Where an adjudicator resigns in accordance with paragraph 9(1), this may be a breach of contract. This will certainly lead to a situation where the parties are unlikely to pay him and he is unlikely to be in a position where he could enforce any right to payment. It is unlikely that such a resignation will constitute an act or omission in bad faith. It is questionable therefore if an adjudicator resigns, whether or not the parties would get very far in an action against him for breach of contract. The only prejudice they will have suffered in most circumstances will be a short delay while they appoint a new adjudicator.

There is a perfectly legitimate circumstance in which an adjudicator should consider resignation. This is when the process is unfair due to some circumstance that has arisen during the adjudication. The remedy in this situation is for the parties to agree more time to allow the process to be conducted fairly. In practice most adjudicators will not have any difficulty obtaining more time when the reasons are properly explained to the parties. In *Balfour Beatty* v. *Lambeth*[9] Judge Humphrey Lloyd QC stated the following:

> 'That is not something which could necessarily and practicably be done within the time allowed. On the other hand, if, as Mr Richards himself recognised right from the outset, the nature of BB's case was likely to make it extremely difficult for himself (or for Lambeth) to complete a reasonably fair investigation of it within the original 28 days, or even the further period agreed by the parties, then an adjudicator would have to say that it would not be possible to carry out such an investigation and to arrive at a decision, even if it was ''coarse'' (to quote paragraph 6.4 of his decision) within the time available. An adjudicator does not act impartially or fairly if he arrives at a decision without having given a party a reasonable opportunity of commenting upon the case that it has to meet (whether presented by the other party or thought to be important by the adjudicator) simply because there is

[9] *Balfour Beatty Construction Limited* v. *The Mayor And Burgesses Of The London Borough of Lambeth*, TCC, Judge Humphrey Lloyd QC (12 April 2002).

not enough time available. An adjudicator, acting impartially and in accordance with the principles of natural justice, ought in such circumstances to inform the parties that a decision could not properly reasonably and fairly be arrived at within the time and invite the parties to agree further time. If the parties were not able to agree more time then an adjudicator ought not to make a decision at all and should resign.'

There is also some helpful comment in *Ballast* v. *Burrell*[10]:

'It also appears to me to be necessary to remember that, although both parties to the contract undoubtedly have a strong interest in the enforceability, without delay, of adjudicators' decisions, they also have an interest in being protected against decisions which are unjust. . . . Notwithstanding the ephemeral and subordinate character of an adjudicator's decision, and the deemed intention that adjudication should be an expeditious procedure rooted in commercial common sense, I would be slow to attribute to the parties an intention that the adjudicator's decision should always be binding notwithstanding errors of law, procedural unfairness or lack of consideration of relevant material submitted to him by the parties, no matter how fundamental such a breach of the adjudicator's obligations might be.'

Correctly adjudicators have been trained not to resign simply because they are challenged or because the matter they are dealing with is difficult. There are limited circumstances, primarily when what they are faced with is unjust, where they should consider resignation as a last resort.

Paragraph 9(2) is sensible. It seems there would be nothing to prevent a party who is dissatisfied with an adjudicator's decision, from framing his dispute in a slightly different manner and seeking a further adjudication. In such circumstances this paragraph makes it mandatory that the adjudicator must resign. This will only occur when the similarity in the disputes is readily apparent. There is nothing to prevent the respondent in the second adjudication arguing as a defence that the dispute has already been decided in a previous adjudication. This will ensure, if this is the case, that the dispute will not be adjudicated again.

This was examined in *Sherwood & Casson* v. *McKenzie*[11]. There are some important and practical matters which arise from this judgment:

'27. However, unlike the question of whether or not there is an underlying contract in existence, the adjudicator is given jurisdiction to determine whether or not the two disputes are substantially the same. The jurisdiction is analogous to that given to arbitrators for the first time by the Arbitration Act 1996 to determine their own jurisdiction. This jurisdiction has long held by arbitrators acting under Civil Law systems, a power often characterised in such systems as kompetenz kompetenz. It might well be thought that if the adjudicator is given the power to determine the jurisdictional question of substantial overlap, he also has the power to make an error in determining that question which is not open to challenge, save perhaps on grounds of perversity or unreasonableness.

28. However, I do not accept that the adjudicator's powers are not open to challenge. Since the scheme provides that the adjudicator has an obligation to furnish reasons for his decision, if these are requested, it can readily be ascertained whether any jurisdictional challenge is being mounted on reasonable and bona fide grounds and whether the adjudicator has correctly determined that challenge. It makes no sense, as I see it, to impose on an adjudicator a mandatory requirement to resign if there is a substantial overlap between the dispute referred to him and one already decided

[10] *Ballast Plc* v. *The Burrell Company (Construction Management) Limited*, Outer House, Court Of Session, Lord Reed (21 June 2001).

[11] *Sherwood & Casson Ltd* v. *McKenzie*, TCC, Judge Thornton (30 November 1999).

> by an earlier adjudication decision but then to make such an obligation unenforceable. This would be the effect of making an adjudicator's jurisdiction decision unchallengeable.
> 29. I draw attention to the fact that my decision on this issue is only, strictly speaking, one affecting scheme adjudications. Most adjudications are conducted under Institutional Rules and many place no obligation on the adjudicator to resign where the dispute has already been the subject of an earlier adjudication. Indeed, I was provided with information that ''none of seven particular sets of Institutional Rules reviewed contained a provision similar to paragraph 9(3) of the Scheme''. However, the same jurisdictional question would arise under these Institutional Rules since, if a dispute had already been substantially decided by an adjudicator, there would not remain in existence a ''dispute or difference'' capable of being referred to a second adjudicator in relation to the matters decided in that adjudication. Any second appointment would probably be one without jurisdiction.'

There is authority here for the adjudicator to decide his own jurisdiction. Where he takes the route of mandatory resignation, because the two disputes are substantially the same, that decision becomes binding, at least for the purposes of that adjudication and that adjudicator. There is nothing that prevents the referring party trying again with another adjudicator. Where the adjudicator decides to proceed, his decision is open to challenge on the grounds of lack of jurisdiction because the disputes were substantially the same.

In *Holt* v. *Colt*[12] the adjudicator was asked to decide whether the referring party was entitled to a certain sum. When he decided no, the same party referred the same dispute in terms of the same sum but added the words 'or such other sum as the adjudicator may determine'. The judge held that this was different enough for the two disputes not to be substantially the same.

As a general rule an adjudication concerning an interim account followed by an adjudication concerning a final account will always be different disputes because they apply to a different stage in the contract[13].

Paragraph 9(3) deals with the consequences of resignation under paragraph 9(1). This simply allows the referring party to serve a fresh notice and then, if requested by the new adjudicator, the parties will as far as possible make available all the documents given to the previous adjudicator.

Paragraph 9(4) deals with two situations. First, when the adjudicator resigns in the circumstances referred to in paragraph 9(2) where the dispute is the same as one in which a 'decision has been taken'. We have looked at paragraph 9(2) above. Second, where after the referral is made the dispute develops to 'vary significantly' from the dispute that was referred and turns out to be outside his competence. This would be a valid reason to resign and in an adjudication under the Scheme would not be a breach of contract. This relates to changes to the case during the adjudication after the referral. It does not deal with a change of case between the notice of adjudication and the referral notice; such a change would mean absence of jurisdiction which is not a matter for resignation. We suspect that the decision of Judge Seymour QC in *Carter* v. *Nuttall* and later cases that we consider in Chapter 9 mean that a change in the case of the nature envisaged by paragraph 9(4) also takes the matter out of the adjudicator's jurisdiction even if he is competent to continue. If there is no jurisdiction there is nothing to resign from.

Where an adjudicator has resigned for good reason as in paragraph 9(2) or for the further reason given in paragraph 9(4), he is entitled to a reasonable amount in respect of his fees

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[12] *Holt Insulation Limited* v. *Colt International Limited*, Liverpool District Registry, TCC, Judge Mackay.
[13] *Skanska Construction UK Ltd* v. *(First) The ERDC Group Ltd and (Second) John Hunter*, Outer House, Court Of Session, Opinion Of Lady Paton (Scotland) (28 November 2002); also *Sherwood & Casson Limited* v. *Mackenzie* (30 November 1999).

and expenses. That amount is to be determined by the adjudicator and he should also determine the apportionment of those fees and expenses. The parties remain jointly and severally liable for these fees as they do for the fees of the new adjudicator.

Paragaph 10

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.

It is essential that the adjudicator be allowed to proceed unfettered. This is therefore a sensible provision. Although this allows the adjudicator to proceed despite any objection to him as a particular person and to reach a decision without the danger of that decision being invalidated by the objection, this provision will not support decisions made where the adjudicator has no jurisdiction at all. The position on this is clear from *Pring & St Hill* v. *Hafner*[14]:

> 'In my judgment, paragraph 10 of the Scheme is concerned about the consequences of an objection to the appointment of a particular person to be the adjudicator – for that is what it says – and it has nothing to do with whether that person, if otherwise validly chosen and appointed, has jurisdiction.'

Paragraph 11

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.

There is nothing to prevent the parties ceasing the proceedings at any time. It is only likely that they will do this by agreement and the most likely reason is that they have reached an agreement on the matters in dispute. In these circumstances paragraph 11(1) makes the parties jointly and severally liable for the adjudicator's fees. The adjudicator still makes a decision on how the fees will be apportioned. This does not go as far as the concept of an agreed award under section 51 of the Arbitration Act 1996. The adjudicator only has the authority to determine the apportionment of fees. There is nothing to prevent the parties from seeking the equivalent of an agreed award in a form of a consent decision which deals with both the substantive matters settled in respect of the dispute and the apportionment of fees. However there would need to be agreement for this to be done.

Paragraph 11(2) causes some concern. In drafting the Arbitration Act 1996 effort was made to avoid the use of the term misconduct and the stigma which it carried. There is no clue or guidance here as to what might constitute a default or misconduct of the adjudicator. The scope to argue that the adjudicator has misconducted himself must be very limited in that the powers available to the adjudicator are so wide. There must be very little he can do that is outside these powers save for failing to act impartially. The adjudicator may only find out that this is the line that the parties wish to adopt when he seeks his fees.

[14] *Pring & St Hill Limited* v. *C.J. Hafner t/a Southern Erectors*, TCC, Judge Humphrey Lloyd QC (31 July 2002).

This paragraph sets out the only grounds on which the adjudicator's fees and expenses can be challenged. This matter was visited briefly in *Paul Jensen* v. *Staveley*[15]. The adjudicator had been asked to deal with his own jurisdiction as a preliminary issue. He did so and ruled he had no jurisdiction and his appointment came to an end. The court quickly supported the claimant for payment of his fees remarking that there had been no suggestion of any default or misconduct. In *Stubbs Rich* v. *Tolley*[16] the paying party lost a challenge to the adjudicator's fees on the basis that these were excessive and the court gave the following reasons for its decision:

> 'I regret to say that in applying that criterion the Deputy District Judge fell into grave error. First, he was not comparing like with like. I accept Mr Stead's submissions. The role of an adjudicator is wholly different from that of a solicitor who is preparing a client's case for trial. The solicitor prepares a one-sided case for argument in court. The adjudicator, on the other hand, had to read the files – in this case a total of 834 pages – interview the parties, visit the sites, and then prepare his decisions. He was acting in the role of both investigator and judge.
> Second, if comparative evidence was relevant and admissible then it should have been in the form of an expert architect/adjudicator; as the court had earlier made provision for, and no doubt by implication wished to hear from.
> Thirdly, a court must be very slow indeed to substitute its own view of what constitutes reasonable hours. I quote again from *Mustill and Boyd*, at page 240, ''The court does not substitute its own view for that of the arbitrator. In order to make good an allegation of misconduct, very clear evidence is required and it is not enough to show that the amount demanded is more than the court would have considered appropriate if it had been approaching the matter afresh.''
> For these reasons I reject the allegation that the hours, which were in fact truly done by Mr Smart, were excessive. . .'

Powers of the adjudicator

Paragraph 12

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.

This paragraph has some similarities to section 33 of the Arbitration Act 1996. It is not a word for word reproduction of that section nor would it have been appropriate to adopt the Arbitration Act 1996 for the purposes of adjudication. Adjudication under the Scheme or under the statutory right to adjudication only deals with disputes that arise under the contract. It is therefore appropriate in the Scheme that reference is made both to the relevant terms of the contract and the applicable law in relation to the contract. The obligations here are mandatory. The use of the word 'shall' in three places in this paragraph places onerous duties on the adjudicator. There are requirements to apply both the terms of the contract and the law in relation to the contract. There is no doubt that adjudication here is a judicial process involving the determination of the parties' legal rights. There are occasions when arbitrators and judges get the law wrong, which is why we have a system of appeals. It is no

[15] *Paul Jensen Limited* v. *Staveley Industries PLC* (27 September 2001).
[16] *Stubbs Rich Architects* v. *W.H. Tolley & Son Ltd* (8 August 2001).

less likely, particularly with the time restraints, that adjudicators will make decisions that do not comply with the law.

The law is simply difficult in some areas and gives rise to the individual making an error. This should not be something that should occur as a matter of course.

For a commentary on the duty to act impartially see Chapter 9 on jurisdiction, powers and duties.

It was hoped that adjudication would be both quick and relatively cheap. This is an aspect that has come under scrutiny with anecdotal reports of high total fee levels. These should not be read out of context and not treated as the norm.

There is nevertheless an obligation imposed on the adjudicator to avoid incurring unnecessary expense.

Paragraph 13

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.

What is clear in any event is that if the adjudicator is going to succeed in reaching a decision within the restraints of a 28-day timetable, he must take the initiative. The process may be an investigation as opposed to a reaction to what the parties provide. The widest single power is in the first sub-paragraph of paragraph 13. The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute. There are two powers given here. The first is to take the initiative in ascertaining the facts and the law, which is permissive; the second is to decide on the procedure to be followed in the adjudication, which is mandatory.

The adjudicator must therefore make up his mind from the outset if he is to exercise inquisitorial powers and to what extent. He must also set the procedure, part of which will be the timetable he sets from the outset.

The other powers listed in sub-paragraphs (a) to (h) really do no more than enlarge on the overall power that the adjudicator has. These are debated more widely in Chapter 9. It is not thought that this list will restrain the adjudicator in any way. The list is not exhaustive. The approach taken here has similarities to section 34 of the Arbitration Act 1996.

Paragraph 14

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

This paragraph imposes a duty on the parties. They are obliged to comply with any request or direction of the adjudicator. Compliance is mandatory. However such requirements are to no avail if the adjudicator does not have sanction against the party who fails to comply. The sanctions are given in paragraph 15 below.

Paragraph 15

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.

These powers are essential if the adjudicator is to reach a decision within the timetable required. Obviously the Scheme spells out the powers but it is questionable as to whether this is entirely necessary. The Act itself allows the adjudicator to take the initiative in ascertaining the facts and the law, and reading the legislation as a whole the courts ought to be unsympathetic to an uncooperative party who does not participate or comply with whatever is necessary to assist the adjudicator in reaching his decision.

The three sanctions in sub-paragraphs (a) to (c) are helpful. However these need to be exercised with caution. Having regard to that overall timetable the adjudicator must be able to continue in the absence of a party or documents or written statement requested. However, the time given to a party to supply information required must be realistic having regard to the timetable itself. It is a matter of balance and the adjudicator should endeavour to allow the party who has the most to do an appropriate time in which to do it.

When drawing inferences from failure to comply, the adjudicator cannot simply find against a party. He must consider the grounds for the failure to comply with any request. If the grounds are reasonable they will be of less weight against the party failing to comply than when a party deliberately withholds or conceals documents.

There is no actual power here to ban a document if it arrives late, particularly given the provisions of paragraph 17. It will simply get the appropriate consideration in the remaining time available.

It is inevitable that a point will be reached when decisions will be made on the basis of the information before the adjudicator. Some consideration will have to be given to evidence that arrives late in order to comply with paragraph 17, but the time available for such consideration will of course relate to the overall time available. Very late information will only get the scantiest regard if the 28-day timetable or any extended period to that timetable is not to be jeopardised.

Paragraph 16

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.

This paragraph gives the parties the right to utilise such representation as they may wish. There may well be situations where parties choose a lawyer, particularly where the adjudication turns on a legal point. There may be situations when no representation is necessary and the adjudication is carried out solely on the investigations undertaken by the adjudicator, principally with the parties themselves.

It is important that the adjudicator has the powers to limit the number of representatives that a party may have. It can be difficult to control any oral hearing necessary with several individuals wishing to make their own representations and put forward their own arguments, although a pointed comment from the adjudicator that 'you are not helping me' generally has a salutary effect.

Paragraph 17

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.

There are two important points under this paragraph. The adjudicator need only consider information that is relevant. This follows the principles of the rules of evidence. There is nothing in the legislation to suggest whether the rules of evidence apply at all. What is important here is not the application of the rules of evidence themselves but the common sense approach of taking into account only those materials that are relevant and the right to reject and not take into account those materials that are not relevant. The other point is that the adjudicator shall make available to either party the information that is to be taken into account in reaching a decision, a point made quite clear in *RSL* v. *Stansell*[17]. This part of the paragraph is written in the future tense, indicating that the adjudicator must tell the parties what he will take into account before the decision is made. This would include any legal or technical advice that the adjudicator has obtained and intends to use in reaching his decision. This does not necessarily put the adjudicator under pressure. It may mean that he will be unable to take into account relevant evidence that arrives too close to the end of the 28-day period unless the time is extended. If the whole process is conducted as an investigation there will be matters that the adjudicator may discover which are privy to only one party or indeed not within the knowledge of either party. Where there are key matters that are discovered by the adjudicator, these ought to be drawn to the attention of the parties before the decision is made.

Paragraph 18

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

[17] *RSL (South West) Ltd* v. *Stansell Ltd* (16 June 2003).

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.

This paragraph does not deal with privilege. It only deals with the matter of privacy and then only insofar as documents supplied have been indicated to be treated as confidential. The parties to the dispute cannot keep documents confidential from one another. The adjudicator can use those documents in making his decision. If at some later date the parties finally decide to settle their dispute by arbitration or litigation, all documents except those which are privileged would be discoverable in any event. At that stage the adjudicator's decision should be ignored and the issues dealt with again from new (*de novo*).

Paragraph 19

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.

Paragraph 19(1)(a) to (c) deals with the timetable. Not surprisingly it reflects exactly the periods given in the Act and permits the extensions to the 28-day period given in the Act.

Paragraph 19(2) deals with the situation where for any reason the adjudicator fails to reach his decision in accordance with the timetable. This could conceivably be due to the default of one of the parties. This is why the adjudicator must keep full control of the proceedings and ensure that a reticent party does not succeed in disrupting the timetable to such an extent that the decision cannot be made in due time. There is no provision here which deals with the decision that is a day or two late. Conceivably if the parties were in agreement they could accept a late decision and agree to be bound by it. If this is to be the case the agreement must be recorded in writing. The court judgment in *St Andrews Bay* v. *HBG Management*[18] should be read in this respect.

In the absence of any such agreement the whole process must commence again. This is done by serving a fresh notice. The new adjudicator is entitled to have all documents from the previous adjudication insofar as it is reasonably practicable. There can be nothing that prevents the new adjudicator in his investigatory role talking to the previous adjudicator to obtain such documents as he had obtained.

Paragraph 19(3) requires that the decision be delivered to each of the parties as soon as possible after it is made. The Act does not make any reference as to whether or not the decision needs to be in writing. What is clear in the Scheme is that the decision must be recorded in some manner, otherwise it would not be possible to deliver a copy of the

[18] *St Andrews Bay Development Limited* v. *HBG Management Limited* (20 March 2003).

decision to each of the parties. This opens up the concept of speaking decisions either on audio or video tape.

There was some debate during the drafting stages of the Scheme as to whether or not the adjudicator should hold a lien on the decision until his fees are paid. This was dropped from this final version of the Scheme. Equally there is no obligation in law to extend credit to the parties. There is no reason why the adjudicator is not entitled to payment of his fees and expenses in full on delivery of the decision. We consider the question of liens in Chapter 8.

Adjudicator's decision

Paragraph 20

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.

The adjudicator will only have jurisdiction to decide the matters in dispute. These are the matters that are identified in the notice of adjudication. Parties often limit or restrict those matters that can be dealt with by poorly worded notices. There is some leeway here on strict jurisdiction points. The parties may agree that the adjudicator can take further matters into account within the scope of the adjudication. The adjudicator can also unilaterally take into account matters under the contract that he considers are necessarily connected with the dispute. This was explored in *A & D Maintenance* v. *Pagehurst*[19]:

> '24. These payments and such matters as set off under the contract or abatement may properly be within his remit, as matters arising under the contract. Given that the adjudicator has been properly appointed under the Scheme and the timetable laid down has been properly observed, he would have the jurisdiction to consider the types of issues raised as to the payment of these invoices. The correctness of his decision is not a matter that falls to be considered at this time by this court which is considering the limited issue arising out of the claimant's claim, namely the enforceability of the adjudicator's decision. For this court to review the adjudicator's decision given that he has been properly appointed under the Scheme and was considering matters arising under the contract, properly within in his remit would be to go behind the intention of Parliament that his decision should be binding. The correctness of the decision may be reviewed, revised, challenged where appropriate in subsequent arbitration proceedings or legal proceedings or by way of an agreement. In the instant case there are the pending legal proceedings commenced by the defendant under 1999 TCC 170, where the disputes between the parties, now provisionally adjudicated by the adjudicator, will be finally determined by the court.'

[19] *A & D Maintenance & Construction Limited* v. *Pagehurst Construction Services Limited* (23 June 1999).

Repudiation arises under the contract. This was explored in *Northern Developments* v. *Nichol*[20]:

> 'Accordingly, if there was in this case a repudiation and an acceptance of repudiation (which has not been established) the performance of the contract was terminated but any rights arising under the contract remained to be enforced under the contract. Such rights would include rights enforceable in adjudication. The repudiation issues were matters arising ''under the contract'', and, if they had been mentioned in the notice of intention to withhold payment, the adjudicator would have had a discretion under paragraph 20 of the Scheme to take them into account if he considered them to be necessarily connected with the dispute. Paragraph 20 says that the adjudicator *may* take such matters into account. If he had the discretion, it would be a wrongful exercise of his discretion to refuse to exercise the discretion. If he did exercise such a discretion, it would almost certainly be impossible to challenge the exercise of that discretion whichever way he decided the discretion, in favour of or against considering the other matters. But in this case, the repudiation not having been mentioned in the notice of intention to withhold payment, the adjudicator did not have a discretion and his refusal to consider exercising a discretion was not a denial of a jurisdiction which had any existence.'

A dispute arising under the contract is not the same as connected with the contract. Frequently arbitration clauses are drafted widely permitting arbitrators to examine matters under or in connection with the contract. Some permit the investigation of whether or not there is a contract at all. This is not so in adjudication under the Scheme. There is only express authority to deal with disputes which arise under the contract and to take into account those things necessarily connected with that dispute. Contract clauses may however be drafted with a wider remit.

There is no doubt in English law that damages for breach of contract or professional negligence arose under the contract. That this concept applied in Scots law was clarified in *Gillies Ramsay* v. *PJW Enterprises*[21]:

> '31. In relation to the terms of paragraph 20(2)(b) of the Scottish adjudication regulations (SI 1998 No. 687), counsel contended that the list in paragraph 20(2) (prefaced by the words ''and, in particular, he may'') was not exhaustive. In any event, ''payment under the contract'' could mean damages arising under the contract: *Heyman* v. *Darwins Ltd*. [1942] AC 356, and the additional authorities above cited. To give the adjudication scheme and paragraph 20 a more restricted meaning as contended by Diamond would hamper the operation of the scheme, and would result in fragmentation of claims and tactical behaviour. Professionals would go to adjudication to recover fees, knowing that the other party could not defend on the basis of poor professional conduct. Disputes involving demands for payment and notices to withhold payment could not be determined. Such consequences could not have been intended by parliament.'

The list of matters, which the adjudicator can consider, is not exhaustive. Express power is required to open up, revise and review any decision or certificate and it is in paragraph 20(a). This was explored in *David McLean* v. *Swansea HA*[22]:

> 'The Scheme (and, so as far as I am aware, other standard forms of contract) does not confer on an adjudicator a right to adapt, vary or otherwise modify a contract. Under the statutory Scheme an adjudicator has to decide a dispute under the contract (and in other schemes, disputes arising out of or in connection with the contract). It is a decision about the rights and liabilities of the contract which are questioned. Thus paragraph 20 of the Scheme expressly provides for the review of a certificate that has been issued (sub-para (a)) and for the adjudicator to decide a person ''is liable to

[20] *Northern Developments (Cumbria) Limited* v. *J & J Nichol* (24 January 2000).
[21] *Gillies Ramsay Diamond* v. *PJW Enterprises Limited*, Outer House, Court Of Session, Lady Paton (27 June 2002).
[22] *David McLean Housing Contractors Limited* v. *Swansea Housing Association Limited* (27 July 2001).

make a payment *under the contract* … [emphasis supplied] and, subject to section 111(4) of the Act, when that payment is due and the final date for payment''.'

The courts no longer need such express powers. The decision in *Beaufort Developments* v. *Gilbert-Ash*[23] has overruled the decision in *Northern Regional Health* v. *Derek Crouch*[24] which restrained the courts' jurisdiction in such matters. The courts have inherent powers in this respect. Adjudicators and arbitrators need express terms to permit them to open up, review or revise any certificate or decision.

A late revision to the draft of the Scheme introduced the restriction 'unless the contract states that the decision or certificate is final and conclusive'. This could have disastrous consequences. It is arguable that there is need for some certainty when final certificates are issued under contracts. There is a fall-back at that point with the arbitration provisions in most contracts. However, there is a limited time for the arbitration to be commenced after the issue of the final certificate. If the arbitration is not commenced within that time, leave of the courts must be sought to extend time to commence arbitration at all. It is obviously sensible that adjudication is not used to flout these provisions or to run in parallel with an arbitration that is properly commenced following a final certificate. It is also possible that adjudication could be commenced long after the time allowed in the contract for arbitration, thus avoiding the need to seek any extension to the time stipulated for commencement of the arbitration.

However there is nothing to prevent divisive parties amending their contracts to make all decisions and certificates final and conclusive. The only means of then dealing with such certificates is on the grounds that they are procured in breach of contract, i.e. the contract has been applied incorrectly. See *John Barker* v. *London Portman Hotel*[25] 50 Con LR in which the courts used this approach. Whether it can be used successfully by an adjudicator without challenge will be seen as jurisprudence is developed in the field of adjudication. There are no reported cases on this point at the time of writing.

The adjudicator can decide that payment be made, when the payment is due and the final date for payment. This aligns the Scheme with the Act on payment provisions. There is a question as to whether set-off or abatement can be used as a defence to not pay against an adjudicator's decision. We consider this in Chapter 12 when looking at enforcement. Paragraph 20(b) deals with the position where an effective notice to withhold payment has been issued and the whole matter is then subject to adjudication. Section 111(4) of the Act refers to the position where there is still a sum due notwithstanding that there is a valid withholding notice. This then deals with the timing of when the residual payment becomes due.

There is a strongly held view, accepted on a technical basis by the authors but not on a practical level, that an adjudicator has no power to order anything, his duty being limited to declaring what the contract says. Thus the adjudicator identifies that the contract entitles the receiving party to be paid, states the date due and the final date for payment. These dates are often some time before the decision is made. He does no more and it is then for the parties to comply with his determination without being told specifically to do so. On a practical level however we take the view that there is nothing wrong with actually telling the parties what they have to do.

Paragraph 20(c) gives the adjudicator powers to deal with interest, in wording that is open to interpretation. Some commentators suggest that the words 'having regard to any term of

[23] *Beaufort Developments (NI) Limited* v. *Gilbert-Ash NI Limited and Others* (1988) 88 BLR 1, HL.
[24] *Northern Regional Health Authority* v. *Derek Crouch Construction Co.* [1984] QB 644.
[25] *John Barker Construction Ltd* v. *London Portman Hotel* 50 Con LR 43.

the contract relating to the payment of interest' mean that the power to award interest under the Scheme is predicated on the existence of interest provisions in the contract. In our view this cannot be right as this would mean the effective exclusion of any right to interest as it is unlikely that such a provision would be included in the type of contract that the Scheme is designed to assist. We interpret the wording as giving the adjudicator the discretionary power to award interest but if he does so he must consider any related provisions in the contract.

This is now pretty much obsolete with the coming into force of the Late Payment of Commercial Debts (Interest) Act 1998. This Act applies to all contracts entered into after 1 August 2002. Where the contract is entered into prior to that date, the adjudicator will need to work through the commencement orders to determine if and to what extent that legislation applies. From 1 August 2002 the contract will always have an interest provision. This is because the Late Payment of Commercial Debts (Interest) Act 1998 imports its provisions into the contract. It is possible that the adjudicator may be faced with deciding whether the contract provision on interest is a substantial remedy sufficient to oust the application of the Late Payment of Commercial Debts (Interest) Act 1998. The JCT contracts and the related sub-contracts now have provisions for contractual interest, as do other standard forms, in recognition of the provisions of the Late Payment of Commercial Debts (Interest) Act 1998.

The question still remains: should the adjudicator award interest if it is not claimed? There are again differing views on this. On the one hand the discretionary power is there to be exercised and the parties are, or should be, aware that the Scheme gives this power to the adjudicator. On the other hand it can be said that the adjudicator could be exceeding his jurisdiction if he did so in the absence of a claim. More importantly is the question: is the adjudicator being fair if he does not give the opposing party the opportunity to make submissions resisting such an award and particularly to deal with the amount of interest? Whatever view the adjudicator has, it is suggested that the principles of fairness suggest that any award of interest should not be made without the adjudicator acquainting the parties beforehand that he is minded to make such an award.

Paragraph 21

> **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.

Where a payment is involved the adjudicator must have regard to the payment provisions both of the contract and the Act. The adjudicator should direct in his decision when the payment is due. Whether payment is involved or not, short of any direction in the decision, this paragraph leaves no doubt that the decision is operative forthwith on delivery. It is both a breach of the contract and these statutory provisions not to comply with a decision.

Paragraph 22

> **22.** If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision.

This was a late addition to the draft that went before Parliament in December 1997. There are arguments that favour the issuing of reasons for any decision taken by a third party. The default position under the Arbitration Act 1996 is for a reasoned award to be given. It is argued that parties find it more acceptable and are more likely to comply with a decision if

they know why they have won or lost. However we have a system here which is restrained to a strict timetable. There is nothing to prevent a party insisting on reasons at the last minute and thus placing the decision date in jeopardy. Reasons can be requested after the decision has been made. The adjudicator cannot refuse to provide reasons for the decision where so requested. However there is nothing to prevent the adjudicator providing the decision on time and then providing the reasons after the decision date if the request is delayed. It is advisable for the adjudicator in any event to set a deadline for such requests to be made. See Chapter 11 for a more detailed discussion.

On balance, reasons given with the decision are the favoured approach. This was explored in *Joinery Plus* v. *Laing*[26]:

> '40. Indeed, although adjudicators are, under some adjudication rules, permitted to issue a decision without reasons, it is usually preferable for the parties for reasons to be given so that they can understand what has been decided and why the decision has been taken and so as to assist in any judicial enforcement of the decision. A silent decision is more susceptible to attack in enforcement proceedings than a reasoned one. Moreover, judicial enforcement, being a mandatory and compulsory exercise imposed by the state, should only be ordered by a court once it has been satisfied that the underlying adjudication decision is valid, is in accordance with law and complies with all applicable contractual and statutory procedures. For that purpose, a court will always be greatly assisted by cogent, albeit succinct, reasons.'

Effects of the decision

Paragraph 23

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.

There were concerns about enforcement of adjudicators' decisions. The first part of paragraph 23 gives a decision a peremptory status if so ordered. The effect of this is discussed below under paragraph 24. The purpose of this was probably to give some status to the decision to assist enforcement. The word peremptorily means so as to preclude debate, discussion or opposition. This does little more than strengthen paragraph 21.

Paragraph 23(2) follows section 108(3) of the Act. This is more important than the preceding sub-paragraph. The basic nature of adjudicators' decisions is that they are to be complied with until some substitute process has taken place.

Paragraph 24

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',

[26] *Joinery Plus Limited (in administration)* v. *Laing Limited*, TCC, Judge Thornton QC (15 January 2003).

(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.

This is an attempt to use a part of the Arbitration Act 1996 to provide a mechanism for enforcement of adjudicators' decisions. To understand the effect of this paragraph the amended version of section 42 of the Arbitration Act 1996 is reproduced here:

Enforcement of peremptory orders of tribunal

42. (1) Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal.

(2) An application for an order under this section may be made—

(a) By the ~~tribunal~~ adjudicator (upon notice to the parties)

(b) By a party to the ~~arbitral proceedings~~ adjudication with the permission of the ~~tribunal~~ adjudicator (and upon notice to the other parties)~~, or~~

~~(c) Where the parties have agreed that the powers of the court under this section shall be available.~~

~~(3) The court shall not act unless it is satisfied that the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal's order.~~

(4) No order shall be made under this section unless the court is satisfied that the person to whom the tribunals order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time.

(5) The leave of the court is required for any appeal from a decision of the court under this section.

Unfortunately there are some drafting errors which remain as a result of the instructions here to amend section 42 of the Arbitration Act 1996. There are instances where the word tribunal remains in place and the word adjudicator should have been substituted.

The clumsiness of the device presented in paragraphs 24 and 23 was quickly revealed in *Macob* v. *Morrison*[27]:

> '38. It is not at all clear why section 42 of the Arbitration Act 1996 was incorporated into the Scheme. It may be that Parliament intended that the court should be more willing to grant a mandatory injunction in cases where the adjudicator has made a peremptory order than where he has not. Where an adjudicator has made a peremptory order, this is a factor that should be taken into account by the court in deciding whether to grant an injunction. But it seems to me that it is for the court to decide whether to grant a mandatory injunction, and, for the reasons already given, the court should be slow to grant a mandatory injunction to enforce a decision requiring the payment of money by one contracting party to another.'

The possibilities under the Scheme were that if a party fails to comply with the decision an application can be made to the court to order compliance with the decision. It is unlikely that the adjudicator himself will apply to the court. It is more likely that the party seeking enforcement will apply. To do this the adjudicator must give permission and notice must be given to the other parties. Section 42(4) also requires that the adjudicator sets a time limit for compliance with his decision if this provision is to be used, and for this provision to be effective the decision needs to be drafted with these points incorporated from the outset.

In essence, from *Macob* the peremptory order and the application of section 42 of the Arbitration Act 1996 is dead. The way to enforce a decision is to seek summary judgment.

[27] *Macob Civil Engineering Ltd* v. *Morrison Construction Ltd* (1999) 1 BLR 93.

Paragraph 25

> **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.

The adjudicator is entitled to a reasonable sum and he may determine what the amount is. The expenses must be reasonably incurred, i.e. he has spent the money and it was reasonable to do so in the execution of his duties. In practice it is unlikely that any adjudicator will proceed without at least giving the parties notice of his terms, including the way in which expenses will be incurred and charged. The adjudicator can determine the way in which fees and expenses will be apportioned.

There is no provision in the Scheme to deal with the parties' costs. They must bear their own costs in any adjudication unless they agree otherwise. There is nothing to prevent a party spending inordinate and disproportionate sums in attempting to win in the adjudication, or in attempting to increase unnecessarily the costs in an attempt to 'break' a financially weaker party. These costs may be revisited in the final determination of the dispute in arbitration or litigation but their admissibility in such later proceedings is a question that has not to our knowledge been considered.

Most adjudicators apportion their own fees and expenses on the basis that costs follow the event. The party who wins will then not have to bear the adjudicator's charges. Some adjudicators split their fee on a 50/50 basis, seemingly on the basis that the adjudication is a temporary contractual process. This can cause a winning party to feel extremely upset but if the adjudicator considers that such a conclusion is appropriate there is nothing to stop him from doing it. If he does so however when reasons have been requested, he will need to be sure that he gives his reasons for this decision as well.

Whatever the approach, until the fee is paid in full the parties are jointly and severally liable for the adjudicator's fees and expenses. This applies notwithstanding that he may have decided that one party will bear all of those costs. A winning party may consider itself obliged to pay the adjudicator's fee in full, but this is generally only when the responding party resists payment of the amount awarded and court proceedings have to be taken to enforce the decision and recover the adjudicator's charges from the other party.

Paragraph 26

> **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.

This paragraph repeats section 108(4) of the Act and thus provides the contractual immunity as an implied term where the contract itself fails to do so. The immunity is not however any different from that which would be provided were the immunity written into the contract itself. The parties cannot hold the adjudicator liable for anything that he does in the course of the adjudication, unless it is in bad faith, but he has no immunity in respect of third parties.

The Scheme: Part II – Payment

The Construction Industry Council discovered in its survey[28] that 73% of the disputes reported involved payment under sections 109 to 112 of the Act. The payment provisions are slightly more complex than those for adjudication. With adjudication it is a simple matter. The contract either complies with all of the requirements of section 108(1) to (4) inclusive of the Act, or it does not. Where it does not the Scheme applies.

In respect of payment the Scheme is referred to in sections 109, 110, 111 and 113. Reversion to the Scheme is on an individual basis and any one or more non-compliant clause is replaced and the compliant parts remain in force.

The payment provisions apply to contracts that exceed a duration of 45 days.

Entitlement to and amount of stage payments

Paragraph 1

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.

The Act leaves the parties free to agree their payment regime provided it complies with the specific requirements in each section of the Act. The construction industry is the only industry as a matter of statute that has the right to payment by instalments. Paragraph 1 of the Scheme deals with those matters required to be agreed in accordance with section 109(2) of the Act. If the matters in paragraph 1 are not agreed, paragraphs 2 to 4 apply.

Paragaph 2

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.

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[28] *Adjudication – The First Forty Months.* A Report on Adjudication under the Construction Act. Construction Industry Council, 2002.

(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.

The method for determining the sum of any payment is less sophisticated than the provisions in the standard form contracts used in the industry. It will ensure that some money flows by way of instalments where the contract is silent on any method to determine such payments. The constituent parts of the gross figure to be calculated (there is no retention or discount to consider) are determined in accordance with paragraph 2(2) and there is deducted from this sum previous payments in accordance with paragraph 2(3).

The gross sum due is calculated at the end of the relevant period. The relevant period, if no period is specified, is 28 days in accordance with paragraph 12 of the Scheme. This sets a 28-day cycle for the period covering the instalment to be calculated. Paragraph 2(2) then describes the component parts to be aggregated to form the gross payment.

Paragraph 2(2)(a) requires that an amount be calculated for the total value of work from commencement date to the end of the relevant period. This amounts to carrying out a gross valuation of all the works from commencement every 28 days. The work to be valued is all the work performed in accordance with the relevant construction contract. 'Work' means any of the work or services mentioned in section 104 of the Act as defined in paragraph 12. This will include any varied or additional work. It excludes materials; these are dealt with separately. There does not need to be a contract sum for there to be a contract. There simply needs to be a mechanism to determine price. A simple example of this would be a contract let on a schedule of rates. Where there is no mechanism at all in the contract to determine the value, the basis required in the Scheme is the cost of the work performed plus an amount equal to any overhead or profit that may be included in the contract price. The contract price means the entire sum payable under the construction contract in respect of the work as defined in paragraph 12.

Paragraph 2(2)(b) only applies where the contract provides for payment for materials. This must not be confused solely with the standard form-type arrangement for payment for unfixed materials on site or even off site, although this could apply also in those situations. In the first instance it applies where payment for materials is part of the mechanism for determining the payment. All of the materials brought on to the works from commencement date to the end of the relevant period are valued and included in the gross sum. Obviously if the contract provides for the traditional payment for materials on site, those terms will operate and there is no danger of a grossed-up value of materials resulting in an over-payment. It does not apply to any materials off site. If the contract is silent on payment for materials, paragraph 2(2)(b) does not fall to be considered at all.

Paragraph 2(2)(c) deals with any other sum which is specified to be payable in accordance with the contract. This really is a catch-all provision. It is unlikely that the contract will be sophisticated enough to make such provisions and also be lacking in other areas sufficient for it to fall within this paragraph.

Paragraph 2(3) simply requires the previous payments, including sums that are calculated as due but not yet paid, to be deducted from the gross sum calculated in accordance with paragraph 2(2). This is simply a method of calculating gross sums due and deducting previous payments, and in principle it follows the practices already prevalent in the industry.

Paragraph 2(4) could lead to some confusion on first reading. The maximum payment due is the contract price less the aggregate of all previous payments. Contract price is not to be confused with contract sum. The contract price is defined in paragraph 12 as being the entire sum payable under the construction contract in respect of the work. This is actually the final sum payable under the construction contract and should not be confused with the contract sum, which is the starting point. The contract price is the total value of the work including all varied and additional work.

Dates for payment

Paragraph 3

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.

Paragraph 3 simply sets the scene for the application of paragraphs 4 to 7 inclusive.

Paragraph 4

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.

Every payment under a construction contract must now have a due date. The due date is the date on which a liability at law to pay is established. This does not coincide with the date on which payment must actually be made. This actual final date on which payment can be made is also determined by this legislation. This is known as the final date for payment (see paragraph 8).

The due date is the later of either seven days after the expiry of the relevant period (payment cycle) or of the making of a claim by the payee. It is imperative in these circumstances that those wishing to be paid always lodge their claim for payment at the end of each payment cycle or slightly earlier than that date. A claim by the payee is defined in paragraph 12. It 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. If no claim is made it must follow that no payment becomes due.

Paragraph 5

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.

Paragraph 5 deals with the final payment payable under a construction contract. These are the payments which normally fall under final certificates. The terminology here is not to be confused with final date for payment. The demands here on the paying party are much higher than anything contained in the standard forms of contract. If a claim is made relating to the final payment under the contract within the 30-day period, the final payment then becomes due on the thirtieth day. In these circumstances the final account must be settled no later than 30 days following the completion of the work. This does give the paying party a bit of leeway but when these provisions apply the final account itself must be agreed or determined in a much shorter period than is customary in the industry.

Paragraph 6

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.

This paragraph almost repeats paragraph 5. The difference here is that it covers construction contracts which are not relevant construction contracts as defined in the Act. These are contracts which specify that the duration of the work is to be less than 45 days or where the parties have agreed that the duration of the work is estimated to be less than 45 days.

Paragraph 7

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.

This paragraph deals with the situation where the construction contract has a mechanism for arriving at the final sum which is due but fails to state the date on which the payment actually becomes due.

Final date for payment

Paragraph 8

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.

Every construction contract must provide a final date for payment. This final date for payment applies to all payments, both interim and final certificates or payments. This sets the date on which the money must actually be paid. For the purpose of the Scheme this is 17 days from the due date. The Scheme does not need to deal with the right to suspend performance for non-payment under section 112 of the Act. What the Scheme simply does is

determine the final date for payment and this is the point at which the necessary notice can be issued to suspend performance. This also gives a date from which any entitlement to interest will run.

Notice specifying amount of payment

Paragraph 9

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.

This paragraph covers requirements of section 110(2) of the Act. The notice must be given even where the payment nets down to nothing due to set-off or abatement. The statement must show the gross amount due on the basis that the obligations under the contract had been properly carried out and without any set-off or abatement by reference to any sum claimed to be due under one or more other contracts. Set-off or abatement are then dealt with separately under the notice requirements in accordance with paragraph 10 below. The notice must specify to what the payment relates and the basis on which the amount is calculated. This has changed the practice of the industry. Payments used to be made with little or no detail as to how they were arrived at. The provisions of the Scheme and the Act require much more than this. The basis on which the amount is calculated requires full detail of the build-up to the payment.

There is a possibility of some difficulty here when stage payments or a payment mechanism dependent on the construction programme cover the works. If the contractor has not performed to the programme or achieved a stage, is the sub-contractor still entitled to his money? On the basis of the wording in the Act he probably is.

There has been some argument as to the effect of failing to issue the section 110(2) or the paragraph 9 notice required here. The argument is that by default, if no section 110(2) notice is issued the amount applied for becomes the amount due. This is not the correct premise under the Scheme. The matter was dealt with in *SL Timber* v. *Carillion*[29]. See the discussion under section 110(2) in Chapter 4.

There is no doubt that the failure to issue a section 110(2) notice (paragraph 9) does not make the sum applied for or claimed, the sum due. There is nothing to prevent a responding party questioning the sum due in adjudication. The whole of the *SL Timber* judgment is worth reading.

The position is different under some of the standard contracts, particularly the JCT with Contractor's Design suite in which the sum applied for may become the sum due if there is no section 110(2) notice.

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[29] *S L Timber Systems Limited* v. *Carillion Construction Limited*, Outer House, Court of Session, Lord Macfadyen (27 June 2001).

Notice of intention to withhold payment

Paragraph 10

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.

This paragraph imports section 111 of the Act. The content of the notice must conform with all the requirements of section 111 of the Act. What this paragraph specifically deals with is the prescribed period for giving the notice when no such period is contained in the contract. Notice must be given not later than seven days before the final date for payment. The final date for payment will be that stated in the contract, or if no provision is made in the contract it will be the date calculated in accordance with paragraph 8 of the Scheme.

Prohibition of conditional payment provisions

Paragraph 11

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.

The Act bars conditional payment provisions. The 'pay when paid', 'pay if paid' and 'pay what paid' clauses can no longer be applied in construction contracts. The only time when they do become operative is when the person paying the payer becomes insolvent. Where a contractor is relying on the employer to pay him, a conditional payment clause would apply in any sub-contract should the employer become insolvent.

At all other times conditional payment provisions are inoperative. Where there is a relevant construction contract, paragraphs 2, 4, 5, 7, 8, 9 and 10 apply to determine the payments which are due. In the case of any other construction contract, paragraphs 6, 7, 8, 9 and 10 apply to determine the payments which are due.

Interpretation

Paragraph 12

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.

This paragraph gives definitions and does not warrant any further explanation.

The Exclusion Order

The purpose of the exclusion order is to exclude further contracts from the definition of construction contracts in the Act. Technically the contracts that this order excludes would have been within the definition of construction contracts in the Act. In some instances they may have been borderline. The premise simply is that the Act was not designed to apply to these contracts. The exclusion order is exhaustive and covers contracts with very specific criteria rather than in broad categories. If the criteria are not met there is no room for argument that the contract in question closely resembles an excluded contract. If the criteria are not met in every detail the contract is still a construction contract. There is nothing however to prevent the parties to a contract covered by this order making a contractual adjudication arrangement.

1998 No. 648
CONSTRUCTION, ENGLAND AND WALES
The Construction Contracts (England and Wales) Exclusion Order 1998
Made *6th March 1998*
Coming into force in accordance with article 1(1)

The Secretary of State, in exercise of the powers conferred on him by sections 106(1)(b) and 146(1) of the Housing Grants, Construction and Regeneration Act 1996 and of all other powers enabling him in that behalf, hereby makes the following Order, a draft of which has been laid before and approved by resolution of, each House of Parliament:

Citation, commencement and extent

1 (1) This Order may be cited as the Construction Contracts (England and Wales) Exclusion Order 1998 and shall come into force at the end of the period of 8 weeks beginning with the day on which it is made ('the commencement date').
(2) This Order shall extend to England and Wales only.

Interpretation

2. In this Order, 'Part II' means Part II of the Housing Grants, Construction and Regeneration Act 1996.

The order came into operation on the same date as the Scheme and Part II of the Act on 1 May 1998. There is a similar order that covers Scotland. Northern Ireland also has its own Exclusion Order which became effective from 1 June 1999.

Agreements under statute

3. A construction contract is excluded from the operation of Part II if it is—
(a) an agreement under section 38 (power of highway authorities to adopt by agreement) or section 278 (agreements as to execution of works) of the Highways Act 1980;
(b) an agreement under section 106 (planning obligations), 106A (modification or discharge of planning obligations) or 299A (Crown planning obligations) of the Town and Country Planning Act 1990;
(c) an agreement under section 104 of the Water Industry Act 1991 (agreements to adopt sewer, drain or sewage disposal works); or
(d) an externally financed development agreement within the meaning of section 1 of the National Health Service (Private Finance) Act 1997 (powers of NHS Trusts to enter into agreements).

It was obviously sensible to exclude such matters as adoption agreements. Although these involve construction works they really are on the fringe of the mischief that the legislation was seeking to correct. The most significant exclusion is work in connection with private finance initiatives. It is only the finance element that is excluded and not the construction works procured using those finances.

Private finance initiative

4. (1) A construction contract is excluded from the operation of Part II if it is a contract entered into under the private finance initiative, within the meaning given below.
(2) A contract is entered into under the private finance initiative if all the following conditions are fulfilled—
(a) it contains a statement that it is entered into under that initiative or, as the case may be, under a project applying similar principles;
(b) the consideration due under the contract is determined at least in part by reference to one or more of the following—
(i) the standards attained in the performance of a service, the provision of which is the principal purpose or one of the principal purposes for which the building or structure is constructed;
(ii) the extent, rate or intensity of use of all or any part of the building or structure in question; or
(iii) the right to operate any facility in connection with the building or structure in question; and
(c) one of the parties to the contract is—
(i) a Minister of the Crown;
(ii) a department in respect of which appropriation accounts are required to be prepared under the Exchequer and Audit Departments Act 1866(a);
(iii) any other authority or body whose accounts are required to be examined and certified by or are open to the inspection of the Comptroller and Auditor General by virtue of an agreement entered into before the commencement date or by virtue of any enactment;
(iv) any authority or body listed in Schedule 4 to the National Audit Act 1983(b) (nationalised industries and other public authorities);
(v) a body whose accounts are subject to audit by auditors appointed by the Audit Commission;
(vi) the governing body or trustees of a voluntary school within the meaning of section 31 of the Education Act 1996(c) (county schools and voluntary schools), or
(vii) a company wholly owned by any of the bodies described in paragraphs (i) to (v).

For a contract to be excluded under the Private Finance Initiative it must satisfy all of the criteria listed in paragraph 4. If it were not for this exclusion, PFI contracts would constitute construction contracts. This matter however is not as simple as it may first seem. Any construction contract made under the PFI contract itself will be within the Act. It is only the PFI concession contract that is excluded from the ambit of the Act. The risks inherent in construction contracts will eventually find their way back to the concessionaire. Such risks in previous arrangements have been on the basis that the contractor would only be able to claim extra monies from the concessionaire to the extent that the concessionaire is able to recover extra from the government. Such an arrangement now constitutes a pay when paid clause which is vetoed under section 113 of the Act. The concessionaire will therefore have to pick up the risk for extra work and delay that it cannot recover from the government. It remains to be seen whether the banks who finance these arrangements are prepared to accept risks which were not previously found in construction contracts under PFI schemes.

Finance agreements

5. (1) A construction contract is excluded from the operation of Part II if it is a finance agreement, within the meaning given below.
(2) A contract is a finance agreement if it is any one of the following—
(a) any contract of insurance;
(b) any contract under which the principal obligations include the formation or dissolution of a company, unincorporated association or partnership;
(c) any contract under which the principal obligations include the creation or transfer of securities or any right or interest in securities;
(d) any contract under which the principal obligations include the lending of money;
(e) any contract under which the principal obligations include an undertaking by a person to be responsible as surety for the debt or default of another person, including a fidelity bond, advance payment bond, retention bond or performance bond.

Under the heading of finance agreements, the types of contract excluded are obvious and self-explanatory. The only area of doubt concerns bond arrangements. Where the principal obligation is to act as surety there is now no doubt that this contract will be outside the provisions of the Act. Where the arrangement involves stepping into the shoes of the contractor to have the work completed, these still may be construction contracts. This will very much depend on the terms of the arrangement.

Development agreements

6. (1) A construction contract is excluded from the operation of Part II if it is a development agreement, within the meaning given below.
(2) A contract is a development agreement if it includes provision for the grant or disposal of a relevant interest in the land on which take place the principal construction operations to which the contract relates.
(3) In paragraph (2) above, a relevant interest in land means—
(a) a freehold; or
(b) a leasehold for a period which is to expire no earlier than 12 months after the completion of the construction operations under the contract.

To be excluded, the development agreement must involve a grant or disposal of the relevant interest in the land on which the construction operations take place. The relevant interest in

the land will mean a freehold or leasehold which has more than 12 months to run after completion of the construction operations under the contract. If the primary contract includes the disposal of the relevant interests in the land other contracts for professional services, building contracts and sub-contracts will not be excluded.