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CONSTRUCTION ACT REVIEW

The Dense Thicket: Successive Adjudications and Interim Payment: *S&T(UK) Ltd v Grove Developments Ltd* in the Court of Appeal

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Introduction

As discussed in previous editions of Construction Act Review (CAR), the sum due as an interim payment to a 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 applies. This situation arises as a matter of contract under the JCT Design and Build contract but also as a matter of statute under the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009 ("the HGCR Act") under construction contracts generally.[1]

Where the contract does not provide for the contractor to apply for payment and payment is dependent on a payment notice from the employer, then in the event of the employer failing to give the notice, the contractor may give its own payment notice which will determine the sum payable, if there is no pay less notice from the employer.[2]

The issue concerning successive adjudications 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 in accordance with the contract's valuation rules 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?

In the writer's first article on this topic,[3] two decisions of Edwards-Stuart J, *Harding v Paice*[4] and the *ISG* case,[5] were considered. In *Harding v Paice*, it was decided that there could be a second adjudication on the correct valuation, where what was at issue was the final payment following termination (not an interim payment). In *ISG*, it was decided, in relation to interim payment, that there could not be a second adjudication on the correct valuation, where interim payment was at issue. The writer respectfully disagreed with the analysis in each case and both the analysis and the result in the latter case, while agreeing with the result in *Harding v Paice*.

The writer's view, in summary, is that the law should be that there can be a second adjudication on the correct valuation, whether what is at issue is an interim or a final payment. That is what the position should be, both in principle and as a matter of higher court authority, for reasons set out in the writer's previous articles on this topic. Further, it is the writer's view that if the second adjudication is completed before payment is made in

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[1] See ss.110(A) and 110(B).
[2] S.110(B)(2) of the HGCR Act.
[3] *Payment Notices and Successive Adjudications*, (2015) 31 Const. L.J. 41.
[4] *Harding v Paice* [2014] EWHC 3824 (TCC).
[5] *ISG Construction Ltd v Seevic College* [2014] EWHC 4007 (TCC).

respect of the first adjudication, the employer's obligation should be to pay the sum which has been decided in the second adjudication is the correct interim valuation, not the sum determined purely on notices.

In a second article on this topic,[6] the writer considered a further decision of the same judge, *Galliford Try v Estura*,[7] which was decided along the same lines as the *ISG* case and gave some further analysis of the judge's position. The writer again respectfully disagreed with both the analysis and the result in this case.

In *ISG* and *Galliford Try*, Edwards-Stuart J decided that, where an adjudicator decides that the amount of an interim payment is fixed by the contractor's application, the employer having failed to issue a payment notice or pay less notice, the amount applied for is deemed to be agreed by the employer to be due for payment (limb 1) and the adjudicator is taken to have decided the question of the *value* of the work (limb 2). It is not permissible, as the judge found, to have a second adjudication, on the "true" valuation of that interim payment in accordance with the contractual rules for valuation. The judge considered, however, that it would be permissible to go straight to court on the "true" valuation of that interim payment or to adjudicate on the "true" valuation of a subsequent interim payment.

The judge's approach does not, on analysis, stand up to scrutiny, for numerous reasons, set out in detail in the writer's articles referred to above and in a third article concerning *Harding v Paice* in the Court of Appeal,[8] in which the writer suggested that although the Court of Appeal did not expressly decide anything about the *ISG/Galliford Try* approach, the analysis in the Court of Appeal would mean that the *ISG/Galliford* Try approach could not survive.

A side effect of the potential windfall for contractors where an inflated application for payment has not been met with an employer's payment notice or pay less notice has been a spate of claims based on dubious alleged applications for payment; dubious in the sense that it was dubious whether the purported notices relied upon were in fact valid applications for payment. The cases in which this issue has reached the courts and the strict approach of the courts in respect of the validity of contractors' payment applications have also been reviewed by the writer in a fourth article.[9]

Again as previously discussed, the Court of Appeal decided in *Harding v Paice* (2015), in relation to the final payment following termination (not interim payment, as in *ISG* and *Galliford Try*), that there could be a second adjudication on the "true" valuation, after a first adjudication decided purely on notices. The writer noted at the time that the approach taken in *Harding v Paice* would be likely to be taken in any final account case (not just where there is termination).

That proved to be the case in the first such case before the court, as the issue was addressed by a Technology and Construction Court judge in *Kilker Projects Ltd v Purton*[10]. Even more recently, the same judge as in *Kilker Projects*, O'Farrell J, revisited the issue concerning successive adjudications, described above, in the *Kersfield* case.[11] O'Farrell J

[6] Sheridan, Payment Notices and Successive Adjudications Revisited (2015) 31 Const.L.J. 220.
[7] *Galliford Try Building Ltd v Estura Ltd* [2015] EWHC 412 (TCC).
[8] Sheridan, Payment Notices and Successive Adjudications Update: *Harding v Paice* in the Court of Appeal (2016) 32 Const. L.J. 195.
[9] Sheridan, Validity of Payment Notices (2016) 32 Const. L.J. 510.
[10] *Kilker Projects Ltd v Purton* [2016] EWHC 2616 (TCC).
[11] *Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd* [2017] EWHC 15 (TCC).

reached the same conclusion as Edwards-Stuart J, in respect of interim payment, adopting the "no dispute" argument of limb 1 of Edwards-Stuart J's analysis, or developing a similar argument. O'Farrell J did not refer to limb 2 and it is not part of her analysis, although she cast no doubt on the analysis in any of Edwards-Stuart J's judgments referred to above. In both *Kilker Projects* and *Kersfield*, O'Farrell J took the view that there could not be a second adjudication on the "true" valuation, after a first adjudication decided purely on notices, in the case of interim payment, but that there could in the case of final payment.

The writer's view, as will be clear from the foregoing, was that the result in *Kilker Projects* was correct, as it is correct that there can be a second adjudication on the "true" valuation, after a first adjudication decided purely on notices, in the case of final payment. The analysis in *Kilker Projects*, though, was not in the writer's view correct, as it relied on a distinction between interim and final payment that is not correct. The writer took issue with both the result and the analysis in the *Kersfield* case in a previous article on the subject.[12] The writer's view has always been that exactly the same considerations apply with interim payment as with final payment and there was no basis for the distinction drawn by the first instance judges who relied on this distinction.

In two other more recent cases, two other Technology and Construction Court judges took a different and far more satisfactory approach. In the first of these cases,[13] Fraser J took much the same view as the writer, to the effect that *ISG* and *Galliford Try* would not now be decided in the same way, after the guidance from the Court of Appeal in *Harding v Paice*. In the second of these cases,[14] Coulson J declined to follow *ISG*, *Galliford Try* and *Kersfield*, broadly for the same reasons as those set out in the writer's earlier articles.

The position at that point was that, given the better analysis in the more recent cases decided by Fraser J and Coulson J, and that they were bolstered by higher court authority, there can be a second adjudication on "true" valuation after an adjudication deciding the amount of interim payment purely on the basis of notices. So far, so good for the writer's view on these matters, but two problems remained.

The first of these problems is the mechanism by which an employer might recover an overpayment made on the basis of notices only, if a second adjudication on "true" valuation established that an overpayment had been made. This issue can arise on standard forms, such as JCT, which do not provide for any payment to be made from contractor to employer, only from employer to contractor, on an interim basis. Only the final payment provisions allow for a balancing payment to be paid either by the employer or the contractor, depending on which way the money is due in the final analysis.

The second problem is that Coulson J found that there may only be a second adjudication on "true" valuation after the employer has first paid the amount decided in the first adjudication, based purely on notices. In the writer's view, there is no such bar to the second adjudication.

[12] Sheridan, Payment Notices and Successive Adjudications Update Part 1 (2018) 34 Const.L.J. 194.
[13] *Imperial Chemical Industries Limited v Merit Merrell Technology Limited* [2017] EWHC 1763 (TCC); 173 Con.L.R. 137; [2017] C.I.L.L. 4025.

[14] *Grove Developments Limited v S&T(UK) Limited* [2018] EWHC 123 (TCC); [2018] B.L.R. 173.

The main purpose of this article is to consider how these two problems were addressed by the Court of Appeal; the writer has previously given his analysis of the judgment at first instance and the decision of Fraser J referred to above.[15]

The facts in *S&T(UK) v Grove Developments* were, in brief, as follows. By a construction contract, which incorporated the JCT Design and Build Contract 2011, the claimant Grove engaged the defendant, S&T, to design and build a new Premier Inn hotel at Heathrow Terminal 4.

A third adjudication between the parties decided that Grove's pay less notice of 18 April 2017 was invalid. This decision meant that, on the face of it, S&T was entitled to be paid in excess of £14 million pursuant to its interim application number 22.

Grove had already anticipated a potentially adverse result in the third adjudication by the issue of CPR Part 8 proceedings (for declaratory relief).

The Court of Appeal found, as Coulson J had at first instance, that Grove succeeded in serving a valid pay less notice. The question whether Grove was entitled to pursue a claim in adjudication to determine the correct value of interim application 22 was accordingly "academic".[16] Nevertheless, Sir Rupert Jackson (who gave the judgment of the Court of Appeal) proceeded to deal with this question, assuming the pay less notice to be invalid. This was partly because it was possible that S&T might establish that a schedule of amendments, which an adjudicator had decided was incorporated into the parties' contract, was not in fact incorporated. That would affect the validity of the pay less notice as to timing. In addition, the issue was one of great importance to the construction industry.[17]

Because of the point about the schedule of amendments, it is doubted if the Court of Appeal's decision on this issue was *obiter*, even though described by Sir Rupert Jackson as "academic". Accordingly, it is doubted if Stuart-Smith J was correct to describe it as "strictly obiter" in *M Davenport Builders Ltd v Greer*.[18] In this case, unsurprisingly Stuart-Smith J nevertheless felt bound to follow the Court of Appeal decision and in any case agreed with it. He found the principles applied by the Court of Appeal in *S&T(UK) v Grove Developments* in respect of interim payment (as to which see below) apply equally to final payment.

First Instance Decision

The judge, Coulson J (as he then was, now Coulson LJ) held, contrary to the finding of the adjudicator in the third adjudication, that Grove's pay less notice of 18 April 2017 was valid and granted a declaration to that effect in Grove's favour. The effect of this was that the

[15] Sheridan, Payment Notices and Successive Adjudications Update Part 2 (2018) 34 Const.L.J. 267.

[16] *S&T(UK) v Grove Developments*, above, at [60].
[17] *S&T(UK) v Grove Developments*, above, at [3] and [60].
[18] *M Davenport Builders Ltd v Greer* [2019] EWHC 318 (TCC) at [34].

court had finally determined the dispute in the third adjudication, which accordingly could not be enforced. Accordingly, there was no extant adjudicator's decision decided purely on notices.

Nevertheless, the judge went on to consider whether, on the assumption that the pay less notice was deficient (contrary to the judge's decision), Grove was entitled to commence a separate adjudication seeking a decision as to the "true" value of interim application 22.

The judge stated:

> "At all times I keep in mind the simplicity of the underlying issue: can an employer, whose payment notice or pay less notice is deficient or non-existent, pay the contractor the sum stated as due in the contractor's interim application and then seek, in a second adjudication, to dispute that the sum paid was the 'true' value of the works for which the contractor has claimed? In my view, on the application of first principles, there are six separate reasons why the answer to that question is yes."[19]

The writer of course does not disagree with the conclusion that the answer is yes, and has argued for that in previous editions of CAR, against the run of cases decided in the TCC.

The question is interestingly formulated by the judge, as his formulation assumes payment of the sums stated as due in the contractor's interim application, before a second, 'true value' adjudication. In the case before him, an adjudicator had found that Grove was obliged to make that payment, but Grove had not complied with the adjudicator's decision but wanted to commence a further "true value" adjudication.

The writer has previously considered this judgment,[20] so will limit comment here to a brief reminder of the judge's decision on the two problems identified above.

The First Issue

The first issue is the repayment mechanism in the event of a second adjudication on "true" valuation establishing that a repayment is due to the employer. Coulson J dealt with this issue briefly, stating:

> "I do not see any difficulty with a repayment mechanism. That was the subject matter of the Supreme Court's decision in *Aspect v Higgins*. They found that, if it turned out that a contractor had been overpaid, the employer was entitled to recover the overpayment, either by way of an implied mechanism in the contract or by way of restitution. It seems to me that precisely the same analysis must apply here."[21]

It should be noted here that the Supreme Court in *Aspect v Higgins*[22] was addressing a rather different issue, which was that there must be a repayment mechanism when a court makes a final determination of a dispute that has been the subject of a temporarily binding

[19] [67]
[20] See fn. [ ] above.
[21] *Grove Developments Limited v S&T(UK) Limited* [2018] EWHC 123 (TCC); [2018] B.L.R. 173 at [133].
[22] *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38; [2015] 1 W.L.R. 2961; [2015] W.L.R. (D) 261; [2015] Bus.L.R. 830; [2015] B.L.R. 503; 160 Con. L.R. 28.

adjudicator's decision, which has the effect that some repayment is due, in circumstances where payment has first been made in compliance with the adjudicator's decision.

That is, it is respectfully submitted, correct,[23] but it does not follow that there is no difficulty with a repayment mechanism in the different situation where there is an adjudicator's decision on the interim amount payable based on notices, followed by a second adjudicator's decision deciding the "true" valuation.

Firstly, the court has inherent powers to grant a restitutionary remedy. An adjudicator does not have this power, because an adjudicator's jurisdiction extends only to disputes arising under the construction contract in question. Restitution is not a contractual remedy.

Secondly, it is a compelling argument that there is an implied term that the tribunal (court or arbitral tribunal) that finally determines a dispute which is initially decided, in temporarily binding fashion, by an adjudicator, may order a repayment that follows from the final determination. The cause of action when the matter goes to court is a claim for the repayment.[24] It is not so compelling that a repayment is due in respect of interim payment by implied term, under a contract that could have provided for such repayment as an interim matter, but in fact provides for any repayment to the employer to be made only at the final payment stage.

Nevertheless, Coulson J considered that the same analysis applied here and there was no difficulty as to the repayment mechanism.

The Supreme Court decision in *Aspect v Higgins* was considered in detail by the writer in an earlier article.[25]

The Second Issue

The second issue under consideration in this article is the question whether there can be a second adjudication on the 'true valuation' (interim or final), when there is a first adjudication in the payee's favour based purely on notices; and, if so, in the case of an interim payment, whether the second adjudication may be in respect of the very interim valuation the subject of the first adjudication, or whether this is prohibited and if so, on what basis.

On this issue, Coulson J found that there can be the second adjudication, but only where the employer has first paid the amount required by the first adjudicator's decision (decided purely on notices). Coulson J stated:

> "Even if we assume that the relationship between the employer and the contractor is poor, so that there is a second adjudication in any event, the adjudications will still be dealt with, by the adjudicators and by the courts, in strict sequence. The second

[23] See Sheridan, Adjudication and Limitation Update: *Aspect Contracts* in the Supreme Court (2015) 31 Const.L.J. 280, where the implied term and the alternative restitutionary remedy are discussed.
[24] See Sheridan, Adjudication and Limitation Update: *Aspect Contracts* in the Supreme Court (2015) 31 Const.L.J. 280.
[25] Sheridan, Adjudication and Limitation Update: *Aspect Contracts* in the Supreme Court (2015) 31 Const.L.J. 280.

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> adjudication cannot act as some sort of Trojan horse to avoid paying the sum stated as due. I have made that crystal clear."[26]

While the judge did make this crystal clear, he did not provide any juridical basis for his assertion. Thus, at this time, we had the analysis from the *ISG* line of cases, which offered a juridical analysis barring the second adjudication, but one which was severely flawed and eventually discredited. In the alternative, Coulson J's view that there may be a second adjudication but only where the employer has first paid the amount required by the first adjudicator's decision, not supported by any legal analysis.

Court of Appeal Decision

The First Issue

On the repayment mechanism, Jackson LJ stated:

> "Let me turn now to the mechanism by which an employer can recover any overpayment made at the interim stage, as a consequence of his failure to serve a payment notice or pay less notice. In many cases, this can conveniently be done by way of adjustment at the next interim payment. However, in some cases, such as the present, that is not practicable. The judge held that the employer can recover any overpayment by virtue of an implied term, alternatively by restitution. Mr Speaight [counsel for S&T] has launched a formidable attack on that analysis. Mr Nissen's principal response is that he does not need to rely upon any implied term or the doctrine of restitution. If an adjudicator finds that the employer has overpaid at an interim stage, he can order re-payment of the excess as the dispositive remedy flowing from the adjudicator's re-evaluation. I agree with that analysis. The parties have agreed (albeit under statutory compulsion) that the adjudicator should have jurisdiction to deal with disputes between them, including any dispute concerning the correct valuation of work under clause 4.7. Having determined the true value of the works at an interim stage, the adjudicator (whose powers are co-extensive with the powers of the court[27] in matters such as this) must be able to give effect to the financial consequences of his decision."[28]

The "formidable attack" on Coulson J's analysis is not recorded in the Court of Appeal judgment, but interestingly counsel for Grove did not seek to support the analysis. The attack may or may have been along the lines of the writer's views set out above.

Jackson LJ's analysis is, it is respectfully submitted, flawed in two respects.

It is correct, on the basis of the *Beaufort* decision,[29] that the adjudicator can decide the "true" valuation in the second adjudication, in the same way as could an arbitrator who was given express power to "open up, review and revise" an interim certificate. *Beaufort* establishes that the court can do this, because it can decide on the rights and liabilities of the parties and

[26] *Grove Developments Limited v S&T(UK) Limited* [2018] EWHC 123 (TCC); [2018] B.L.R. 173 at [141].
[27] As to which, see *Beaufort* and *Henry Boot* discussed above.
[28] *S&T(UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448 at [100].
[29] *Beaufort Developments (N.I.) Ltd v Gilbert-Ash N.I. Ltd* [1998] 2 W.L.R. 860, HL. The relevance of this decision to the current topic was considered in the writer's first article in the series, see fn 3 above.

does not need a power to open up and revise a certificate. It is correct, it is submitted, that an adjudicator has the same power as the court in this regard.

It does not follow that an adjudicator has the same power as the court to order repayment. Nor does it follow from the adjudicator having jurisdiction to decide the "true" valuation, as Jackson LJ appears to suggest. An adjudicator may have jurisdiction to decide the "true" valuation but it remains an open question as to whether the adjudicator may order repayment. If an adjudicator may do so, what is the juridical basis? The juridical basis appears from Jackson LJ's judgment not to be restitution or implied term.

While it is correct, as Jackson LJ states, that an adjudicator's powers in respect of interim valuation are co-extensive with the powers the court has on *Beaufort* principles, it does not follow, as Jackson LJ appears to suggest, that the adjudicator "must be able to give effect to the financial consequences of his decision." It is a circular argument that an adjudicator may give effect to the financial consequences of his decision because he must be able to do so. It begs the question: on what juridical basis may he do so? It glosses over the fact that the court has inherent jurisdiction and no jurisdictional difficulty over restitution, whereas an adjudicator's jurisdiction is limited and derives from the contract. If the implied term suggested by Coulson J is not correct, then it is difficult to see what the juridical basis may be; Jackson LJ does not (other than in respect of the two non-sequiturs considered above) state what it is.

Court of Appeal Decision

The Second Issue

On this issue, as noted above Coulson J found that there can be the second adjudication, but only where the employer has first paid the amount required by the first adjudicator's decision (decided purely on notices), but he gave no juridical basis for this assertion.

In the Court of Appeal, Jackson LJ agreed with Coulson J's conclusion, but gave an analysis in support of it, while recognising that Coulson J had not. Jackson LJ's analysis is as follows.

Jackson LJ made the point that section 111 of the HGCR Act imposes direct obligations on the contracting parties, unlike sections 109-110, stating:

> "If a contract complies with the requirements of sections 109-110A, those provisions have no operational effect. What matters is the contract and, in particular, how the contract deals with those matters which the statute leaves the parties to sort out for themselves…If and to the extent that the contract does not comply with sections 109-110A, then the Scheme[30] comes into force and overrides the offending contractual provisions.
>
> Section 111 imposes direct obligations on the contracting parties. In so far as the contractual terms provide otherwise, they are overridden. In so far as those contractual terms say the same thing as the statute, they are a mere aide memoire – what matters are the statutory provisions. The statute requires the employer to pay

[30] The Scheme for Construction Contracts (England and Wales) Regulations 1998 SI 1998 No 649, referred to in this article as "the Scheme".

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> the 'notified sum' by the final date for payment, unless it has specified a lesser sum in a timeous payment notice or a timeous pay less notice."[31]

Thus, Jackson LJ saw a significant difference between a statutory provision imposing direct obligations as to payment (section 111) and statutory provision requiring the parties' contract to set out certain types of provision as to payment, which comply with the statutory provision or, if non-compliant, are overridden by the terms of the Scheme. A distinction is drawn between a statutory provision of direct application and one which dictates what the contract must say.

Jackson LJ also characterised the payment obligation under section 111 as "immediate", because it is "a provision concerned with cashflow and immediate payments".[32]

Later, when addressing the issue here under discussion, Jackson LJ relies on the distinction between a statutory provision of direct application and one which dictates what the contract must say, as follows:

> "The immediate statutory obligation is to pay the notified sum as set out in section 111. As required by section 108…the contract also contains an adjudication regime for the resolution of all disputes, including any disputes about the true value of work done under clause 4.7. As a matter of statutory construction and under the terms of this contract, the adjudication provisions are subordinate to the payment provisions in section 111. Section 111 (unlike the adjudication provisions of the Act) is of direct effect. It requires payment of a specific sum within a short period of time. The Act has created both the prompt payment regime and the adjudication regime. The Act cannot sensibly be construed as permitting the adjudication regime to trump the prompt payment regime. Therefore, both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a re-evaluation of the work before he has complied with his immediate payment obligation."[33]

This is a bold and innovative approach to statutory interpretation.

Even if one assumes that the distinction between a statutory provision of direct application and one which dictates what the contract must say can bear the weight Jackson LJ imposes on it, is it even correct that section 108 of the HGCR Act (the adjudication provision) is not of direct effect?

It is correct that section 108(2) states "The contract shall include provision in writing so as to…" and then sets out terms that must be set out in the contract, such as provision to "enable a party to give notice at any time of his intention to refer a dispute to adjudication".[34] Sections 108(3), (3A) and (4) are similarly provisions dictating what the contract must say. But what about section 108(1)? It is as follows:

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

[31] *S&T(UK) v Grove Developments*, above, at [41-42].
[32] *S&T(UK) v Grove Developments*, above, at [88].
[33] *S&T(UK) v Grove Developments*, above, at [107].
[34] S.108(2)(a).

That is a provision of direct effect, it is submitted. Sub-sections (2) to (4) provide for detailed matters required to be included in the contract, but the effect of sub-section (1) is that a party to a construction contract has the right to refer a dispute to adjudication by reason of direct statutory provision, not by reason of a statutory provision requiring the parties to include provision to that effect in their contract. Section 108(5) provides that if the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme apply. So, while it is true that one has to look to the contractual provisions, if compliant with the requirements of subsections (2) to (4), or (if not) the Scheme provisions for the procedural rules of the adjudication, it is also true that sub-section (1) is of direct effect.

A similar point may be made about section 109(1), which provides:

> "A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments…"

before going on to provision as to the content required in the contract.

Leaving that point aside, the writer does not agree that the distinction between a statutory provision of direct application and one which dictates what the contract must say can bear the weight Jackson LJ imposes on it. There is no convincing reason for the supposition that the provisions dictating what the contract must say are subordinate to the direct provisions. On the contrary, it seems to the writer extremely unlikely that parliament had any such intention. Provisions dictating what the contract must say are used in the HGCR Act, not for terms of lesser importance, but for terms where parliament judged there was room for some party autonomy in connection with the term required by parliament. For example, while under section 109(1) there is entitlement to payment by instalments, stage payments or other periodic payments, which the parties may not avoid, the parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due, under section 109(2).

With some of the provisions of section 108(2), it is difficult to see what room for manoeuvre the parties might have. For example, under section 108(2)(c), the contract must include provision so as to require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred. It is difficult to see how the parties might depart much from the statutory wording, but they are free to express the point as they wish. Perhaps a provision providing for a decision within a period of, say, 25 days would comply with the statutory provision. In any case, parliament has chosen the route of provisions dictating what the contract must say for the matters at section 108(2). To the extent that a statutory provision which dictates what the contract must say leaves limited room for party autonomy, that suggests to the writer that the provision is important, not that it is subordinate to some other part of the statute.

Stepping back from the fact that it is unconvincing, as a matter of statutory interpretation, that parliament intended the provisions at section 108 to be subordinate to the provision with direct effect at section 111, section 108 is a provision of self-evident importance in the statute; It is the only provision that addresses adjudication.[35] Sections 109-113 are related to payment. Both are important and address different subject matter.

[35] Now with the addition of s.108A, a provision about adjudication costs.

It would have been open to parliament to include wording to indicate that section 108 was subordinate to section 111, in the way suggested by Jackson LJ. It is a perfectly normal and simple process in statutory draughtsmanship to make a provision subordinate to another by clear wording. It strikes the writer as extremely unlikely that parliament intended any such consequence, by its use of provisions of direct application and provisions dictating what the contract must say. It seems to the writer extremely unlikely that parliament intended any exception to its clear statutory rule that a party may refer any dispute to adjudication at any time.

It is difficult to see what justification there may be for asserting that a provision of direct effect takes precedence over a provision requiring a provision in a contract. It would be no less compelling to assert that a statutory provision requiring a provision in a contract takes precedence over one of direct effect. In either case, there would need to be some basis for the assertion, but Jackson LJ does not provide any.

A more fundamental problem with Jackson LJ's analysis, in any case, is that there is no contradiction between section 111 and section 108. A party may have an immediate right to payment under section 111 and the other party may wish to refer another dispute to adjudication under section 108. Nor does a contradiction between section 111 and section 108 magically appear if the other dispute the other party wishes to refer to adjudication is a dispute as to the "true" valuation of the same interim payment that is the subject of the immediate right to payment under section 111.

Jackson LJ is here confusing or conflating two separate points, one of which is not expressed in the passage from Jackson LJ's judgment under discussion. The unexpressed point is that a party obliged to make immediate payment under section 111 may not in fact make immediate payment. There may then be a period of time in which the payee establishes entitlement in adjudication and if necessary enforcement in court. That delays payment to the payee, in the same way as there may be a period of time before any payment entitlement accrues and actual payment.

That is not at all the same thing, however, as a conflict between section 111 and section 108, to be resolved by a supposed hierarchy of the statutory provisions. What Jackson LJ perceives to be problematical arises from the delay (which may always occur when a party does not immediately meet its obligation), not a conflict between a payment entitlement and a dispute resolution procedure.

One can test the supposed principle that there is a conflict between section 111 and section 108 in the following way. Suppose that a contractor is entitled to immediate interim payment by reason of the direct effect of section 111. Suppose at the same time the employer is entitled to liquidated damages from the contractor. Suppose that at the same time or roughly the same time, each claim is disputed and referred to adjudication and each claimant wins its adjudication. The effect, it is submitted, is that each party would establish a debt, each debt could be set off against the other and only any net amount would be payable. Any other result would be unjust, as each party has a good claim. It would not be correct to say that the liquidated damages could not be referred to adjudication until after the section 111 claim had been paid, on the basis of a conflict between section 111 and section 108. On analysis, there is no conflict between section 111 and section 108. Section 111 establishes entitlement to payment. Section 108 is concerned with a means of dispute resolution. They do not conflict. The employer's entitlement to liquidated damages does not "trump" the contractor's entitlement to interim payment, nor does section 108 "trump" section

111. It is just that sums may become due by more than one route, and that timing considerations may affect the net payment position.

If it transpires that a sum should have been paid earlier pursuant to section 111, interest is the remedy. The remedy should not be a bar on a perfectly legitimate claim the other way. The concept that there is a category of dispute that may not be referred to adjudication at any time is purely a construct of the courts; there is nothing to support it in the statute.

The correct position, it is submitted, is that the second adjudication should take precedence over the first, so that if payment has not yet been made in respect of the first, it need not be. The "true" valuation should take precedence over the sum determined purely by notices, because it is a valuation in accordance with the valuation terms of the contract objectively determined. The effect is that the correct amount is paid instead of the wrong amount. If payment has been made in respect of the first adjudication, then following the second adjudication there should be repayment of any overpayment which becomes apparent on determination of the "true" valuation. The juridical basis for this is an implied term, it is submitted, or a correct construction of the express terms based on the parties' intention. The parties' intention should be taken to be that the correct valuation replaces the incorrect amount determined purely on notices, once the correct valuation is known. If payment has not been made in respect of the first adjudication, then there is no point in the employer first paying the sum due pursuant to section 111 and the contractor then paying back any overpayment. That would be futile in most cases, but in cases where the contractor becomes insolvent between receiving payment and making repayment, injustice is done unnecessarily to the employer. As stated above, if it transpires that payment pursuant to section 111 should have been made earlier, interest is the remedy.

There are practical difficulties with Jackson LJ's views. Suppose the "second" adjudication on "true" valuation is in fact started just before the adjudication based on section 111. The adjudicator will embark on the "second" adjudication, as there will be no jurisdictional bar. Is the "second" adjudication then invalidated when the "first" adjudication based on section 111 is started? If not, there is simply a race to serve the first adjudication notice, in circumstances where there is a dispute as to the "true" valuation, *i.e.* in most cases. Or is the "second" adjudication invalidated if and when the contractor succeeds with the "first" adjudication based on section 111? Or, is the "second" adjudication not invalidated, because it came first?

One then comes to the rationale for the path taken by Jackson LJ, who states:

> "One important policy of [the HGCR Act] is to promote cash flow in the construction industry. In other words, there should be prompt payment followed by any necessary financial adjustments."[36]

This is a weak point, because a second adjudication on the "true" valuation will not prevent cash flow. Cash will flow, either in the sum decided purely on notices in the first adjudication, or, if the second adjudication is completed very quickly and before payment has to be made in respect of the first adjudication, in the correct amount in accordance with the contractual rules as to valuation, as determined in the second adjudication. Therefore, allowing the second adjudication does not prevent or impede cash flow.

The judge states further:

[36] *S&T(UK) v Grove Developments*, above, at [108].

> "If I am wrong…the consequence will be that the employer can commence a 'true value' adjudication without troubling to meet its payment obligation under section 111…That would be unfortunate for the construction industry and it would indicate a need for statutory amendment."[37]

This situation will only arise if the employer is very prompt in starting the second adjudication. In that event, no unfortunate consequence for the construction industry will occur; the cash will simply flow in the correct amount instead of in the wrong amount. No need for statutory amendment arises.

The passage just quoted and the passage in which Jackson LJ decided that *ISG*, *Galliford Try v Estura* and *Kersfield* were wrongly decided, indicate how difficult the courts have found this issue. Jackson LJ stated:

> "This is not a criticism of any of the judges concerned. We are all trying to hack out a pathway through a dense thicket of amended legislation, burgeoning case law and ever-changing standard form contracts."[38]

The courts have made unduly heavy weather of this issue. Their misplaced anxiety to prevent a second adjudication on "true" valuation has led them, time and again, into weak, unsatisfactory and illogical legal analysis. The anxiety is misplaced because all it does is promote and perpetuate payment of the wrong amount after the right amount has become known. It is completely contrary to the policy of the HGCR Act. Jackson LJ's analysis also undermines the statutory provision allowing parties to adjudicate any dispute at any time, a cornerstone of the HGCR Act.

This case was destined for the Supreme Court, but this will not now happen. It may therefore take some time for these issues to be considered by the Supreme Court, although it is hoped that will occur in due course, given how they have been addressed in the lower courts.

[37] *S&T(UK) v Grove Developments*, above, at [111].
[38] *S&T(UK) v Grove Developments*, above, at [102].

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