PAYMENT NOTICES AND SUCCESSIVE ADJUDICATIONS

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Introduction

This article concerns an issue relating to payment, particularly interim payment, that has become one of increased significant practical importance since the amendments to the Housing Grants, Construction and Regeneration Act 1996 (the HGCR Act) brought in by the Local Democracy, Economic Development and Construction Act 2009 (the LDEDC Act).

The issue arises in the following way. A contractor succeeds in a first adjudication against an employer with the case that it is entitled to a sum for which it has applied for payment, in the absence of a valid payment notice and pay less notice from the employer. The result in the adjudication is thus decided simply on the procedural rules as to notices; the correct valuation is not decided. Is it then open to the employer in a second adjudication to have decided the correct underlying valuation and, if so, what is the net effect of the two decisions?

The primary purpose of this article is to examine two recent cases which have a bearing on this issue, both decisions of Edwards-Stuart J in the Technology and Construction Court: *Harding v Paice*[1] and *ISG Construction Ltd v Seevic College*.[2] The latter case also entailed a consideration of *Watkin Jones v* LIDL,[3] which was followed in the ISG case. Before turning to these cases, it will be useful to bear in mind some basic principles from earlier, mainly higher court decisions and the legislative rules on notices.

For contracts under which interim payment is certified by a contract administrator, it is always open to either party, if dissatisfied with the level of certification, to refer a dispute as to the level of valuation to adjudication, the court or an arbitral tribunal. Provided there is a dispute as to the correct level of certification, such a dispute may be referred to adjudication.

Beaufort[4] is the well known decision of the Privy Council, which establishes that the court (and any dispute tribunal) has the power to determine a dispute between the parties as to their rights and liabilities, where these matters are provisionally decided by a certifier. *Beaufort* overruled the *Crouch* decision of the Court of Appeal and did away with the fallacy that only an arbitral tribunal with express power to open up, review and revise a certificate could undertake such an exercise. There is no need for "open up, review and revise" wording in dispute resolution clauses; a tribunal may simply decide what is the correct valuation.

A dispute as to the correct level of valuation of an interim certificate is therefore normally justiciable, in adjudication, in court or before an aribitral tribunal.

The position is in any event completely clear for these types of contract from the Court of Appeal decision in the *Rupert Morgan* case,[5] which concerns a form of contract providing for

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1 *Harding v Paice* [2014] EWHC 3824 (TCC).
2 *ISG Construction Ltd v Seevic College* [2014] EWHC 4007 (TCC).
3 *Watkin Jones & Son Ltd v LIDL UK GmbH (No.2)* [2002] C.I.L.L. 1847; [2001] EWHC 453 (TCC).
4 *Beaufort Developments (N.I.) Ltd v Gilbert-Ash N.I. Ltd* [1998] 2 W.L.R. 860, HL.
5 *Rupert Morgan Building Services (LLC) Ltd v Jervis* [2003] EWCA Civ 1563; [2004] 1 W.L.R. 1867.

interim certification by an architect (the Architecture and Surveying Institute standard form). Because of the wording of the contract, the obligation to make interim payment was an obligation to pay the amount certified. The sum due each month was accordingly the amount in the certificate. The obligation was not to pay the correct value of the work done; the certificate may be wrong. The provision is about cash flow on an interim basis. Jacob LJ stressed the point that the provision does not deal with the ultimate position between the parties,[6] going on to say about this analysis of the position:

> "It provides a fair solution, preserving the builder's cash flow but not preventing the client who has not issued a withholding notice from raising the disputed items in adjudication or even legal proceedings.
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> …
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> It does not preclude the client who has paid from subsequently showing he has overpaid. If he has overpaid on an interim certificate the matter can be put right in subsequent certificates. Otherwise he can raise the matter by way of adjudication or if necessary arbitration or legal proceedings."[7]

Sedley LJ, who agreed with the entirety of Jacob LJ's judgment, added:

> "There is, as Lord Justice Jacob demonstrates, nothing irrevocable about the s.111 process. It is designed simply to ensure that once a certificate is issued, payment follows unless proper notice of withholding is given. It has no legal effect, even presumptively, on the true incidence of liability."[8]

Therefore, there are, on the basis of *Rupert Morgan*, two routes open to a party not satisfied with an amount incorrectly certified:

(1) correction in a subsequent certificate;
(2) adjudication on that very certificate, as to the correct application of the valuation rules.

The same applies, it is submitted, if the contractor has obtained an adjudicator's decision in its favour on the amount certified, on the basis that it is the amount certified. This is because such a decision decides the amount is due, not that it is correct. It therefore does not decide it is the correct amount for the purposes of future certificates; and as it does not decide what the amount is on the correct application of the valuation rules for that very certificate, so a dispute on that issue is justiciable and may, as the Court of Appeal indicated, be adjudicated.

The position in the case of a first adjudication on the sum certified and a second one on the correct valuation is subject to the *Interserve* principle, stated by Jackson J (as he then was):

> "Where the parties to a construction contract engage in successive adjudications, each focused upon the parties' current rights and remedies, in my view the correct approach is as follows. At the end of each adjudication, absent special circumstances, the losing party must comply with the adjudicator's decision. He

[6] *Rupert Morgan*, above, at [7].
[7] *Rupert Morgan*, above, at [14].
[8] *Rupert Morgan*, above, at [17].

> cannot withhold payment on the ground of his anticipated recovery in a future adjudication based upon different issues. I reach this conclusion both from the express terms of the Act and also from the line of authority referred to earlier in this judgment…”[9]

Therefore, on the scenario under discussion, the contractor would first be paid the amount certified and decided on in the first adjudication, but would repay any sums found to have been overpaid in the second adjudication.

The rules on notices

The scheme of the legislation, reflected in the Scheme for Construction Contracts is as follows. Taking interim payment under a building contract as an example for the moment, there has to be a notice from either employer or contractor of the sum it considers due.[10] Often in standard forms provision is made for both contractor’s application and employer’s own valuation (or that of its contract administrator). There is then normally an application for payment from the contractor and the employer then has an opportunity within time limits to put in a payment notice with its own valuation.

The employer has a further opportunity within time limits to put in a pay less notice,[11] which seems to allow another opportunity for the employer to put in its own valuation and also allows the employer to notify that it will pay less than the valuation by reason of claims it has against the contractor, for example for liquidated damages. The sum due as an interim payment to the contractor is normally the sum that results from the employer’s payment notice and pay less notice, if any. But if the employer fails to issue either a valid payment notice or a valid pay less notice, the contractor is entitled to be paid the sum for which it applied.[12]

If the contract provides only for payment notice from the employer, not the contractor, but the employer fails to give the notice, the contractor may then give its own notice of the sum it considers due, which will then become the sum payable, in the absence of a valid pay less notice, under s. 110B.

Harding v Paice

The defendants, property developers and employer under the contract, appointed the claimant as building contractor on terms including the JCT Intermediate Form (2011), to construct and fit out two residential houses in Surrey. The contract provided for the right to refer a dispute to adjudication in accordance with the Scheme for Construction Contracts (the Scheme).

The relationship between the parties deteriorated and the employer purported to terminate the contract, alleging a failure to proceed regularly and diligently, and a refusal to accept the employer’s choice of contract administrator and refusal of access to the site. These matters were disputed by the contractor.

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[9] *Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd* [2006] All E.R. (D) 49; [2006] EWHC 741 (TCC) at [43].
[10] S.110A(1).
[11] S111(3).
[12] S.110B.

The contractor subsequently gave notice that the works had been suspended because of the employer's failure to appoint a replacement architect/contract administrator and to provide design information necessary to continue with construction. In the same letter the contractor gave notice pursuant to clause 8.9.3 of the contract that the employer had 14 days in which to cease the suspension, otherwise the contractor would be entitled within 21 days from the expiry of that 14 days to terminate its employment under the contract. Within that 21-day period, the contractor served notice of termination of its employment under the contract.

By the terms of clause 8.12.3 of the contract, following termination by the contractor he was entitled to submit an account for the work carried out up to termination, the cost of removal from site and any direct loss or damage; the contractor duly submitted an account. The net amount of the account submitted, after allowing for payments already made, was £397,912.48.

Under clause 8.12.5 of the contract, the employer was obliged to pay the amount properly due in respect of the account within 20 days of its submission. The contractor's case was that if the employer wanted to pay less than the amount stated in the account, it had to issue a pay less notice in accordance with the requirements of paragraphs 9 and 10 of the Scheme; and that the pay less notice had to set out the sum the payer considered to be due and the basis on which that sum was calculated.

The contractor started an adjudication (described in the judgment as the third adjudication, although the judgment does not otherwise refer to the first two) to claim the £397,912.48. The adjudicator decided that he had first to decide who had terminated the contract; he resolved this issue in favour of the contractor. He then decided that if the employer wished to pay less than the sum stated in the contractor's account, it had to issue a compliant pay less notice. He then decided that the employer had not issued a compliant pay less notice, principally because – whether or not it was served in time - it did not specify the basis on which the sums set out were calculated. The adjudicator decided the contractor was entitled to the £397,912.48 stated in the contractor's account. The adjudicator also stated, for the avoidance of doubt, that he had not decided that £397,912.48 represented a correct valuation of the works, as this did not fall for consideration because of the rule relating to a notified sum becoming automatically due in the absence of a valid pay less notice.

Implicit (or perhaps explicit, it is not stated in the judgment) in the adjudicator's decision is that the provisions for payment following termination are subject to but not compliant with the HGCR Act, as amended by the LDEDC Act, so that the provisions of the Scheme are implied terms of the contract. It is on the basis of these terms that it was decided that the sum in the contractor's account became payable in the absence of a compliant pay less notice.

In a fourth adjudication, the employer sought to refer to a dispute as to the correct value of the works undertaken by the contractor, and entitlement in relation to defects in the contractor's works. The contractor applied for an injunction to restrain the employer from proceeding with the fourth adjudication, primarily on the basis that the adjudicator in the fourth adjudication did not have jurisdiction because the dispute was the same or substantially the same as that already decided in the third adjudication.

Clause 8.12.5 of the contract provided:

> "after taking into account amounts previously paid to the Contractor under this Contract, the Employer shall pay to the Contractor (or vice versa) the amount

properly due in respect of the account within 28 days of its submission to the other Party, without deduction of any retention."

The reasoning of the judgment is hard to follow. The judge may have found this provision, particularly the words "the amount properly due in respect of the account" to be significant, stating:

> "Clause 8.12.5 is in one respect a curious provision because, unlike the interim payment machinery in the contract, it does not require the employer to pay the amount stated in the contractor's account. Instead, it provides that the employer is to pay "the amount properly due in respect of the account" within 28 days. If anything, this suggests that the amount payable under the clause might be different from the amount stated in the contractor's account."[13]

It was submitted on behalf of the contractor that, given that the adjudicator had decided in the third adjudication that if the employer wanted to pay less than the sum in the contractor's account, it had to issue in time a compliant pay less notice, that the employer had not done so and so the employer had to pay the sum in the contractor's account, the adjudicator had determined the "the amount properly due in respect of the account", so that the employer could not re-open this issue in a fourth adjudication.

The judge adverted first to the far-reaching consequences of this submission. As this case concerned the payment due following the operation of the termination clause, the contractor's account would, if the submission were accepted, have permanent effect. There would be no subsequent occasion on which the merit of the account could be considered, as would be the case with a dispute as to an interim payment. This would be a more draconian regime than applies to the final certificate, which becomes conclusive only to the extent that adjudication or litigation is not commenced within 28 days of its issue.

The judge considered that it is open to the employer to have determined either by adjudication or litigation the question of what sum is properly due in respect of the contractor's account; the adjudicator in the third adjudication did not determine what was "properly due".

The judge also stated:

> "I should add that I have some reservations about the application of the provisions of the Scheme…to clause 8.12.5 and, in that context, the meaning of expressions such as 'due date for payment' and 'notified sum', but since I have heard no argument on this point I do not propose to say any more about it."

Here it seems the judge was casting doubt on whether the basis on which the third adjudication proceeded, namely that if the employer wished to pay less than the amount in the contractor's account, it had to issue a pay less notice, was actually correct. Similarly, the judge may have been doubting whether the Scheme requires the employer to issue a notice stating the amount due in the circumstances applicable to payment following termination. This part of the judgment appears to be couched in *obiter* terms, judging from the words quoted in the preceding paragraph and the judge's further comment "If it is correct that if the

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[13] *Harding v Paice*, above, at [37].

employer wishes to pay less than the sum stated in the contractor's clause 8.12 account, it must issue a pay less notice (a proposition about which I express no opinion)..."[14]

The judge's comments may be similar to Lord Hoffmann's observation that "the concept of a 'final date for payment' applies only to interim payments",[15] although both the wording then and the wording now, in the legislation and the Scheme, post the Local Democracy, Economic Development and Construction Act 2009 appear on the face of it to apply to any payment under the contract, not just interim payments.

Although the judge's comments appear from the way they are expressed to be *obiter*, it is difficult to make sense of the judgment unless these comments are part of the *ratio decidendi*. The position as to whether the terms of the Scheme apply or not affects the result. If, as the adjudicator thought, the provisions of the Scheme were part of the contract, then there was a failure on the part of the employer to issue a pay less notice, which meant that the sum applied for became the sum due. It does not matter in these circumstances that the amount due is not the amount "properly" due if the contractual mechanism as to what is properly due were correctly applied. If the relevant terms of the HGCR Act (as amended by the LDEDC Act) and the Scheme apply, then the sum applied for becomes the sum payable in the absence of an employer's notice. That is the effect of s.110B. Similarly, that remains the effect however far-reaching the consequences.

Therefore, it seems to the writer that, in order to arrive at the conclusion reached, it was or should have been an essential element of the judge's reasoning, forming part of the *ratio*, that the relevant statutory provisions do *not* apply to the payment under the termination provision, whereas they do apply to the interim payment provisions. Without that element of reasoning, it is also hard to explain why the judge decided *Harding v Paice* differently from the *ISG* case, considered below. In so saying, the writer is making a point only about the coherent reasoning necessary to support the conclusion, given the arguments adverted to by the judge; the writer is not necessarily indicating agreement with that line of reasoning. The writer's view is that the result in *Harding v Paice* was correct, but the reasoning was not; the writer returns to this in the conclusions at the end of this article, as it is convenient first to consider the *ISG* case.

ISG v Seevic College

In a first adjudication, the adjudicator decided that ISG was entitled to £1,097,696.29, being the sum claimed in ISG's interim payment application number 13, because Seevic had not served either a payment notice or a pay less notice in accordance with the terms of the contract.

In a second adjudication, the adjudicator decided that the value of ISG's works as at the date of application 13 was £315,450.47. The adjudicator accepted ISG's valuation of its measured works, but did not accept the sum claimed by ISG for loss and expense, which was a little over £1m. He concluded that the true value of the loss and expense claim was a little over £300,000, so that ISG had been overpaid.

[14] *Harding v Paice*, above, at [32].
[15] *Melville Dundas Ltd v George Wimpey UK Ltd* 2006 S.L.T. 95; [2006] B.L.R. 164, at [21].

The contract was the JCT Design and Build Contract 2011, the payment provisions of which are compliant with the statutory requirement for payments by instalments, required under s.109 of the HGCR Act, as amended by the LDEDC Act. This form of contract has for many years included provision that interim payments are in the sum applied for by the contractor, unless the employer provides its own valuation on time, in which case the interim payment is in the sum assessed by the employer. The payment regime requires an application from the contractor, stating the amount it considers to be due to it and the basis on which that sum has been calculated.

As the judge explained:

> "The final date for payment of an interim payment is 14 days from its due date (which is the later of the specified date and the date of receipt by the employer of the interim application). If the employer disagrees with the amount of the contractor's interim application, it can serve a payment notice stating the amount that it considers to be due and the basis on which that sum has been calculated. The payment notice has to be served not later than five days after the due date.
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> The sum due to the contractor on an interim application is either the amount stated in the application or the lesser amount stated in the employer's payment notice, if it has served one. If the employer intends to pay less than the sum stated in the payment notice or interim application, as appropriate, because it claims to be entitled to withhold money on other grounds, it may give the contractor notice of that intention by serving a pay less notice no later than five days before the final date for payment. So, if the employer either does not agree with the sum claimed by the contractor in an interim application, or in any event does not intend to pay it, it must serve either a payment notice or a pay less notice, or both."[16]

Apart from the regime for final payment, the judge stated that there is no other entitlement to payment under the contract. It followed that

> "the contractor has no entitlement to be paid the value of his work at any arbitrary date during the course of the contract. His only entitlement to payment is either through the machinery for interim applications or, at the end of the project, following issue of the Final Statement. Conversely, if it has not complied with the notice provisions, the employer has no right to seek a repayment of money paid to the contractor on the ground that either at the date of the last interim application or some subsequent date, the true value of the contractor's work was less than the gross amount stated in that application."[17]

In the judge's view, the amount applied for by the contractor is deemed to be the value of the work, in the absence of an employer's notice. The judge also took the view that if the employer fails to serve a notice, it must be taken to have agreed the valuation in the contractor's application, right or wrong. Therefore, the judge concluded, the first adjudicator had decided the interim valuation and it therefore did not remain to be decided in a second adjudication. The adjudicator in the second adjudication accordingly did not have jurisdiction as the issue had been decided in the first adjudication. It is respectfully submitted that the reasoning on these points is incorrect.

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[16] *ISG*, above, at [10-11].
[17] *ISG*, above, at [14].

This case may be seen as doing no more than following Judge Lloyd's decision in *Watkin Jones v LIDL*, a decision in 2001 on the JCT Design and Build payment terms. The result on that occasion was the same; the reasoning was similar and was relied on by Edwards Stuart J in the *ISG* case. In *Watkin Jones v LIDL*, there was an adjudication establishing that the contractor was entitled to the sum for interim payment applied for in the absence of a notice from the employer. The adjudicator in a subsequent adjudication on the correct valuation of the interim payment was held not to have jurisdiction, Judge Lloyd stating:

> "The contract, in my judgment, makes it clear that when a contractor applies for payment it expresses its view as to the gross valuation required by clause 30.2A. To that extent this contract does not differ from many other contracts. This contract provides that the employer then has within five days to decide whether that opinion as to the valuation is acceptable or not. If it is not acceptable then a notice must be given under clause 30.3.3. That will specify the amount of payment proposed to be made in respect of that application, the basis on which such amount is calculated and to what the amount relates (as provided by clause 30.3.3). In other words, the employer is to set out its view of what is due for the purposes of the gross valuation under clause 30.2A.
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> The contract is thus precise. If a notice is not given under clause 30.3.3 or clause 30.3.4[18] then the amount applied for must be paid. Watkin Jones' entitlement under those provisions was settled by the first adjudication…
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> I do not consider that it is open to either party to this contract thereafter to go back over such grounds, and certainly not the employer in this case, and thus to say that the valuation which ought to have been the subject of the payment stemming from an application number 11 was other than that applied for by Watkin Jones. Under this contract the route by which that contention may be raised is the route provided by clause 30.3.3…
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> It is not possible, in my view, to avoid those consequences under this form of contract where no notice has been given by then asserting that the dispute, which undoubtedly there does exist, is justiciable as it concerns prior questions namely what ought to have been applied for, what the valuation was, etc, since they are the rationale for clause 30.3.3."[19]

Earlier, in the *VHE* case,[20] there had been a different result in similar circumstances concerning the same form of contract. In a first adjudication the contractor succeeded on the basis of the sum applied for as interim payment (application 4) and the absence of notices from the employer under clauses 30.3.3 or 30.3.4. In a second adjudication, the employer sought a review of the sum properly payable in respect of application 4. The adjudication proceeded on the basis that the second adjudicator could review and revise application 4 and determine the proper sum which ought to have been applied for. The adjudicator decided on a sum in favour of VHE that was substantially lower than the sum that resulted from the first adjudication. VHE then sought to enforce the lower sum (which

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[18] A withholding provision.
[19] *Watkin Jones v LIDL*, above, at [19-23].
[20] *VHE Construction Plc v RBSTB Trust Co Ltd* [2000] B.L.R. 187; (2000) 70 Con. L.R. 51; [2000] C.I.L.L. 1592; (2000) 2 T.C.L.R. 278 TCC.

required enforcement because of a further argument the employer had in relation to liquidated damages, not relevant to the current discussion). The issue that the adjudicator in the second adjudication might not have jurisdiction does not appear to have been raised by VHE and is not considered by the judge in *VHE*. The case was decided by a highly capable and experienced Technology and Construction Court judge, Judge Hicks, who might have commented if he considered the adjudicator's jurisdiction in the second adjudication to have been problematical. It is perhaps more likely that Judge Hicks considered he did have jurisdiction, as the writer does.

This is simply because there is a separate dispute as to the correct amount properly due, which may be referred to adjudication. The reasoning in *Watkin Jones v LIDL* went wrong, it is respectfully submitted, at the point at which Judge Lloyd stated that this separate dispute (which he rightly accepted existed) was not justiciable as it concerns prior questions and they are the rationale for clause 30.3.3. The rationale for clause 30.3.3, it is submitted, is to arrive at a figure, ascertained with certainty, on the occasion of each interim payment. That is the amount which normally has to be paid, so clause 30.3.3 fulfils an important function. But the prior questions may still remain remain. The fact that they are prior questions does not make them non-justiciable; any dispute is normally justiciable. Clause 30.3.3 does not dispose of a dispute as to those prior questions, because it is procedural and may not reflect the merits. The rationale for clause 30.3.3 is to arrive at a figure, not to preclude a dispute as to the merits, it is submitted. If there is no dispute as to the merits, the figure arrived at by the clause 30.3.3 route is payable. But if there is a dispute as to the merits, the figure correctly payable is then resolved and this overtakes the figure previously (and wrongly) arrived at by the purely procedural clause 30.3.3 route, it is submitted.

If the writer understands the *ISG* case correctly, the judge's view is that once an interim payment is decided on notices, there can be no challenge to it as to the amount. It is the correct amount, because (1) it is deemed to be the value and (2) it is deemed to be agreed.

The judge's view that the amount applied for by the contractor is deemed to be the value of the work, in the absence of an employer's notice, is not correct, it is submitted. The contractor is *prima facie* entitled to be paid the amount applied for, in the absence of an employer's notice, because that is the effect of the contractual provisions as to notices. As a matter of logic, the amount applied for is a different concept from the value of the work. The judge considered that his view on this was another way of putting what was decided by Judge Lloyd in *Watkin Jones v LIDL*, but this is not so. Judge Lloyd in *Watkin Jones v LIDL* clearly considered there was a separate dispute as to the correct value, rightly it is submitted (albeit he took the view that it was not justiciable). Because the amount properly due is a different concept from an amount due by way of the procedural operation of notices, it may still be in dispute notwithstanding the fixing of an amount due by way of the procedural operation of notices. Where there is such a dispute, the amount fixed by the notices cannot be said to be the correct amount on the basis that it is deemed to be agreed.

Another problem with the *ISG* approach is that its logical extension is that a contractor may not challenge, on the merits, an interim valuation provided by the employer. If the contractual mechanism provides a fixed amount and no means of challenge by the contractor, then the contractor has agreed in advance that that sum is all that is due (right or wrong). That, however, cannot be correct. If the matter falls to be decided in a future case, no doubt distinctions will be made between the provisions for arriving at a sum due as applied for by the contractor (where the employer has opportunities to challenge, which it

may fail to take) and the provisions for arriving at a sum due as determined by the employer (where the contractor has no opportunities to challenge other than by dispute resolution).

Although, as stated above, the *ISG* case may be seen a simply following *Watkin Jones v LIDL* on the narrow issue of the construction of the terms peculiar to the JCT Design and Build form, it may also be seen as of much wider application. All construction contracts now have a similar interim payment mechanism to that of the JCT Design and Build form, in that a notice from the contractor will always determine the amount of interim payment in the absence of a valid employer's payment notice and/or pay less notice.

Distinction between certification and JCT Design and Build

There is of course a distinction between the regime of a contract which provides for the amount of interim payments to be in the sums set out in architect's certificates and the JCT Design and Build regime which provides for the amount of interim payments to be in the sums set out in the contractor's application, unless the employer validly provides its own assessment, in which case that prevails (or validly serves a pay less notice). These are obviously inherently different processes for arriving at interim payments.

However, in the writer's view, the distinction is one without any significant difference in relation to the subject matter of this article; what is significant is the similarities between the processes. Each provides and is intended to provide a fixed and certain amount, which may be right or wrong, for payment now and possible argument later. Underlying each, whether an architect'' certificate or a contractor's application under a JCT Design and Build contract, are contractual rules as to interim valuation and therefore as to what should properly be the content of each. It is accepted and inherent in each system that that correct answer will not always, perhaps not even usually, be the sum applied for or certified; but it should perhaps normally be approximately correct. In any event, the important thing is that a sum is arrived at and has to be paid; but to the extent that it is wrong, it can be put right later. Inherent in each system is the notion that the certificate or application may in fact have failed correctly to apply the contractual rules as to interim valuation.

It follows that, notwithstanding that the parties know what the interim payment due is, there may still be between them a dispute as to what it should be, if the contractual rules as to interim valuation are correctly applied. Once that figure is known, in the sense that it is established in an adjudication, then in the writer's view that figure should trump the figure arrived at previously. The correct figure, once known, should be substituted for the incorrect figure previously wrongly arrived at by the provisional procedural route. The reason for this is that it meets the justice and merit of the case, whereas the *Watkin Jones v LIDL* and *ISG* approach perpetuates the incorrect result. Put another way, the only risk that the *Watkin Jones v LIDL* and *ISG* approach guards against is the risk that the right figure on the merits is paid instead of the wrong figure.

The *ISG* case is typical in this regard of cases the writer comes across in practice with increasing frequency, whereby the the *Watkin Jones v LIDL* and *ISG* approach is prayed in aid of an unmeritorious loss and expense claim included with little justification in an interim payment application. In *ISG*, the adjudicator who considered the merits impartially reduced ISG's loss and expense claim from a little over £1m to a little over £300,000.

If there is any relevant difference between an architect's certificate and a contractor's application under a JCT Design and Build contract, then it is that an architect is obliged to act fairly and impartially, whereas a contractor is not. There is *a fortiori* more often a need to enable an employer to have corrected an overpayment that results from an inflated claim put forward by way of a contractor's application, in respect of which the employer has failed to issue its own notice, if a justice-driven approach is to be taken.

Distinction between a decision on notices and one on valuation

For reasons already discussed, there is a distinction between a decision that a sum is due because that is the result of the operation of notices, and a decision that a sum is due because that is the correct sum once the valuation provisions have been correctly operated. There is only one correct answer which results from the correct operation of the valuation provisions. The result of the operation of notices is that, in the absence of a payment notice or pay less notice, the sum applied for is payable. That sum is whatever is applied for, which may or not correlate with the one correct answer which results from the correct operation of the valuation provisions. It is the sum payable, as the judge in *ISG* put it, "*right or wrong*". The distinction is self-evident because there are two separate exercises which can and often do yield different monetary results.

What the HGCR Act (as amended) does is to provide a procedural mechanism whereby an amount of interim payment is always arrived at. The policy behind this is a perceived need to provide regular cash flow to those undertaking construction work. That is the purpose of the rules on notices. It is not, however, the purpose or policy of the legislation to provide to contractors cash to which they are not entitled. That, it is submitted, is self-evident, but in any event it follows from the facts that statutory provision is made allowing the paying party to control the valuation and to set off sums to which it is entitled, and that how works are valued is not the subject of further statutory interference.

Current law and the writer's views

ISG may be taken to represent the current law concerning the JCT Design and Build contract and, as stated above, it may be taken as having wider application to the interim payment mechanisms of all construction contracts. However, in the writer's view, for the reasons stated above, neither the result nor the reasoning in *ISG* is satisfactory and it is hoped an appellate court will ultimately take a different approach.

In the writer's view, the law should be that the approach taken in *VHE* was correct. *Watkin Jones v LIDL* was not correctly decided, as the adjudicator in the second adjudication should have been held to have had jurisdiction. The dispute was a separate one as to the correct valuation. This became more apparent after *Rupert Morgan*, because the Court of Appeal made it clear that a purely procedural means of arriving at a fixed interim payment did not preclude an employer from adjudicating as to the truly correct valuation. *ISG* was also therefore wrong in following *Watkin Jones v LIDL*. The better view is that there can be a second adjudication on the correct level of valuation: see *Beaufort* and *Rupert Morgan*. This applies to any construction contract, whether JCT Design and Build or not. The second adjudication trumps the first, but the first has to be complied with in the meantime.

Harding v Paice arrives at the correct result, but the reasoning which the writer would have preferred is that the correct level of valuation on termination was a matter the parties could dispute and refer to adjudication. The alternative justification for the result in *Harding v Paice* is that the provisions of the HGCR Act as amended and the Scheme simply do not apply to the payment due on termination.

That is an interesting point on which again clearer guidance from the higher courts would be welcome. The wording of the legislation concerning notices is apt to apply to payments due on contractual termination. Sections 110A, 110B and the Scheme apply "in relation to every payment provided for by the contract"[21] or "in relation to every payment provided for by the contract"[22] or "in relation to a payment provided for by the contract".[23]

However, the purpose of the HGCR Act as amended and the Scheme is to deal with the perceived need for improved cash flow, particularly for sub-contractors. Its primary target is therefore interim payment, and although the Scheme also addresses final payment, it is arguable that the legislation was not intended to affect other payments pursuant to construction contracts, such as the payment due on contractual termination.

One explanation for the different approach taken by Edwards-Stuart J in the two cases is that the opposite result would have had permanent effect in *Harding v Paice*, whereas *ISG* dealt only with the interim payment position.

If the writer understands the *ISG* case correctly, the effect of it is not final, in the sense that it does not decide what a later interim payment should be. It would therefore seem that errors in an amount determined by notice and even decided on in adjudication could be corrected on a later interim valuation, as well as on the final payment. This should be the position, it is submitted, applying the *Rupert Morgan* principles. However, no doubt the contrary is also arguable. Again, clear guidance from the higher courts on this issue would be welcome.

In support of the writer's approach, one may in addition pose the *Rupert Morgan* question: what if it is the final payment and not an interim payment that is at issue?[24] Standard form contracts and the Scheme have provisions whereby this too may be fixed by notices, which, as discussed above, may be right or wrong. It would be desirable, in the interests of justice, if a mechanism were available for arriving at the right amount, rather than the effect of these provisions being to perpetuate the wrong amount. It may be expected, therefore, that the *ISG* approach and reasoning would not be adopted in respect of a final payment; the *Rupert Morgan* approach would apply.

The cases indicate the likelihood of a spate of negligence claims against industry professionals for failing to take the correct steps as to notices. Clarity in the law is likely to be needed and may be developed as a result. It would be unfortunate, in the writer's view, if these claims could not be mitigated by the relatively more straightforward means of merit-based adjudication between employer and contractor.

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[21] S.110A.
[22] S.110B.
[23] The Scheme, paragraph 9.
[24] See *Rupert Morgan*, above, at [8-10].