HGCRA: RE-ADDRESSING THE BALANCE OF POWER BETWEEN MAIN CONTRACTORS AND SUBCONTRACTORS?

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Abstract

The U.K. construction industry has traditionally suffered from a reputation as being inefficient and adversarial, particularly with regards to the relationship between main contractors and their domestic sub-contractors.

It has been alleged that main contractors have abused their dominant position in the contractual chain to withhold monies due to the sub-contractors by way of spurious abatements, set-offs and counter-claims, with the sole purpose of increasing their own profit margins. The great expense of the traditional forms of dispute resolution (i.e. arbitration and litigation) often prevented sub-contractors pursuing their legitimate commercial entitlement, and in many instances the consequential lack of funds led to insolvency.

The Housing Grants, Construction and Regeneration Act 1996 was introduced on 1st May 1998. The Act was the result of consultation between the government and trade bodies and was intended to put a stop to the payment abuses which were endemic in the industry. The Act also provided parties with a cheap and rapid means of achieving justice via statutory adjudication.

The aims and objectives of this dissertation are to assess whether or not the Construction Act has re-addressed the imbalance of powers, which traditionally existed between main contractors and their sub-contractors.

The research methodology used will be the utilisation of secondary data, i.e. journals, books, Internet articles, etc. including a review of a large section of published literature.

After a brief introduction, chapter two will examine the nature and scope of the UK construction industry prior to the introduction of the Act. In doing so it will highlight the perceived wrongs which the Act sought to bring to an end, The chapter will then follow on with an examination of the scope of the Act in order to draw attention to how it deals with the wrongs it sought to address.

Chapter three will then consider the attempts being made to circumvent the provisions of the Act. In doing so this chapter will draw attention to the endeavours of main contractors to minimise or prevent those parts of the Act which threaten their position of commercial superiority.

Chapter four will review published adjudication surveys to assess the impact the Construction Act has had on the construction industry in general, and sub-contractors in particular.

Chapter five will then conclude with an overview of the dissertation and ask the question has the Act gone far enough in re-addressing the balance of powers.

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1.00 - Introduction

Since the introduction of the Housing Grants, Construction and Regeneration Act 1996,[1] statutory adjudication is now established as the first formal approach to resolving disputes in the construction industry. The main advantage of adjudication is that it is a fast and cheap method of resolving disputes. It was introduced to rid the industry of the adversarialism and contractual abuse, which had made it notorious as a conflict-ridden industry.

A large percentage these disputes usually occurred between the main contractor and his domestic sub-contractor, and related to valuation of variations and late or non-payment. Whilst some of these were resolved by the legal process, a large percentage were resolved acrimoniously by the main contractor asserting his financial and contractual dominance over the sub-contractor.[2]

Whereas statutory adjudication under the Act has undoubtedly aided the Sub-contractor and re-addressed the balance of power, it has been argued that, due to loop-holes in the Act, the beneficial effects are being minimised, or even evaded.

This paper will begin with an examination of the nature of the UK construction industry, with particular emphasis on problems that the Construction Act was intended to address. This will also necessitate an examination of the scope of the Act in order to assess its effectiveness in tackling the problems it was intended to address.

This paper will then assess the effectiveness of main contractors' attempts to evade the provisions of the Act, as well as reviewing published adjudication surveys to examine adjudication in practice in order to establish exactly what impact the Act has had on the UK construction industry.

2.00 - Nature of the UK Construction Industry

The Construction industry is, arguably, the largest in the United Kingdom. Construction, including suppliers, employs approximately 1.9 million people and is worth around £65 billion a year (eight per cent of GNP).[3] However, it has long held a reputation for conflicts being "endemic in the industry" [4] and has been described as "large, fragmented and adversarial…a fertile seed bed for disputes".[5]

Whitfield [6] believes that the reason for this is that the industry is extremely diverse. It covers a wide range of end products and employs a large variety of different professions. He also believes that "each major project is unique. It is a prototype, a one-off. This means that for every project undertaken, a learning curve is inevitable. It is a rare industry indeed that produces so many varied products without significant repetition. It is this variety of interests that provides the catalyst for conflict within the industry."

Similarly, *Song Wu et al.* [7] notes "The UK construction industry has been continuously criticised for its less than optimal performance by several government and institutional reports [8]….Most of the reports conclude, time and time again, that the fragmented nature of the industry, lack of co-ordination and communication between the parties, the informal and unstructured learning process, lack of investment into research and development, adversarial contractual relationships and lack of customer focus is what inhibits the industry's performance. In essence, UK construction projects are seen as unpredictable in terms of delivery time, cost and quality".

Due to the complex nature of the construction industry, most construction contracts have clauses, which allow a contracting party to 'claim' for recovery of 'loss and/or expense' incurred as a result of a specific eventuality. However, there is a belief that an increased attitude of 'claims consciousness' has manifested

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1 Hereafter referred to as 'the Act'

2 *Per* Harding, C (1991) Building without conflict. *Building*. November

3 Carlisle, J. *Getting construction back on track*. www.mra.org.uk/bottom_line/chapter8.html (visited 29th July 2002)

4 Smith, M.G.C (1992) *Facing up to conflict in construction*. pp.27-34. In Fenn, P. & Gameson, R (ed.) Construction conflict management and resolution. E&F Spon. p.28

5 Doran, D (1997) *Introduction*. Chapter 1 in Campbell, P (ed.) *Construction disputes – avoidance and resolution*. Whittles Publishing. pp.1-8. at pp.1&2

6 Whitfield, J (1994) *Conflicts in construction avoiding, managing, resolving*. Macmillan. p.1

7 Song Wu, A.L., Cooper, R. & Aouad, G. *The process protocol, a solution for the problems of construction*. (visited 29th July 2002) pp2.dct.salford.ac.uk/pdf/new%20york%20paper%20business%20ethics%20(1).doc

8 Such as Emmerson, H (1962) *Studies of problems before the Construction Industries*. HMSO; Banwell, H (1964) *Report of the Committee on the Placing and Management of Contracts for Building and Civil Engineering Work*. HMSO; Latham, M (1994) *Constructing the team*. HMSO; Egan, J (1998) *Rethinking Construction*. Report from the Construction Task Force, Department of the Environment, Transport and Regions, UK

itself within the industry and it is for this reason that claims are often perceived as 'frivolous', forwarded merely to redress the effects of tendering inefficiencies and are therefore unlikely to receive sympathetic consideration. [9]

Conflict has traditionally been particularly common in the industry between the main contractor and his sub-contractor, usually relating to late and underpayment. Prior to the implementation of the statutory adjudication in the United Kingdom, arbitration was the formal dispute resolution process provided for in the majority of standard form contracts as an alternative to court proceedings.

However, *Cottam* [10] points out "to resolve the matter by arbitration is likely to take about 12 months and by litigation about double that. Contractors, particularly sub-contractors, in the construction industry are generally under-capitalised and a major hiccup in cash flow can put one of the firms involved into liquidation. This can be a weapon in the hands of the unscrupulous".

Smith [11] noted the imbalance of power between the financially stronger main contractors and their 'weaker' sub-contractors often prevented justice being achieved, as the main contractor would use tactics to 'drag' out the proceedings. He observed:

> "The constant delay and deliberate procrastination increasing the "costs" of the arbitration or litigation can easily create a situation where the investment in the "costs" may become sizeable in relation to the sum originally at issue. The smaller company may be in danger of being taken out of its financial depth in circumstances where it is already financially stretched. This is trial by ordeal, not my concept of justice".

The Insolvency Service Review Group [12] notes that the construction industry does not have a strong asset base: "the liabilities of most of the large contracting firms far exceed their assets. Traditionally, their profits have been generated by sub-contracting all the work and thus having access to the funds out of which – ultimately – payment will be made to sub-contractors and sub-sub-contractors". Arguably this causes a conflict of interest for main contractors. Should they make payment to their sub-contractors in accordance with their contractual obligations, they reduce their cash flow and profit. It is perhaps for this reason that late/underpayments were so common. Not surprisingly, the high occurrence of late and substantial underpayments have resulted in the fact that incidence of insolvency failure in the construction industry is greater than in other industries. [13]

In view of the fact that it is not in the interests of main contractors to make timely payments, it is often the case that main contractors put forward defences to sub-contractors claims for payment with little merit and cross-claims of a similar quality. This has long been recognised in the construction industry, for as Lord Denning [14] noted "there must be cashflow in the building trade. It is the very life blood of the enterprise".

2.01 - Background to the Act

In 1994 Sir Michael Latham published his review of procedural and contractual arrangements in the UK Construction industry.[15] The report set out thirty recommendations, with number twenty-six stating "adjudication should be the normal method of dispute resolution".

Consultation followed between the Government and trade bodies and the spotlight fell on payment provisions and adjudication. The result of the consultations was the Housing Grants, Construction and Regeneration Act 1996. The Act embodies many of the Latham recommendations and can be seen to have developed directly out of the report.[16]

The Act received Royal Assent in July 1996, although Part II dealing with adjudication would not apply until the 'commencement of this Part', which was 1st May 1998. This was due to the fact that the operation of the

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9 *Per* Seeley, I (1997) *Quantity surveying practice*. 2nd edition. Macmillan. p.208

10 Cottam, G (1997) *Adjudication*. Chapter 7 in Campbell, P (ed.) *Construction disputes – avoidance and resolution*. Whittles Publishing. pp.115-144. at p.115

11 Smith, M.G.C (1992) *Op. cit*. p.31

12 (2000) *A review of company rescue and business reconstruction mechanisms*. May. www.insolvency.gov.uk/information/con_doc_register/responsecomprescue/pdfs/clg.pdf (visited 30th July 2002)

13 *Loc. cit.*

14 *Gilbert Ash v Modern Engineering* (1974) AC 689

15 (1994) *Constructing the Team*. HMSO. This was a report commissioned jointly by the government and the industry itself.

16 Lupton, S (1998) *Architect's guide to adjudication*. RIBA Publications. p.13

Act was dependent on the existence of a Scheme for Construction Contracts [17] being in place. This is essentially a default mechanism for contracts, which do not comply with the Act.

When signing the Orders bringing into effect Part II of the Act and the accompanying Scheme for Construction Contracts, the Construction Minister, Nick Raynsford stated:

> "The legislation gives a right to fast and effective adjudication; it will make payment provisions more certain, and it will outlaw most pay-when-paid clauses. Together these measures will reduce the time and effort spent on disputes and allows the industry to concentrate on what it does best – producing quality buildings and infrastructure. I am certain that, if used sensibly, the legislation will be a huge benefit to the industry and its clients".[18]

2.02 - Scope of the Act

Dancaster [19] notes "the Act is a substantial piece of legislation. It contains parts and 151 sections running to 89 pages. It also contains a further 14 pages of Schedules. It contains in many ways what appears to be a hotch potch of matters allied to the property field that needed to be dealt with by legislation…most of the Act is taken up with grants for the renewal of private sector housing and for regeneration and relocation…but of particular interest to anyone involved in construction contracts is Part II which is so entitled and deals with the payment for construction work and the statutory right to adjudication."

Part II of the Act introduced new statutory rights into most construction contracts, with the requirement that said contracts include at least minimum provisions for payment and adjudication. If these are not met the Scheme applies.

Parties cannot contract out of the application of part II of the Act, and the Act provides that part II applies whether or not the law of England and Wales or Scotland is the law otherwise applicable to the contract.[20]

2.03 - Payment

Riches and *Dancaster* [21] note that it is unusual for any industry to have minimum payment criteria stipulated by legislation, and the fact that this was covered by the Act serves to demonstrate just how widespread payment abuses were within the UK construction industry. Indeed, *Wright* [22] notes that the reasons for the payment provisions in the Act were that: "the construction industry had become more adept at finding ever more ingenious ways to avoid payment".

Whilst the adjudication provisions under the Act give aggrieved sub-contractors an effective means of redress against perceived wrongs, the payment provisions of the Act attempt to alleviate the late and/or underpayments which were so common within the industry. Part II of the Scheme will apply if the parts of the Act relating to payments are not specified in the contract.

2.04 – The right to stage payments

The Act gives a party to a construction contract an entitlement to stage payments unless the contract specifies that the duration of the work is to be less than 45 days, or the parties agree that the estimated duration of the work is less than 45 days.[23] Should the right to stage payment apply, the Act provides that the parties are free to agree the amount of stage payments and their intervals.

Whilst most standard forms of contracts already made provisions for stage payments, prior to the implementation of the Act, unless there was an express provision in the contract for interim payments, it was the completion of the whole of the works was a condition precedent to payment.[24] Clearly the statutory right to interim payments is welcome in an industry which relies greatly on cash flow.

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17 Its full title is the Scheme for Construction Contracts (England and Wales) Regulations 1998. Hereafter referred to as 'the Scheme'.

18 Greenwood, D.J. & Klein, S.T.R (2001) The impact of the HGCR Act on sub-contract formation: results of some early research. *Construction Law*. 17. No. 2. pp.122-126.

19 Dancaster, C. Adjudication in the British Construction Industry. http://www.arbitrate.org.uk/nvjan97.adjudic.htm (Visited 7th October 2002)

20 There are distinct provisions for Scotland and Northern Ireland

21 Riches, J.L. & Dancaster, C (1999) *Construction adjudication*. LLP. p.47

22 Wright, A (2001) *Pay now – litigate later.* 8th November. www.wreghitt.co.uk/wrightswrightnov82001.htm (visited 6th August 2002)

23 Section 109

24 See *Sumpter v Hedges* [1898] 1 QB 673 and *Ibmac v Marshall (Homes)* (1968) 208 EG 851. Cited by Riches, J.L. & Dancaster, C (1999) *Op. cit*. p.47

2.05 - "Adequate mechanism" for determining payment

The Act provides [25] that every construction contract shall provide an *adequate mechanism* for determining what payments become due under the contract and when and provide for a final date for payment in relation to any sum which becomes due. It also requires the paying party to give a notice not later than five days after the date when payment becomes due, specifying the amount of the payment and the basis on which the payment is calculated.

Such a notice is clearly beneficial to a sub-contractor who may be reliant on cash flow, for as *Atkinson* [26] notes "one significant change brought about by the Construction Act is the way payments are dealt with – the emphasis now is on transparency and disclosure".

2.06 - Notice of intention to withhold payment

The Act provides that a party to a construction contract may not withhold payment after the final date for payment of a sum due unless he has given an effective notice of intention to withhold payment.[27] Thus a party who intends to withhold payment must issue a notice of his intention and to be effective the notice must contain the amount to be withheld and grounds for withholding it. Furthermore, the notice must be in writing. In ***Strathmore v Colin Scott Greig t/a Hestia fireside Design*** [28] it was held that a telephone message would not suffice as a section 111 notice.

This is clearly of assistance and is intended to prevent the widespread occurrence by main contractors of underpaying against a sub-contractors' application for payment, without providing any substantiation as to the reduction, or any prior notification that a set-off was to occur. It also provides the sub-contractor with the necessary information to challenge the withholding notice through adjudication where there are no grounds to withhold.

2.07 - Suspension of performance for non-payment

The Act gives a party to a construction contract the right to suspend performance if no payment has been received by the final date for payment, without the serving of an effective withholding notice.[29] The right to suspend performance only arises in respect of failure by the payee to give an effective withholding notice and there is no right to suspend because of a dispute about the amount withheld.

The right to suspend cannot be exercised without at least seven days notice, and the right to suspend ceases when the party in default makes payment in full. Furthermore, in terms of time lost the suspending party is entitled to an automatic extension of time, although it has been noted, not necessarily loss and expense for the delay. [30]

Prior to the implementation of the Act, in the absence of a specific condition in the contract, a sub-contractor had no automatic right to suspend work on site due to non-payment. Thus a sub-contractor was likely to find himself in breach of contract for suspending work due to non-payment. The Act has addressed this situation and provided a useful remedy against non-payment. It is perhaps for this reason that *Piper* [31] notes that "the bite in the interim payment regime is the contractor's right to suspend work if the employer fails to pay on time without notice of a sufficient reason".

2.08 – Conditional payment provisions

The Act provides that conditional payment clauses are ineffective.[32] These are commonly referred to in the construction industry as 'pay-when-paid' or 'pay-if-paid' clauses, and, prior to the Act, were extremely common in the UK construction industry having been described as "one of the plagues of sub-contractors over the years".[33] Indeed, such provisions remain common in the Commonwealth and the United States of America.

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25 Section 110

26 Atkinson, D (2001) Gauging the impact of section 111. *Construction News*. 2nd August.

27 Section 111

28 Outer Court of Session, 18th May 2000

29 Section 112

30 *Anon* (1998) *Review.* www.tjg.co.uk/publications/pdfs/conengineer%20summer%2098.pdf

31 Piper, R (1998) Fairer & faster? *Welsh Builder and Engineer.* August. Issue 12.

32 Section 113

33 McCann, S (1997) Sheathing the clause. *New Law Journal Practitioner.* 16 May. p. 729.

Pay-when-paid clauses operate on the principle that a main-contractor would not become liable to pay his sub-contractor for work carried out until after such time as he had received payment from his client. Thus a pay-when-paid clause essentially passed on the risk of default by the employer of its obligation to make payment, onto the sub-contractor.

McCann [34] notes "the rationale for such a draconian clause is protection of the main contractor's cash flow…ideally the main contractor does not want any liabilities to arise until he has received the money to pay them. This enables the main contractor to devote little or none of his own capital to the project and thus keep down his costs".

However, the Act specifies an exception to this rule; it states that contractual clauses making payments "conditional on the payer receiving payment from a third person" are permitted where that third person is insolvent. *Rich et al.* [35] noted in their Review of the Act that 73% of contracts contained a provision stating pay when paid clauses apply due to the insolvency of a third party from whom payment is due.

Consequently, whilst sub-contractors have clearly benefited from the fact that conditional payment clauses are now illegal, in the event of a clients insolvency and subsequent non-payment of the sub-contractor by the main contractor, the sub-contractor will still be liable to pay all his material suppliers and therefore still carries the risk in this situation. [36] In the United States of America this is not a problem because the employer has to furnish a bond so that in the event of his untimely liquidation, the bondsman becomes ultimately liable for the debt to the main contractor, thereby releasing payment for his sub-contractors.

2.09 – Part II of the Scheme for Construction Contracts

Part II of the Scheme deals with payment, and the three main divisions [37] are paragraphs: -

- 1 to 2: the right to interim and final payments;
- 3 to 8: dates for payment;
- 9 to 10: payment notices.

The section of the Scheme that deals with payment differs from the section that deals with adjudication. The Scheme's payment provisions are independent terms, and only non-compliant terms are replaced, whereas the compliant terms will remain unaffected. In contrast, the adjudication provisions of the Scheme are full applied if any adjudication provisions in a construction contract are non-compliant.

This undoubtedly encourages main contractors to take greater risks in modifying the payment terms than the adjudication provisions, as any singular clause relating to payment which does not comply with the Act will be removed, whereas all the adjudication provisions would by replaced by those in the Scheme if only one does not comply.

2.10 – Conclusion

The payment provisions of the Act addresses many of the onerous conditions and procedures that were prevalent prior to it's introduction. The Act specifically addresses issues such as the right to stage payments, restrictions on set-off, the prohibition of conditional payment clauses, and the right to suspend work for non-payment. Indeed, it has been noted that "the right to withhold monies has been severely curtailed".[38] This can be demonstrated by a 1999 a survey of 300,000 companies carried out by business information specialist Dun and Bradstreet [39] observed that two out of five construction forms paid their bills on time (fifty per cent more that three years previously. Thus the Act has been successful in reducing the previously widespread payment abuses throughout the UK construction industry and thereby goes some way to re-addressing the balance of power between main contractors and their sub-contractors.

2.11 -Adjudication

The Act now makes it mandatory that construction contracts provide for the resolution of disputes by means of adjudication. In this context it is a statutory procedure by which a party to a construction contract has a

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34 *Loc. Cit.*

35 (2000) Review of the "Construction Act". *New Steel Construction*. September/October. p. 14

36 *Per* Klein, R (2002) 'You've done a great job – but we're not going to pay. *Construction News*. 25th April. p.28

37 Cited in this format by *Anon. Part II of the Scheme: Payment*. www.legal500.com/devs/uk/cn/ukcn_017.htm (Visited 7th October 2002)

38 *Anon. adjudication.* (visited 24th July 2002) www.davenportlyons.com/www/legal_services/contentious_property/adjudication.htm

39 Commissioned by *Construction News*. Cited by Morby, A. & Green, B (1999) Contractors clean up act on payment. *Construction News.* 19th August. p.1

right to refer a dispute to an adjudicator, who must generally decide the dispute within forty-two days. The adjudicators' decision is binding on the parties until it is finally settled by arbitration, litigation or by agreement and is therefore essentially an interim decision.

The Act itself does not define 'adjudication' but merely sets out a number of requirements that an adjudication clause has to meet in order to comply with the Act. However, the Oxford English Dictionary defines the verb 'adjudicate' as: "*(1) act as a judge in a competition, court, etc. (2) decide judicially regarding (a claim, etc.)*" [40]

Adjudication has been described as a procedure where "a summary interim decision-making power in respect of disputes is vested in as third-party individual (the adjudicator) who is not involved in the day-to-day performance or administration of the contract, and is neither an arbitrator nor connected with the State".[41] Thus adjudication is a judicial process.

Fenwick Elliott [42] points out that adjudication is not unique to construction and has a statutory footing in a number of areas, such as the Asylum and Immigration Appeals Act 1993 and the Social Security Act. It is also utilised in a non-statutory framework, for example the Law Society Compensation Fund.

Adjudication in construction is not a new notion, and *MacPhee* [43] notes some international project contracts, such as FIDIC, provide for a dispute to be referred to a panel of experts or a dispute review board for a binding interim resolution.

Furthermore, non-statutory adjudication provisions have been in certain standard form of building contracts for some time. [44] However, *Draper* [45] notes of the judicial attitude to early adjudications, "from a review of the early authorities it is clear that the courts were reluctant to enforce adjudicators' decisions". Indeed, in A Cameron Limited v John Mowlem & Co plc [46] the judge described adjudication as having "an ephemeral and subordinate character".[47]

For the adjudication provisions of the Construction Act to apply there are four conditions: -

1) The Act must have been in force;
2) There must be a contract in writing;
3) The contract must be a 'construction contract';
4) There must be a dispute.

2.12 - The Act must have been in force

The right to refer the dispute to adjudication is conditional upon the contract having been entered into after 1st May 1998.[48] The Act is not intended to be retrospective and provides that the right to refer a dispute for adjudication applies only to construction contracts, which are entered into after the commencement of Part II of the Act, which relates to adjudication.[49] This was confirmed in Project Consultancy v Trustees of the Gray Trust [50] where an application for summary judgment of an adjudicators decision was dismissed on the grounds that the contract was formed prior to 1st May 1998.

Glover [51] notes that this is not quiet as simple as it may seem: parties often commence work on site under a letter of intent and do not enter into a formal contract until a later date. If this occurs, whereas the signing of the contract will have a retrospective effect, in *Atlas Ceiling and Partition Company v Crowngate Estates*

40 Simpson, J. & Weiner, (Ed.) (2002*) Oxford English Dictionary*. 2nd ed. Oxford University Press.
41 McGraw, M.C (1991) *Adjudicators, experts and keeping out of court*. Centre for Construction Law and Management. September. Conference: Current Developments in Construction Law. Cited by Riches, J.L. & Dancaster, C (1999) *Op.cit.* p.7
42 Fenwick-Elliot, R. *The legal nature of adjudication*. http://www.fenwick-elliot.co.uk/public/articles/adjdef.htm (Visited 17th July 2002)
43 MacPhee, M (2001) *Compulsory adjudication of disputes*. October. Freshfields Bruckhaus Deringer. www.freshfields.com. p.1 (Visited 7th July 2002)
44 For example DOM/1 sub-contract conditions; 1976 Green Form For Nominated Subcontractors; JCT 1981 with Contractors Design Contract (1988 Supplementary); 1993 the New Engineering Contract.
45 Draper, M (2001) Adjudication – how the euphoria started. *Construction Law*. June. p.14.
46 (1990) 52 BLR 24
47 Cited by Helps, D (1998) The adjudicatory paradox. *Building*. 6th November. p. 70
48 Section 104(6)(a)
49 By statutory instrument, the commencement date for Part II of the Act is 1st May 1998
50 TCC, 16th July 1999
51 (2000) *When can you adjudicate?* Notes from Fenwick Elliot Adjudication Update Seminar. 30th October. The Savoy Hotel London.

(Cheltenham) Limited [52] it was held that this does not mean that the date of the contract will have a similar retrospective effect for the purposes of the Act

This can be contrasted with *Yarn Road Limited v Costain Limited* [53] it was held that a contract made before 1st May 1998, but novated [54] after the date, came within the provisions of the Construction Act. The reason for this is that "what matters is the date the contract actually came into existence, not the date work stated on site",[55] although such matters will be of less significance as time passes.

2.13 -There must be a contract in writing

Section 107 of the HGCRA provides that adjudication will only apply where the construction contract is in writing. The requirement for writing is not onerous and is widely drafted with the intention of covering a wide variety of contracts. It may be satisfied if:

- The agreement is made in writing (whether signed or not) or;
- The agreement is made by the exchange of letters or;
- The agreement is evidenced in writing, or
- The agreement is in writing if an oral agreement is asserted in pleadings and not denied by the other party.

In circumstances where a contract may not be covered by section 107, *Atkinson* [56] notes that "the courts have taken a robust approach to the interpretation of section 107, straining its meaning….so that parties without a contract can benefit from adjudication." Indeed, in *A&D Maintenance & Construction Ltd. v Pagehurst Construction Services Ltd.* [57] the court confirmed that, although there was no written contract, both parties were proceeding as if there were one and neither party denied a contract was in place, therefore there was an agreement in writing.[58]

2.14 - The contract must be a 'construction contract'

A contract will be subject to statutory adjudication if it falls within the Act's [59] definition of a construction contract. The Act defines a 'construction contract' as

- the carrying out of 'construction operations';
- arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
- providing his own labour, or the labour of others, for the carrying out of construction operations;
- architectural, design, or surveying work, or
- to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations

'Construction operations' are also broadly defined in the Act [60] and include: -

- Construction, maintenance, demolition of buildings and structures forming part of the land;
- Walls, roadways, powerlines, telecoms apparatus, runways, docks, railways, pipes and sewers;
- Installation of heating. lighting, air conditioning, and other systems;
- cleaning of buildings and structures during construction, alteration or restoration;
- Preparatory work for any of the above installations, for instance site clearance, tunnelling;
- Painting or decorating buildings or structures.

In addition, the following are specifically excluded 'construction operations':

- Drilling/extraction of oil or natural gas;
- Mining and associated earth working;

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52 CILL July-August 2000
53 TCC, 30th July 2001
54 Novation is defined as the substitution of a new contract for an existing one, and can only be done with the consent of all parties involved. *Per* Chappell, et al. (2001) *Building contract dictionary*. 3rd edition. Blackwell Science. p.287
55 Glover. *Op. Cit.*
56 Atkinson, D (2002) Stretching a point. *Building*. 8 February. p.54.
57 (1999) CILL 1518
58 Had one of the parties denied that there had been an intention for a written contract to be in place then an adjudicator would not have jurisdiction: *Grovedeck v Capital Demolition Ltd* TCC, 24th February 2000
59 Section 104
60 S. 105: *Anon* (1998) *Review.* www.tjg.co.uk/publications/pdfs/conengineer%20summer%2098.pdf

- Installation/demolition of plant or machinery for nuclear processing, power generation, or water or effluent treatment, or production, processing, transmission or storage of chemicals, oil, gas, steel, or food or drink;
- Manufacture/delivery to site of building or engineering components, materials, plant or machinery or systems components except where the contract also provides for their installation

There are also several classes of contract specifically excluded from the application of the Act.[61] These include: -

- Contracts of employment; [62]
- Certain agreements under statute; [63]
- Private finance initiatives;
- Finance agreements; [64]
- Development agreements.

Furthermore, the Act specifically excludes [65] contracts with a residential occupier, *i.e.* a construction contract that principally relates to operations on a dwelling, which one of the parties to the contract occupies, or intends to occupy as a residence. However, the provisions of the Act will apply to sub-contracts sub-let under a main contract with a residential occupier.

Whilst the provisions of the Act do not apply to a construction contract with a residential occupier. It is not so clear when only part of the contract is for residential purposes: in *Samuel Thomas Construction v J&B Developments* [66] 65% of the contract sum related to the development of part of a property for residential occupation by one of the parties to the contract. The court held that this proportion of the works was not sufficient to come within the definition of section 106(2) of the Act.

Piper [67] notes "the impact of the Act is limited to the extent that certain categories of contract are excluded from its provisions. For example, contracts involving domestic housing, the processing and chemical industry, power generation and water treatment are specifically excluded". These sections of the Act have come under a lot of criticism, and *Edwards* and *Anderson* [68] note that the list and wording of the included/excluded operations, "some of which was the result of intense lobbying, is not as clear as the drafters intended".

Examples of activities that the courts confirmed were 'construction operations' include scaffolding,[69] maintenance and repair of domestic gas appliances,[70] and electrical works to a standby generator.[71] Examples of activities, which did not fall within the provisions of the Act, include shop fitting works,[72] insulation and cladding of pipework at a power station,[73] and final account 'settlement agreements'.[74]

Furthermore, the courts have been asked to examine the situation when parts of a contract fall within the scope of the Act and parts don't.[75] In *Homer Burgess Ltd. v Chirex (Annan) Ltd.* [76] the court held that when this situation arose, an adjudicator would have jurisdiction for those parts of the contract that the scope of the Act applies to only. Thus a contract is severable where it relates to 'construction operations' and other activities, and the Act only applies to those parts, which are construction operations. [77]

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61 Under the Construction Contracts (England and Wales) Exclusion Order 1998

62 Under the Employment Rights Act 1996

63 Specifically agreements under the Highways Act 1980; Town and Country Planning Act 1990; Water Industry Act 1991and National Health Service (Private Finance) Act 1997

64 For example loan agreements, bonds and insurance contracts.

65 Section 106.

66 Exeter District Registry, 28th January 2002

67 Piper, R (1998) Fairer & faster? *Welsh Builder and Engineer*. August. Issue 12.

68 Edwards, L. & Anderson, R.N.M (2002) *Practical Adjudication for Construction Professionals*. Thomas Telford Publishing. p.10

69 *Palmers Ltd. v ABB Power Construction Ltd.* TCC, 6th August 1999

70 *Nottingham Community Housing Association v Powerminster Ltd.* TCC 30th June 2000

71 *ABB Zantingh Ltd. v Zendal Building Services Ltd* TCC, 12th December 2000

72 *Gibson Lea Interiors v Makro Self Service Wholesalers* TCC, 24th July 2001

73 *ABB Power Construction v Norwest Holst Engineering*, TCC, 1st August 200

74 *Lathom Construction v Brian Cross and Anne Cross*, TCC 29th October 1999

75 It has been noted that this is common in 'hybrid' facilities management contracts: *per* Hanson, M (2000) Crazy mixed-up contracts. *Building*. 18 August. pp.50-51.

76 Outer House, Court of Session (Scotland) 10th November 1999

77 *Fence Gate v J.R. Knowles* TCC, 31st May 2001

Atkinson [78] observes "the difficulty in identifying the exact scope of the Act is that the terms adopted in the Act to describe construction are not precisely defined. So it is hardly surprising that disputes would arise on the exact scope of the Act and the meaning of its terms". It is for this reason that the DETR consultation paper [79] has recommended amending the Act to clarify what works are included/excluded.

2.15 - There must be a dispute

A party to a construction contract has the right to refer a dispute [80] arising under the contract for adjudication. It is important to stress that it is a *right* and not an obligation. A party is free to refer the matter directly to arbitration or litigation (depending on which is specified in the contract) should he choose to do so.

In *Fastrack Contractor's Ltd. v Morrison Construction Ltd. & Impreglio UK* HHJ Thornton took the opportunity to discuss the circumstances in which a dispute can arise: -

> "….These cases help in showing that a claim and its submission do not necessarily constitute a dispute, that a dispute only arises when a claim has been notified and rejected, that a rejection can occur when an opposing party refuses to answer a claim and a dispute can arise where there has been a bare rejection of a claim to which there is no discernible answer in fact or in law…." [81]

Similarly, in *K&D Contractors v Midas Homes* [82] Judge Humphrey Lloyd gave his opinion as to a claimant bringing a matter to adjudication where a respondent has not had a sufficient chance to consider the matter: -

> "..not only has there to be time to consider the claim or assertion, but, also, in an appropriate case, time to discuss it and to resolve by agreement, for only if that fails will there be a dispute.."[83]

Thus a response of some kind to a claim is required (even if it is silence) before the matter can be classed as a dispute, and that the formulation of a dispute requires a party to be given reasonable notice of the claim made, and a reasonable opportunity to respond. [84] In *Edmund Nuttall Ltd. v RG Carter Ltd.*[85] it was held that documentation added to a claim in the referral notice was not part of the dispute, as it had not been seen by the responding party.

Additionally, not only must there be a dispute, it must be a dispute 'arising under the contract'. It has been noted that "it is clear from the absence of the words 'in connection with' make for a narrow construction, [86] and in *Fillite (Runcorn) Ltd. v Aqua Lift* [87] it was held that disputes 'arising out of a contract' relate to 'obligations created or incorporated into a contract, [88] and do not cover disputes, for example, concerning misrepresentation, negligent misstatement or collateral undertakings.

2. 16 -Statutory right to refer disputes to adjudication

Once it has been established that there is both a dispute and a right to refer said dispute to adjudication, the Act sets out minimum criteria that the contract terms in question must comply with. Should the contract fail to comply with these criteria, the Scheme for Construction contracts will apply.[89] Thus contracts must include an adjudication scheme that complies with the following eight points [90]: -

1) Enable a party to give notice of his intention to refer a dispute to adjudication *at any time*;
2) Provide a timetable for securing adjudicators' appointment and referral of the dispute to him within seven days;
3) Require the adjudicator to reach a decision within 28 days (or longer if agreed by the parties);
4) Allow the adjudicator to extend the 28 days' period by up to 14 days with referring party's' consent;
5) Impose a duty on the adjudicator to act impartially;

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78 Atkinson, D (2000) Understanding the scope of the 1996 Act. *Const.News*. 2nd March. p.14
79 *Anon* (2001) *Improving adjudication in the construction industry*. DETR Consultation Paper. April.
80 For the purpose of the Act "dispute" includes any difference.
81 TCC, 4th January 2000
82 TCC, 21st July 2000
83 Cited by Parisotti, M (2001) Adjudication in the bushes. *Building*. 12th January. p.63
84 As in Sindall Ltd. v Solland and others TCC, 15th June 2001
85 TCC, 21st March 2002
86 *Anon* (1998) *The legal nature of adjudication*; *fish or foul* (Visited 5th October 2002) http://www.fenwick-elliot.co.uk/tech/adjudication/legal.htm
87 (1988) 45 BLR 27
88 Cited by Edwards, L. & Anderson, R.N.M (2002) *Practical Adjudication for Construction Professionals*. Thomas Telford Publishing. p.19
89 Section 108(5)
90 Sections 108(1) – (4) of the Act

6) Enable the Adjudicator to take the initiative in ascertaining the facts and the law;
7) The contract should provide that the adjudicators' decision is binding until determined by litigation, arbitration or by agreement;
8) The contract should provide for the immunity of the adjudicator unless he acts in bad faith.

1) Enable a party to give notice of his intention to refer a dispute to adjudication *at any time*.

The ability to refer a dispute to adjudication *at any time* was confirmed by Mr. Justice Dyson, [91] who declared: "Parliament has decided that a reference to adjudication may be made 'at any time'. I see no reason not to give those words their plain and natural meaning".

In A&D Maintenance v Pagehurst [92] it was confirmed that the fact that adjudication proceedings can take place at any time means that it may be commenced, adjudication proceedings may take place regardless of ongoing litigation or arbitration proceedings. Similarly, in RG Carter v Edmund Nuttall Ltd.[93] it was held that a bespoke clause stating disputes could not be referred to adjudication until they had been mediated was invalid.

However, in A Straume (UK) Ltd. v Bradlor Developments Ltd. [94] a caveat was added to the right to refer a dispute to adjudication at any time. In this case a building contractor sought to refer a dispute to adjudication for non-payment of monies allegedly due. However, the contractor was in administration and the issue before the court was whether leave of the court was required before the contractor could refer the matter to adjudication. Section 11(3) of the Insolvency Act 1986 states: -

> "During the period for which an Administration Order is in force, no other proceedings and no execution or other legal process may be commenced or continued and no distress may be levied against the company or its property except with the leave of the consent of the administrator or the leave of the court and subject, where the court gives leave, to such terms as aforesaid".

The court found that adjudication was a quasi-legal proceeding under the Insolvency Act 1986 and leave of the court was required before a matter could be referred to adjudication.

Prior to the implementation of the Act, many standard forms of contract specified that arbitration could only be commenced in respect of limited issues, or could not be commenced until after practical completion of the works, or conversely could not be commenced once practical completion had been achieved. This clearly hindered a referring parties access to justice.

Fortunately the Act addresses this issue and allows a referring party an unrestricted right to refer a matter to adjudication at any time. Indeed, provided the contract was signed after 1st May 1998 *Edwards* and *Anderson* [95] note the Act does not state a: -

> "…definition of when the Construction Act is to cease to apply. It is therefore likely that Practical completion or a Certificate of final completion will be of no legal effect on this issue, and that the right to adjudicate at any time will pass right through the defects, retention and liability period, and will be ended only by the legal limitation periods applicable".

To commence an adjudication, the first step requires a 'notice of adjudication'. The form and contents of this will vary depending on the procedural requirement of the contract. Effectively the notice will be a short document, which simply sets out brief details of the dispute, the parties to the contract and the nature of the redress which is sought.[96]

For example, paragraph 1(3) of the scheme requires that the notice of adjudication set out briefly the nature and a brief description of the dispute and of the parties involved, details of where and when the dispute has arisen, the nature of the redress sought, and the name and addresses of the parties to the contract. The notice of adjudication should be sent to the other party to the contract and to the adjudicator named in the contract or to the relevant adjudicator nominating body.

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[91] Herschel Engineering Ltd. v Breen Property Limited (2000) BLR 272
[92] *Supra.*
[93] TCC, 21st June 2000
[94] Chancery Division, Leeds District Registry
[95] *Op. cit.* p.21
[96] Henchie, N (2002) *Adjudication for architects*. RIBA Enterprises. P.16

Cottam [97] notes that it is important that care is given to the drafting of the notice, as it is required to satisfy two functions:

1) It sets out the jurisdiction of the adjudicator, that is the issues he is required to consider;

2) It acts as a guidance for an adjudicator nominating body when selecting a suitable person to act as adjudicator.

Henchie [98] concurs: "despite the brief nature of the notice of adjudication it is in fact a crucial document, since it is this document, and not the referral notice, which actually defines the adjudicator's jurisdiction. It is vital therefore that the notice of adjudication is drafted carefully and accords with the requirements of the adjudication rules governing the adjudication".

The importance of the correct drafting of the notice of adjudication has been considered in a number of cases. In *K&D Contractors v Midas Homes* [99] the court held failure to draft the notice in accordance with the requirements of the Scheme meant that only one of many claims for payment was validly referred to adjudication. Similarly in *F.W. Cook Limited v Shimizu (UK) Limited* [100] a notice which merely requested valuation of disputed items and failed to request payment of outstanding for them, did not give the adjudicator jurisdiction to order payment. However, in *Fastrack v Morrison* [101] the court held that a notice of adjudication did not have to contain full details of the quantum of a claim, and that the dispute could be in the form of 'what sum is due?"

2) Provide a timetable for securing adjudicators' appointment and referral of the dispute to him within seven days.

The securing of the adjudicators' appointment can either be by the agreement of the parties or by appointment by an adjudicator nominating body and the method of appointment will generally be specified in the contract. If the contract does not nominate an adjudicator, the parties can agree the adjudicator. If the parties cannot agree then the referring party can ask an adjudicator nominating body to make an appointment. Failure to nominate an adjudicator in accordance with the contract may result in the court restraining an offending referring party from taking any further steps in the adjudication.[102]

Within seven days of the notice of adjudication, the referring party must deliver to the adjudicator a document setting out its case, complete with all relevant documents, this is known as the referral notice. Strictly, if a party does not comply with the timetable, their claim should be struck out. However, it is unlikely an adjudicator would make such an order for what is essentially a very small breach of the timetable and the adjudicator would accept the referral notice despite its late submission.

It may be the case, however, that the other party may object to the adjudicators' late acceptance of the referral notice. *Klein*[103] notes "the adjudicator might be able to proceed if the delay has been negligible, but not presumably, if it has been excessive. In the latter case, the referring party may have to start the process again by submitting another notice of adjudication". Thus the decision on whether or not to proceed will be dependent on the individual facts of the case, and the opinion of the other party (as well as any express terms in the contract).

Lupton [104] points out that this is "an objective, rather than an obligation, as neither the adjudicator nor the adjudicating bodies are bound by the contractual provisions. The contract must provide a viable set of procedures, and it could be inferred that the parties are promising each other to use their best endeavours to secure an appointment within this timeframe".

3) Require the adjudicator to reach a decision within 28 days (or longer if agreed by the parties)

The twenty-eight day period commences immediately after the date on which the referral notice is served.[105] The period includes weekends, but excludes bank holidays and public holidays.[106]

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97 (2000) *Presenting your case to the adjudicator*. Notes from Fenwick Elliot Adjudication Update Seminar. 30th October. The Savoy Hotel London. P.3

98 (2002) *Op. Cit*. p.16

99 *Supra.*

100 TCC, 4th February 2000

101 *Supra.*

102 As in *John Mowlem & Co. Plc v Hydra-Tight Ltd* TCC, 6th June 2000

103 (1999) Adjudication: a case for a change. 30th July. *Building*.

104 Lupton, S (1998) *Op. cit*. p.31

105 Section 116(2)

The time-frame for a decision highlights the fast track nature of adjudication and clearly overcomes the protracted time frames of arbitration or litigation. However, this timeframe has also come in for some criticism. It has been noted that "owing to the tight timetable, adjudicators are often unable to consider in detail the legal issues arising out of the disputes referred to them, and decisions tend to be made on the basis of commercial expediency" [107]

Originally there were concerns that the twenty-eight day period for reaching a decision may fall foul of the European Convention of Human Rights.[108] The Convention right which is most relevant to adjudication is the right to a fair trial. Article 6 provides that:

> "in the determination of his civil rights and obligations ….everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly"

Thus the Convention allows a victim (person or company) to bring proceedings against a public authority which has acted in some way that is incompatible with the Conventions provisions. It has been noted "if a case were brought in relation to adjudication or arbitration, a victim could argue that the proceedings had not been conducted in a fair manner in accordance with Article 6".[109] Moreover, some have argued that an adjudicator acts in a quasi-judicial capacity, and therefore in a 'public nature' therefore adjudication would be subject to the provisions of the Convention.[110]

In *Elanay Contracts v Vestry* [111] Judge Havery considered the question of whether or not the Human Rights Act applied to adjudication. He considered that the time-limits imposed by the Construction Act were "inherently unfair" and went on to warn that "if Article 6 [of the European Convention] does apply to the proceedings before an adjudicator it is manifest that a coach and horses is driven through the whole of the Housing Grants, Construction and Regeneration Act".[112] However, the court held that Article 6 did not apply to adjudication due to the fact that adjudication is an interim and not a final determination of the dispute.

The short timetable also opens up the risk that some opportunistic referring party may gain a considerable tactical advantage by spending several months preparing a detailed and lengthy claim which their opponent will not be able to fully respond to in the time available. There is also anecdotal evidence, that such 'ambushing' may be exacerbated by, for example, serving documents immediately before public holidays Notwithstanding this fact, *Lennard* [113] notes the timetable "reflects the rationale of the legislation – to avoid cash-flow crisis for unpaid yet deserving sub-contractors".

4) Allow the adjudicator to extend the 28 days' period by up to 14 days with referring party's' consent.

The referring party has unilateral authority to extend the adjudication timetable (albeit this is limited to 14 days). It is interesting that the adjudicator does not have the power to grant himself an extension without the referring parties' permission, and there is nothing to require the referring party to give such consent.

Dancaster [114] notes "there is a body of opinion that the adjudicator should be allowed to extend the period unilaterally in order to avoid the situation where he feels he is unable to deal with the dispute presented to him within the set time-scales. This view has not been accommodated and many consider that this will be for the best interests of a 'quick-fix'. Human nature being what it is, an adjudicator offered the opportunity to extend the time could well take it on order to make full investigations and the adjudication process become just as long winded as arbitration often seems to be".

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106 Section 116(3)

107 *Anon. Housing Grants, Construction and Regeneration Act: disputes objective achieved?*

108 The provisions of the Convention were incorporated into the laws of England, Wales, Scotland and Northern Ireland on 2nd October 1998, pursuant to the Human Rights Act 1998

109 *Per Anon* (2000) *The Human Rights Act 1998: the impact on construction and engineering law.* October. www.freshfileds.com/practice/disputeresolution/publications/pdfs/22510.pdf. p.1

110 *Loc Cit*. p.2

111 [2001] BLR 33, TCC; (2000) CILL 1679

112 Cited by Miller, J (2000) *Human rights Act does not apply to adjudication.* www.masons.com/php/page.php3?page_id=humanrigh9724 (Visited 13th October 2002)

113 Lennard, S (2000) *Adjudication – a brief introduction*. www.hardwickebuilding.com

114 Dancaster, C. Adjudication in the British Construction Industry. http://www.arbitrate.org.uk/nvjan97.adjudic.htm (Visited 7th October 2002)

The ability of an adjudicator to deal with excessive documentation submitted by the referring party within the time-frame, has been a cause for concern for many adjudicators. The *Construction Umbrella Bodies Adjudication Task Group* [115] note many adjudicators are worried that if they seek to limit the amount of documentation they will be susceptible to a challenge on the grounds of a breach of natural justice: paragraph 17 of the Scheme requires the adjudicator to consider any relevant information submitted to him.

However, the *Task Group* [116] points out that paragraph 13(g) of the Scheme gives the adjudicator the power to limit the length of documents submitted to him. The adjudicator should never decide that a decision cannot be made. *McMillan* [117] notes, "if the dispute is too difficult then the appropriate course is to resign – usually without fees". This was confirmed in *Ballast plc v The Burrell Company (Construction Management) Limited*.[118]

5) Impose a duty on the adjudicator to act impartially.

Here a duty is imposed on the adjudicator that is similar to the duty imposed on an arbitrator under section 33 of the Arbitration Act 1996. *Redmond* [119] points out that the object of this is to "ensure that one party cannot effectively control the adjudication by providing for the appointment of a biased adjudicator". Whilst there is no requirement for the adjudicator to be independent, lack of independence would give the appearance of bias.

In *Glencot Development & Design Co. Limited. v Ben Barrett & Son (Contractors) Limited.* [120] HHJ Lloyd stated that the test for bias (formulated in the case of *Director General of Fair Trading v Proprietary Association of Great Britain* [121]) could be used to interpret the word 'impartiality' under the Act. The test was whether: -

> "The circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased".

Failure by the adjudicator to act impartially may result in the court refusing to enforce an adjudicators' decision: in *Wood Hardwick v Chiltern Air Conditioning* [122] it was held that the adjudicator had failed to make information received from one party available to the other and had therefore failed to maintain impartiality.

Furthermore, whilst there is no express obligation in this sub-section for the adjudicator to observe the requirements of natural justice, in *Discain Project Services v Opecprime Development* [123] the court held that an adjudicator did have to conduct the proceedings in accordance with the rules of natural justice.

It has been noted [124] that natural justice is not a defined term. As one judge observed: "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental principle degenerate into hard and fast rules".[125] Notwithstanding this fact, there are two main aspects to the rules of natural justice: -

1. 'No man may be a judge in his own cause' – this means that any decision, even though it may appear fair, is invalid if made by a person with a interest (for example a financial interest) in the outcome.[126] Therefore this again requires a degree of independence.
2. Both sides must be given a chance to be heard – this means that a decision will be invalidated unless a party against whom the tribunal finds was given a fair opportunity to put his own case and to know and answer the other sides.[127]

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115 (2002) *Guidance for adjudicators*. July. www.cic.org.uk. (Visited 7th September 2002)
116 *Loc. Cit.*
117 McMillan, F (2001) *Adjudicators – the do's and don'ts.* http:www.masons.co.uk/php/page.php3?page_id=adjudicato6556 (visited 4th May 2002)
118 21st June 2001, Outer House, Court of Session
119 Redmond, J (2001) *Adjudication in construction contracts*. Blackwell Science. p.52
120 TCC, 2nd and 13th February 2001
121 (2001) 1 WLR 700
122 Unreported, TCC, 2nd October 2000; (2001) CILL 1698
123 TCC, 9th August 2000; [2000] BLR 402
124 Construction Umbrella Bodies Adjudication Task Group (2002) *Op. Cit.*
125 *Per* Lord Reid *Wiseman v Borneman* [1971] AC 297 HL, at 308B. Cited by Construction Umbrella Bodies Adjudication Task Group (2002) *Op. Cit.* p.2
126 Gaitskell, R (2002) *Natural justice and adjudication*. www.watsonburton.co.uk/seminars/seminar_notes/salsart.doc (Visited 14th September 2002)
127 *Loc Cit.*

6) Enable the Adjudicator to take the initiative in ascertaining the facts and the law

This sub-section effectively means there is no obligation upon the adjudicator to follow the normal rules of evidence. Although he must decide the dispute in accordance with the terms of the contract and the applicable law, he is free to adopt an inquisitorial approach. [128]

Riches and *Dancaster* [129] note that the ability to adopt an inquisitorial approach "gives the adjudicator wide powers. He may visit the site, talk to the appropriate personnel on site. Make his own enquiries by telephone. There is nothing to prevent the adjudicator seeking legal advice or technical advice in pursuit of his enquiries. In fact, in every respect the adjudicator is 'master in his own house' provided he does not ignore the duty to act impartially".

Notwithstanding this fact, the adjudicator is also bound by the rules or procedures stated in his contract with the parties, "which will either expressly or implicitly state that the adjudication is to be conducted in accordance with the particular rules or procedure. Any deviation will be a breach of the adjudicator's contract and may put the validity of the decisions in doubt." [130] for example, as demonstrated by the cases, [131] unreported and shared communications between one party and the adjudicator can result in the decision being rendered unenforceable.

7) The contract should provide that the adjudicators' decision is binding until determined by litigation, arbitration or by agreement.

The Act provides that any decision of an adjudicator is 'interim', until finally determined by litigation, arbitration, or agreement. The parties are bound by the decision and immediate settlement is required.

The fact that an adjudicators decision is binding until finally determined in arbitration, litigation, or agreement means that if a dispute between the parties has already been referred to an adjudicator and a decision given, there can be no reference of the same dispute to another adjudicator, as the decision of the first adjudicator is binding. This was confirmed in *VHE Construction v RBSTB Trust*.[132]

Originally there were doubts about the enforceability of an adjudicators award, and it is for this reason *Draper* [133] notes "although any dispute under a construction contract entered into after 1st May 1998 could be referred to adjudication it was not until 12th February 1999, in the case of *Macob Civil Engineering Ltd. v Morrison Construction Ltd.,* [134] that Mr. Justice Dyson handed down his judgement, stating: -

> "Parliament has not abolished arbitration and litigation of construction disputes. It merely has introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that the decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved…"

The reason for the original doubts is that the Act is silent on enforcement: other than providing that the adjudicators' decision is binding, albeit temporarily. It makes no mention on how to enforce the decision. The Scheme allows for the adjudicator to make a peremptory order in his decision requiring any of the parties to comply. The Scheme also modifies section 42 of the Arbitration Act 1996 [135] allowing an application to be made to the court for an order requiring compliance with a peremptory order made by the adjudicator in his decision. An application to the court can only be made by the adjudicator or by a party to the adjudication, with the permission of the adjudicator.

Notwithstanding this fact, Mr. Justice Dyson [136] stated that he believed the most appropriate way to ensure enforcement was to issue a writ adopting the summary judgment procedure (Part 24 of the Civil Procedure Rules) In *Outwing Construction Limited v H. Randall & Son Limited* [137] the court agreed with this, and further held that a party who commenced enforcement proceedings in the court due to the failure by the other party to implement the adjudicator's decision, was entitled to recover costs incurred by that summons even if

[128] *Anon* (1998) *Review.* www.tjg.co.uk/publications/pdfs/conengineer%20summer%2098.pdf
[129] Riches, J.L. & Dancaster, C (1999) *Op.cit*. LLP. p.44
[130] Cottam, G (1997) *Adjudication*. Chapter 7 in Campbell, P (ed.) *Construction disputes – avoidance and resolution*. Whittles Publishing. p.116.
[131] For example *Wood Hardwick v Chiltern Air Conditioning Supra.*
[132] *Supra.*
[133] Draper, M (2001) Adjudication – how the euphoria started. *Construction Law*. June. pp.14-16.
[134] TCC, 12th February 1999; [1999] BLR 93
[135] Enforcement of peremptory order of tribunal
[136] *Macob Civil Engineering Ltd. v Morrison Construction Ltd Supra.*
[137] [1999] BLR 156

the money was paid before the court hearing. The court also demonstrated its willingness to abridge procedures to ensure rapid enforcement of the adjudicator's decision.

However, summary judgment is not available if the resisting party can establish a triable issue, and for that reason it has been noted [138] that "there have been a large number of cases before the courts in which various "defences" have been put forward to avoid the enforcement of an award. Generally the approach of the courts has been to enforce an award even where there has been a clear error by the Adjudicator".[139]

Indeed, in _Bouygues UK Limited v Dahl-Jensen UK Limited_ [140] he losing party sought to resist enforcement of an adjudicators decision which contained mathematical and legal errors. Dyson J held that the decision had to be complied with, and stated: -

> "..it is inherent in the Scheme that injustices will occur because, from time to time, adjudicators will make mistakes….sometimes those mistakes will be glaringly obvious and disastrous in their consequences for the losing party…..the victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation"

Notwithstanding this fact, should the adjudicator agree that he has made an error he has the ability to correct it under what has become known as the 'slip rule'. In _Bloor Construction (United Kingdom) Ltd. v Bowmer and Kirkland (London) Ltd._ [141] HHJ Toumlin stated: -

> "In the absence of the specific agreement by the parties to the contrary, there is to be implied into the agreement for the adjudication power of the adjudicator to correct an error arising from an accidental error or omission or to clarify or remove any ambiguity in the decision which is reached, provided this is done within reasonable time and without prejudicing the other party".

The Construction Umbrella Bodies Adjudication Task Group [142] observe that the slip rule generally reflects section 57 of the Arbitration Act 1996: "by analogy with arbitration, an adjudicator may correct his award to give true effect to his first thoughts and intentions, but would not be able to change the substantive decision because he has second thoughts or intentions".

As an adjudicators' decision is a temporary one, a losing party does not appeal against a decision he is unhappy with, he merely refers the matter to arbitration or litigation where it will be heard *de novo* as if the adjudication had not occurred.

8) The contract should provide for the immunity of the adjudicator unless he acts in bad faith.

This subsection is similar to the statutory immunity of an arbitrator by virtue of section 29 of the Arbitration act 1996, although unlike an arbitrator, the adjudicator does not receive statutory immunity from the Construction Act and therefore needs a contractual indemnity bestowed on him from the parties.

Thus the Act requires the contract to provide that the adjudicator (and any agent or employee of his) shall not be liable for anything done or omitted in the discharge of functions unless due to bad faith. In view of this, *Hibbert* and *Newman* [143] note "an adjudicator's potential for liability is substantially reduced as a consequence of this provision as they have a measure of protection against wrong decisions, regardless of negligence".

However, where the adjudicator acts in bad faith he receives no such immunity. Bad faith has been defined as "malice or knowledge of absence of power to make the decision in question".[144]

2.17 – Part I of the Scheme for Construction Contracts

Section 108(5) of the Act states that all construction contracts must embody the eight principles relating to adjudication. Should a construction contract not meet the eight minimum adjudication requirements or the construction contract is silent regarding the rules to be applied, the adjudication provisions in the contract will be disregarded (with the exception of the naming of an adjudicator or adjudicator nominating body) and the Scheme for Construction Contracts will apply. The Scheme is given effect by virtue of section 114(4) of the Act, which states: -

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138 *Anon. Adjudication awards – can enforcement be avoided?* (Visited 7th October 2002) www.gatelywareing.com/images/GWCONSTUPDATE.pdf

139 Provided that the adjudicator has not exceeded his jurisdiction

140 *Supra.*

141 [2000] Build. L.R. 764

142 (2002) *Op Cit.*

143 Hibbert, P. & Newman, P (1999) *ADR and adjudication in construction disputes*. Blackwell Science. p.160

144 _Melton Medas Ltd. and Another v Securities and investment Board_ [1995] 3 All ER 881. Cited by Riches, J.L. & Dancaster, C (1999) *Op.cit*. LLP. p.46

> "Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part [of the Act] in default of contractual provisions by the parties, they will have effect as implied terms of the contract concerned".

The Scheme includes all eight principles and will automatically apply to any construction contract, which omits even one of the principles. If, however, the construction contract complies with all eight principles, it can also contain other provisions regarding adjudication, and provided they do not conflict with the Act, they will be contractually valid.

2.18 - Conclusion

The introduction of statutory adjudication procedures are clearly welcome and have provided sub-contractors with a rapid and cheap means of obtaining resolution of disputes. Equally important is the Scheme for Construction Contracts. In the absence of contractual provisions complying with the Act, the Scheme applies. This has the effect of invalidating those bespoke conditions of contract which do not comply with the provisions of the Act.

Prior to the Act *Langley* [145] notes, when negotiations broke down, the traditional options were: -

i) Forget about it;
ii) Go to arbitration; or
iii) Go to litigation.

None of these represent satisfactory outcomes given particularly the cost and risk/uncertainty of arbitration and litigation." He also notes "litigation is essentially the highest form of gambling know to man".[146]

Whilst the imprecise wording of what exactly constitutes a construction contract is unfortunate, those contracts that do fall within the scope of the Act now have the benefit of a swift, albeit temporary, mechanism for the resolution of disputes. This clearly benefits sub-contractors.

3.00 - Attempts to evade the provisions of the Act

It is clear the Acts' provisions reduce the inequality of bargaining power between main contractors' and their sub-contractors, and provide the latter with a rapid and cost-effective 'access to justice'. As adjudication is a mandatory process, it is likely that one party (usually the Responding party) will be a 'reluctant' participant in the process. Indeed, *Lupton* [147] points out "it is significant that adjudication under the Act is conferred on the parties by Statute, and in that respect differs fundamentally from other consensual forms of dispute resolution".

In *Christiani & Nielson v The Lowry Centre Development Limited* [148] it was confirmed that the terms of the Act are mandatory and cannot be contracted out of, otherwise the parties would be robbed of their statutory entitlement to adjudication. Notwithstanding this fact, *Meara* [149] points out that some "contractors may take exception to being told how they should act. Consequently, they will be tempted to sidestep the bits of the legislation they do not like. And by keeping within the letter of the law, but not necessarily the intent, this can be surprisingly easy". There have been numerous attempts to hinder or evade the provisions of the Act, and it will be necessary to examine the effectiveness of attempts to evade the provisions of the Act.

It is extremely common in the construction industry for parties to have their own standard terms and conditions for entering into construction contracts. These 'bespoke' conditions are frequently based on standard form of contracts with amendments that favour the party in question and, arguably, are used to undermine the spirit of the Act

Provided the contract in question is compliant with the eight core provisions of section 108, the Scheme will not apply. However, as *Draper* [150] points out contracts can be 'Act compliant' but still contain onerous conditions contrary to the spirit of the Act. It has been noted [151] that "there are many instances where the good intentions of the Act are being flaunted, and deliberate attempts made to bend the wording or create grey areas for the benefit of one contracting party over another." The Constructors Liaison Group stated that

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[145] Langley, R (2002) *Mediation and Adjudication*. Civil Engineers Association CPD Programme. 8th March. www.watsonburton.co.uk/seminars/seminar_notes/rlbncea.doc (Visited 8th August 2002)
[146] *Loc. cit.*
[147] Lupton, S (1998) *Op.cit.* p.13
[148] TCC, 29th June 2000
[149] Meara, C (1999) Law and its limits. *Building*. 26 March. p.63.
[150] Draper, M (2001) Adjudication – how the euphoria started. *Construction Law*. June. pp.14-16.
[151] *Anon* (1999) Construction Act is being dangerously undermined. *CSM*. January. p.34

two years after the implementation of the Act, 29% of contracts surveyed included procedures designed to obstruct the use of adjudication.[152] Examples of these include: -

1) Elongated payment provisions;
2) Extended notice period prior to the right to suspend work;
3) 'Pay-when-certified' clauses in lieu of 'pay-when-paid';
4) Referring party pays all the costs of the Adjudication;
5) Re-definition of a dispute to prevent access to adjudication;
6) Payment of awards to stakeholder pending final determination;
7) Avoiding the applicability of the Act;
8) Resisting/challenging the adjudicators decision;
9) Failure to provide withholding notices.

3.01 - Elongated payment provisions

Section 110 of the Act states of the right to regular payments: "the parties are free to agree how long the period is to be between the date on which the sum becomes due and the final date for payment". However, *Meara* [153] notes the flaw in this section: "the apparently foolproof idea of staged payments can be got round by stating in the contract that the first-stage payment shall be on completion, and the second when the any defects have been made good, say 12 months later".

The problem has been highlighted by the Confederation of Construction Specialists, who point out that this section does not take into account the unequal bargaining powers of upstream parties. They state: "this is not freedom at all because it gives supreme power to Main Contractors to impose whatever terms and conditions they like". [154] Indeed, *Sutton* [155] notes "while the Act requires some agreement between the parties [as to payment intervals] this might be regarded by a subcontractor as merely one more clause in the "take it or leave it standard terms".

It is perhaps for this reason that *Klein*, stated "well over 80% of the subcontracts we were told about put in a provision which elongated the payment period for subcontractors in some way, whether it was through pay-when-certified or something else".[156] Consequently, such clauses allowing long periods for payment are effectively being used to circumvent the prohibition on pay-when-paid clauses, [157] with examples of 60 and even 90-day payment periods being imposed. [158]

Furthermore, as the right to interim payments only applies to contracts over forty-five days in duration, some main contractors are issuing several separate contracts which contract periods under 45-days to one sub-contractor on one construction project. The rationale behind this is that they therefore avoid the requirement for monthly payments and merely pay on completion of each individual contract.

3.02 - Right to suspend work

Section 112 of the Act allows a party to suspend work where payment has not been made by the final date for payment, and no effective withholding notice has been given. The section clarifies that the right to suspend work must not be exercises unless *at least* seven days notice if intention to suspend work has been given.

However, The Constructors Liaison Group [159] highlights that 20% of contracts extended the seven-day notice period for the exercise if suspension of rights, with some contracts demanding up to 60 days notice of intention to suspend work over payment disputes. [160]

Furthermore, some contractors are inserting clauses insisting that subcontractors resume work immediately after payment is received. *Norcroft* [161] points out that this "means the company has to wait in readiness by

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152 Quoted by Jones, W (2000) Constructive criticism. *Electrical and Mechanical Contractor*. September. p.21
153 *Op.cit*.
154 Cited by Rideout, G (1998) Will the scheme for construction contracts make a monkey out of you? *Contract Journal*. 18 March. p.18.
155 Sutton, G (1998) Cash injection. *Welsh Builder and Engineer*. May. Issue 9.
156 Cited in Barrie, G (1999) Specialists call for overall of act. *Building*. 23 April. p.11.
157 *Per* Meara, C (1999) *Op. cit*.
158 Russell, J. *The Construction Act 1996 including tricks, dodges and loopholes used by clients and builders*. http://www.jrconsultant.co.uk/construction%20Act.htm (visited 29th July 2002)
159 *Anon. CLG Report on the operation of the Construction Act.* http://www.clg.uk/CLG/rconsact.htm (visited 25th May 2002)
160 Barrett, N (2000) No quick fix for industry attitudes. *Construction Law*. July. p.1

the site or incur penalties. Any costs incurred during that time have to be paid by the subcontractor". Consequently, the statutory right to suspend works is being seriously undermined, and a provision which was clearly intended to re-dress the balance becoming ineffective.

3.03 - 'Pay-when-certified' clauses

Section 113 provides that 'pay-when-paid' clauses are ineffective. However, to circumvent the illegality of such clauses, many Main Contractors have merely replaced them with 'pay-when-certified' ones. *Klein* [162] observes "where such provision exists in domestic subcontracts, the sub-contractor is, generally, unaware of the dates when main contract certificates are issued. Furthermore, he will not be in a position to verify whether the amount shown on the main contract certificate has included an amount in respect of his works".

There has been much debate about the legality of 'pay-when-certified' clauses and it has been argued that they fall foul of the statutory requirement that there is an adequate mechanism for payment. Clearly the insertion of 'pay-when-certified' clauses in lieu of the outlawed 'pay-when-paid' ones is contrary to the spirit of the Act: one hopes this matter will come before the courts for resolution.

3.04 - Costs of the Adjudication

The recovery of adjudicating parties' costs is generally viewed as a matter for the contract, as the Act and the Scheme are silent as to whether an adjudicator as the power to decide that one party pay another party's costs.

In *John Cothliff Ltd. V Allen Build (Norwest) Ltd.*[163] The court held that the adjudicator had an implied power to award inter party costs, although *Henchie* [164] points out that this is "widely regarded as being wrongly decided". Indeed, in *Absolute Rentals v Gencor Enterprises* [165] and *Northern Developments (Cumbria) v J&J Nichol* [166], it was held that an adjudicator has no implied power to award inter-parties costs unless the parties expressly agree: HHJ Bowsher stated "if parliament had intended by the Act or the statutory scheme to give the power to award costs, it would have said so."[167]

Consequently, the adjudicator only has the power to award inter party costs where he has a contractual obligation to do so, or where the parties agree that he may do so. Main contractors are exploiting this fact, however: the Constructors Liaison Group [168] noted that in 29% of the contracts analysed the referring parties – usually the sub-contractors – were required to pay the adjudicator's costs and/or the costs of the other party – win or lose.

An example of this is the case of *Bridgeway Construction Ltd. v Tolent Construction Ltd.*[169] where the contract contained the following clause: -

> "The party serving the Notice to Adjudicate shall bear all the costs and expenses incurred by both parties in relation to the adjudication, including but not limited to all legal and expert fees'…..The party serving the Notice to Adjudicate shall be liable for the adjudicator's fees and expenses".

The adjudicator ordered the main contractor to pay £39,637 to the subcontractor, but for the subcontractor to pay the main contractors costs of £13,205 plus the adjudicators' fee's of £2,755. When this was tested in court, the judge ruled that there was nothing to stop the parties agreeing further terms to those required by the act, even if they did look a 'bit unfair'".[170] When asked about the clause Tolent stated that it was intended to deter 'spurious claims'.[171]

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161 Northcroft, A (2000) New contract threat to adjudication. *H&V News*. 22nd July. www.arbitrate.org.uknvsep00/threat.htm (Visited 30th July 2002)

162 Klein, R (1999) 'Pay-when-certified' clauses hit subbies. *Construction News*. 18th February. p.22

163 Liverpool County Court, 29th July 1999

164 (2002) *Op. Cit.* p.23

165 (2000) CILL 1637

166 TCC, 24th January 2000

167 *Northern Developments (Cumbria) v J&J Nichol Supra.* Cited by *Anon (2001) Adjudication Review.* http:www.masons.co.uk/php/page.php3?page_id=draftanal1444 (visited 04/05/02)

168 *Anon. CLG Report on the operation of the Construction Act.* http://www.clg.uk/CLG/rconsact.htm (visited 25th May 2002)

169 Liverpool District Registry, 11th April 2000

170 *Per* Bessey, J. The price of freedom. *Building*. 1 September 2000. p.65

171 *Per* Bingham, T (2000) fighting for one's cause. *Building*. 14 July. http://www.tonybingham.co.uk/column/2000/20000714.htm (visited 5th April 2001)

The Confederation of Construction Specialists [172] noted of the courts' decision: "the message we have received from our Members is that most main contractors resent the fact that sub-contractors have the ability to fight back against payment abuse using adjudication. This ruling means that win or lose, the main contractors has the ability to make the sub-contractor suffer".

Section 60 of the Arbitration Act 1996 states that agreements as to the payment of the costs of an arbitration by one party is only valid if made after the dispute in question has arisen. Such a clause in the Construction Act would have prevented abuses relating to costs occurring in adjudication proceedings.

It is for this reason that the DETR consultation paper [173] recommended the "amending the Act….to outlaw the practice of putting into contracts requirements that a party that refers a dispute to adjudication should bear the other party's legal and other costs", and the Construction minister, Brian Wilson, recently announced that parliament intends to stop this practice.[174]

3.05 - Re-definition of a 'dispute'

It is well established that, pursuant to section 108 of the Act, a party to a construction contract has the right to refer a dispute arising under the contract for adjudication, and that this right is incumbent on there actually being a dispute in existence.[175] However, in an attempt to evade this right *Barrett* [176] observes "some contracts have tinkered with the definition of what is a dispute allowing them to argue that where there is no dispute there is no route to adjudication". Indeed in their review of the Construction Act, *Rich et al.* [177] noted that 29% of contracts provided for pre-dispute procedures.

For example, *Bingham* [178] highlights one main contractors standard terms and conditions which state that no difference of opinion can be termed a 'dispute' until such time as directors from both parties meet and use their best endeavours to resolve the 'dissatisfaction'.

Furthermore, clause 66 of the ICE conditions of contract, 7th edition state that no matter shall constitute a dispute until 'matters of dissatisfaction' have been referred to the engineer, who has up to one month to come to a decision regarding this matter.

Such 'matters of dissatisfaction' clauses were considered in *John Mowlem & Co. plc v Hydra-Tight Ltd.*[179] The contract was let under the Engineering and Construction Contract option Y (UK) 2. The contract provided "the parties agree that no matter shall be a dispute unless a notice of dissatisfaction has been given and the matter has not been resolved within four weeks".

Whether these provisions offended the Act was not put before the Court since the parties agreed that the provisions were illegal. However, Judge Toumlin [180] commented:

> "This contract does not comply [with s.108] since…the parties have no immediate right to refer at any time or to give notice of an intention to refer the dispute to adjudication…Therefore, on the plain wording of the Statute, the Scheme applies".

In view of this fact, it would appear that attempts to re-define a 'dispute' would not stand up to a legal challenge.

3.06 – Stakeholder Provisions

A large number of bespoke conditions of contract include a mandatory stakeholder clause, whereby in an attempt to avoid honouring unfavourable adjudication provisions, any award made by the adjudicator has to be paid to a stakeholder, pending final determination by arbitration, litigation, or agreement. Indeed, such is the popularity of this type of clause that *Barrie* believes that half the bespoke contracts issued by the UK's top 50 contractors incorporated stakeholder accounts to hold up payments awarded after adjudication. [181]

[172] Cited by Northcroft, A (2000) *Op.cit.*
[173] *Anon* (2001) *Improving adjudication in the construction industry*. DETR Consultation Paper. April.
[174] *Anon* (2002) Wilson to axe rule on adjudication payment. 26th July. *Building*.
[175] *Fast Track Contractors v Morrison Construction Supra.*
[176] Barrett, N (2000) No quick fix for industry attitudes. *Construction Law*. July. p.1
[177] Rich, M, Pettigrew, R. & Klein, R (2000) *Op. cit.*
[178] Bingham, T (1999) Naughty contracts. *Building*. 29 October. p.61.
[179] TCC, 6th June 2000
[180] TCC, 6th June 2000
[181] Cited in Barrie, G (1999) Specialists call for overall of act. *Building*. 23 April. p.11.

Other examples of the award being withheld include; a top client, insisting that adjudicators' awards are lodged with its own solicitors until legal proceedings are exhausted;[182] a Main Contractor, whose standard terms and conditions include arrangements that postpone the effect of an adjudicator's decision for three months (only where the Main Contractor has to pay). [183] Furthermore, one Main Contractors adjudication rules state that adjudicators' awards are not due "until 14 days after practical completion".[184] *Klein* claimed that a piling contractor working for the Main Contractor in question, on a major project, might have to wait at least five years to receive the award. [185]

The question remains to be asked as to whether stakeholder provisions are contrary to the Act. In *Drake and Scull Engineering Ltd. v McLaughlin and Harvey plc* [186] the court granted an injunction requiring compliance with an adjudicators' decision that a sum of money be paid to a stakeholder pending final resolution of the dispute. However, that case was prior to the introduction of the Act and concerned the set-off provisions under the DOM/1 form of sub-contract where there was an express power for the adjudicator to award payment be made to a stakeholder.

With regard to statutory adjudication, in the Scottish case of *Allied London and Scottish Properties plc v Riverbrae Construction Limited* [187] the court held that an adjudicator had no implied power under the Act or the Scheme to order an award be paid to a third party stakeholder pending final determination.

Furthermore, *Klein* [188] points out that stakeholder clauses breach two section of the Act: section 110 stipulates that every construction contract shall provide a final date for payment in relation to any sum which becomes due. Clearly a payment to a third party stakeholder breaches this clause. Furthermore, section 111(4) of the Act states: -

> "Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than-
> (a) Seven days from the date of the decision, or
> (b) The date which apart from the notice would have been the final date for payment, whichever is later".

In view of this fact it is unlikely that a stakeholder provision would survive a judicial challenge. The payment of adjudicators' awards to stakeholders certainly contravenes the spirit of the Act and effectively prevents a sub-contractor from being paid what is due to him, and may make the possibility of insolvency a reality. Clearly, the Act needs amending to prohibit stakeholder provisions.

3.07 – Avoiding the applicability of the Act

There have been attempts to alter bespoke forms of contracts so that provisions of the Construction Act do not apply at all. For example: -

'Effective dating' of contracts, whereby contracts not signed by 1st May 1998 are deemed to pre-date the Act's coming into effect. Thus, as the Act only applies to contracts entered into after 1st May 1998,[189] Sub-contractors who sign up on these terms and conditions are not covered by the Act. [190] Whilst such a practice clearly only has a short time scale, it is another example of main contractors attempts to avoid the Acts provisions.

Furthermore, some contracts are including a clause by which parties are deemed to agree that, regardless of actual period, the subcontract duration will be construed as less that 45 days. He states "this is an extreme abuse of the Act….the purpose of this clause is to trick the subbie into signing away his entitlement to monthly payments. I have seen this clause on a multi-million sub-contract with a programme in excess of twelve months". [191]

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182 *Anon*. Stamp out the ref bashing. *Building* 18 September 1998. p.5
183 Bingham, T (1999) Naughty contracts. *Building*. 29 October. p.61.
184 *Anon*. Stamp out the ref bashing. *Op. Cit*. p.5
185 Quoted by Barrie, G (1998) Specialists slam amended contracts. *Building*. 18 September. p.10
186 (1992) 60 BLR 102
187 12th July 1999 Outer House, Court of Session (Scotland)
188 Price, J & Klein, R (1999) Clash points. *Building*. 29 January. p.56.
189 Section 104(6)
190 Barrie, G (1999) Contractors sidestep act. *Building*. 16th April. p.11
191 Russell, J(B). *Op. cit.*

It is doubtful whether either of these clauses would be enforceable, and they may be struck out for a number of reasons: -

i) Such clauses may deemed invalid for attempting to contract out of the mandatory provisions of the Act.[192] Indeed, in _Christiani and Neilson v The Lowry Centre Development co. Ltd._[193] HHJ Thornton stated: "the terms [of the Construction Act] are mandatory and cannot be contracted out…..any agreement or understanding of the parties that the Act would not apply would be one that robs one of the parties of its statutory entitlement to adjudication".[194]

ii) The agreement may be voidable and set aside on the basis of economic duress,[195] as in _Carillion Construction v Felix (UK) Limited_.[196] However, economic duress "has always been considered by lawyers as a notoriously difficult allegation to establish" [197] for as *Bennett* [198] observes "the line between illegitimate pressure and the rough and tumble of the normal commercial bargaining is a thin one".

iii) They may not satisfy the 'requirements of reasonableness' pursuant to the Unfair Contract Terms Act 1977, or they may be deemed fraudulent. This is particularly the case when dealing with a main contractor and his domestic sub-contractor, as Schedule 2 of the Act requires the court to take into account the 'strength of the bargaining positions of the parties relative to each other'.

3.08 - Resisting/challenging adjudicators decisions

Whilst adjudication has arguably been a success in settling disputes quickly and economically, there are an increasing number of disgruntled losing parties refusing to pay the amount awarded.[199] *Gainford* [200] notes "there have been several cases…where the recipient of an adverse adjudication decision has sought to stave off a summary judgment by claiming that the decision of the adjudicator was in some may flawed. Most such defences have failed". The main reason for this is the robust approach adopted by the courts in enforcing decisions (even blatantly flawed ones).

Examples of unsuccessful challenges include; that section 108 of the Construction Act was inherently unfair and contrary Article 6 [201] of the European Convention on Human Rights [202]; that contract had been terminated;[203] that the decision was based on material errors or errors of law,[204] that the parties had 'contracted-out' of the provisions of the Act,[205] and that the adjudicator had decided a matter which fell outside the remit of the dispute referred to him.[206]

However, there are currently two main exceptions to this, the first of which is the pending insolvency of the winning party. _In Rainford House Limited v Cadogen Limited_ [207] summary judgment was stayed due to the fact that there was serious doubt about the ability of the claimant to re-pay the monies awarded under an adjudicators decision once the matter had finally been determined. This was due to the fact that the claimant

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192 As in _Karl Construction Limited. v Sweeney Civil Engineering Limited_ Extra Division, Inner House, Court of Session. 22nd January 2002

193 *Supra.*

194 Cited by Russell, V (2000) *Trends and developments*. Notes from Fenwick Elliot Adjudication Update Seminar. 30th October. The Savoy Hotel London.

195 In substance, economic duress amounts to the application of illegitimate pressure by one party on another, which results in the innocent party being forced to enter into a contract they would otherwise not have entered into. Per *Anon. Economic duress*. (Visited 8th September 2002) www.legal500.com/devs/It/uklt_116.htm

196 (2000) BLR 530

197 Per *Anon. Economic duress. Op.cit.*

198 Bennett, A (2001) *Under pressure?* Spring. www.ashursts.com/pubs/pdf/1721.pdf

199 To enforce an award a judgment of the High Court adopting the summary judgment procedure (Part 24 of the Civil Procedure Rules) is required if an award is to be enforced

200 Gainsford, F (2000) Challenging adjudicators' decisions. *Construction Law*. April. p.21

201 Article 6 requires each party to be given a reasonable opportunity to present its case

202 _Elanay Contracts v Vestry_ [2001] BLR 33, TCC; (2000) CILL 1679; _Austin Hall Building v Buckland Securities_ [2001] BLR 272, TCC; (2001) CILL 1734

203 _A&D Maintenance and Construction v Pagehurst Construction Services_ *Supra.*

204 As in _VHE Construction plc v RBSTB Trust Co Ltd_ TCC, 13th January 2000; _Bouygues UK Ltd v Dahl-Jensen UK Ltd_. TCC, 17th November 1999; _C&B Scene Concept Design Limited v Isobars Limited_ TCC, 21st June 2001. The courts' justification for this is that the victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation.

205 _Christiani & Neilson v The Lowry Centre Development Co. Ltd._ *Supra.*

206 _KNS Industrial Services (Birmingham) Limited v Sindall_ TCC, 17th July 2000 and _LPL Electrical Services v Kershaw Mechanical Services Ltd._ TCC, 21st February 2001

207 TCC, 13th February 2001

was in administrative receivership. Thus the court decided summary judgment should be granted, but suspended to allow the defendant to commence an action in respect of a counter-claim.

Furthermore, where a claiming party is in liquidation, the court will not enforce an adjudicators' where there is a prospect of a defence and/or counter-claim being advanced by the defending party. This is established in rule 4.90 of the 1986 Insolvency rules and was confirmed by the Court of Appeal in *Bouygues UK Limited v Dahl-Jensen UK Limited*.[208]

Here we see sub-contractors put in a catch-22 situation: it is likely that they are facing financial difficulties due to the non-payment by the main contractor. There claims obviously have merit as they are the subject of a favourable adjudicators award. However, the financial difficulty, which the main contractor has caused, gives the main contractor an effective means of resisting enforcement.

The second main ground for resisting enforcement is if it can be shown by the opposing party that the adjudicator lacked the necessary jurisdiction to make his decision. *Atkinson* [209] notes "since the adjudicator derives his authority from statute it is not surprising that when faced with an unwanted adjudication, there are challenges to an adjudicator's authority or jurisdiction. Indeed it is now these challenges which are the main vehicle for the development of adjudication law". The reason for this is that courts have recognised that if the adjudicator acts beyond his statutory jurisdiction, there can be no statutory temporary binding effect to the adjudicators' decision.[210]

Jurisdictional challenges may take the form that the adjudicator lacks any jurisdiction at all, for example where the contract pre-dates the implementation of the Act [211] or they may take the form of a procedural challenge, for example that the adjudicator has failed to follow the rules of natural justice.[212]

The courts [213] have laid down the options, which are open to a party who wishes to challenge the jurisdiction of an adjudicator. The party can: -

1. Agree to the adjudicator widening his jurisdiction to include the dispute over jurisdiction; [214]
2. Refer the dispute over jurisdiction to a second adjudicator;
3. Seek a declaration from the courts that the adjudicator lacked jurisdiction from the outset;[215]
4. Reserve its position, participate in the adjudication and then challenge any attempt to enforce the adjudicators' decision when it has been issued.[216]

The increasing number of jurisdictional challenges as a means of resisting enforcement is clearly a cause for concern and is in danger of undermining the adjudication process. Whilst some are clearly valid as adjudicators will undoubtedly make mistakes given the short duration they are given to reach a decision, it is clear that the majority of jurisdictional challenges are failing and are therefore only being undertaken as a means of resisting enforcement.

3.09 - Failure to provide withholding notices

The Act requires that a paying party to a construction contract must issue a payment notice of a sum due. [217] However, *Knowles* [218] points out that that main contractors are largely failing to issue payment notices, and the main reason for this is that there is no sanction. This was confirmed *in VHE Construction plc v RBSPB Trust Company* [219] and *SL Timber Systems v Carillion Construction Limited*.[220]

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208 *Supra.*

209 Atkinson, D (2002) *HGCR Act 1996 – jurisdictional challenges.* (visited 12th August 2002) www.atkinsonlaw.com/CasesArticles/articles/HGCR_Act_1996Jurisdictional_Challenges.htm

210 *Per* Gainsford, F (2000) Challenging adjudicators' decisions. *Construction Law.* April. p.22

211 As in *The Project Consultancy Group v The Trustees of Grays Trust* *Supra.*

212 *Discain v Opecprime* TCC, 9th August 2000; *Woods Hardwick v Chiltern* *Supra.*

213 *Fastrack Contractor's Ltd. v Morrison Construction Ltd. & Impreglio UK* *Supra.* Cited in *Anon* (2001*) Adjudication Review.* www.masons.co.uk/php/page.php3?page_id=draftanal1444 _ (visited 4th May 2002)

214 As in *Whiteways Contractors (Sussex) Limited v Impressa Castelli Construction UK*, TCC, 9th August 2002

215 As in *Palmers v ABB Construction* TCC, 6th August 1999 and in *Universal Music Operations Ltd. v Fairnote Ltd. & Sulzer Infra CBX Ltd.* TCC, 24th August 2000

216 As in *Project Consultancy Group v The Trustees of Grays Trust* *Supra.* and in *John Mowlem v Hydra-Tight* *Supra.*

217 Section 110

218 Knowles, R. *Adjudication – is it a licence to print money?* www.blissuk.com/buildersbible/licence.pdf (Visited 29th June 2002).

219 TCC, 13th January 2000

220 Outer House, Court of Session, 27th June 2001; [2001] CILL 1760

Even where notices are given, the requirement under the Act is that it is given within the 'prescribed period' before the final date on which payment is made. Unfortunately, the parties 'are free to agree' this period [221] and the imbalance of contracting parties is once again open to exploitation. Thus in some amended contracts the right to set-off is exercisable up to the day prior to the final date of payment. [222] *Russell* [223] observes "clearly one days notice of set off, with all its potential impact upon cash flow, is totally inadequate".

Furthermore, the Act [224] also states that a paying party may not withhold payment after the final date for payment of a sum due unless he has given an effective notice specifying the value and the grounds for withholding payment.

However, although the Act requires that a notice must specify the amount to be withheld, this requirement falls some way short of the 'set-off' requirements that were in place in standard industry subcontracts prior to the implementation of the Act. For example, the provisions of DOM 1 required that the amounts of any set-off were to be quantified in detail and with reasonable accuracy. There is no such requirement in the Act. Thus, even where notices are forwarded specifying deductions, they do not have to be as detailed as previously required. [225]

Moreover, there has been considerable debate about the implications of a failure to provide an effective withholding notice: one school of thought is that the amount applied for should be treated as the amount due (whether or not it is reasonable). In <u>*Millers Specialist Joinery Co v Nobles Construction*</u> [226] HHJ Gilliland held that:

> "The effect of section 111 is to prevent the paying party if he does not have appropriate notices from exercising his right to retain and withhold payment of monies which would otherwise be due and payable but for the existence of some right to withhold payment. Section 111 refers to 'withholding' payment generally. It must have been intended to include situations where the paying party was legitimately entitled under the general law and under the terms of the contract to withhold monies which were otherwise payable."

In contrast, the other school of thought believes that a failure to provide a withholding notice does not detract from the requirement to determine the proper amount due under the terms of the contract. [227] This view was supported in the Scottish case of <u>*SL Timber Systems v Carillion Construction Ltd*</u>.[228] where Lord MacFaden stated: -

> "the absence of a notice of intention to withhold payment does not relieve the party making the claim of the ordinary burden of showing that he is entitled under the contract to receive the payment he claims. It remains incumbent on the claimant to demonstrate, if the point is disputed, that the sum claimed is contractually due".

Furthermore, there is at present legal uncertainty as to whether the issue of a withholding notice extends to abatement.[229] In <u>*Woods Hardwick Ltd. v Chiltern Air Conditioning*</u> [230] it was held that abatement would not be caught by section 111 of the Act. In contrast, in <u>*Whiteways Contractors (Sussex) Ltd. v Impressa Castelli Construction (UK) Ltd.*</u> [231] it was held that the Act made no distinction between set-off and abatement and if abatement was sought it must be included within a withholding notice.

The conflicting judicial decisions in this matter are unfortunate: as the payment notices are clearly intended to provide an element of openness and transparency, it is unfortunate if contractors are able to ignore their contractual obligations regarding payment notices, only to dispute the claiming parties' entitlement to payment at a later date.

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221 Although the Scheme states 7 days, the Act does not prescribe a period.
222 Klein, R (1999) Why we still need to get our Act together. *Const. News*. 11th March. p.16
223 Russell, J. (B) *Op cit.*
224 Section 111
225 *Anon* (1998) Balancing act. *Electrical Contractor*. September. p.27.
226 TCC 13th August 2001
227 *Per* Brewer, G (2001) Geoff Brewer of Brewer Consulting considers the statutory payment notice in adjudication. *Contract Journal*. 31st May. p.57.
228 *Supra.*
229 In the construction industry, abatement is most commonly used to refer to the process of reducing a price of value, e.g. when a valuation is reduced to take into account of the fact that some work is not properly executed. *Per* Chappell *et al.* (2001) *Building contract dictionary*. 3rd edition. Blackwell Science.
230 Unreported, TCC, 2nd October 2000; (2001) CILL 1698
231 TCC, 9th August 2000

3.10 – Conclusion

The Construction Act has gone a long way to re-addressing the balance of power between main contractors and their sub-contractors, and overall the Act has had and will continue to have a beneficial impact.

However, for commercial reasons, parties are exploiting loopholes in the Act by using contract terms, which seek to minimise or circumvent the provisions of the Act relating to payment and adjudication. It is for this reason that *Klein* [232] advocates making the Scheme for Construction Contract mandatory in order to prevent the utilisation of clauses which, whilst complying with the provisions of the Act, seek to minimise its effect.

Traditionally, main contractors have utilised 'pay-when-paid' clauses as well as late and/or under payment of subcontractors in order to benefit their cash flow. With the outlawing of conditional payment clauses, pursuant to the Act, main contractors have been forced to devise ways, such as elongated payment provisions, to circumvent the illegality of such clauses.

Furthermore, adjudication has proved effective in providing subcontractors with a rapid and cheap means of settling disputes (this is demonstrated by the fact that sub-contractors are the main users of adjudication). Arguably, a prompt resolution of disputes prevents main contractors from retaining disputed monies for extended periods and therefore has a detrimental effect on their cash flow. Thus, main contractors are utilising more and more ingenious ways to hinder access to adjudication. It is clear that some are not yet ready to forfeit their position of financial superiority.

4.00 - Adjudication Survey Results

In order to highlight the use of statutory adjudication within the UK construction industry it will be necessary to examine the findings of several adjudication surveys, comprising of: -

- A nationwide survey carried out by Masons solicitors of 589 industry participants was conducted during a series of annual construction law conferences. Further information was gathered through a detailed survey of approximately one-hundred adjudications with which Masons had been involved up to the end of September 2000; [233]
- The School of Engineering and the Built Environment at the University of Wolverhampton compiled a study based on a three-stage analysis of which the third stage involved a detailed questionnaire relating to seventy-five different adjudications; [234]
- A survey carried out by Liam Holder of JR Knowles: five hundred questionnaires were distributed to main contractors, subcontractors, engineers and solicitors, of which 159 were returned. Forty-four of the respondents were unable to complete the questionnaire as a result of limited experience of adjudication or ignorance of its existence. The survey results were compiles from the remaining 115 completed questionnaires;[235]
- A survey undertaken by Lee Crowder solicitors: between November 2000 and March 2001 Main Contractors were invited to respond to questionnaires by post or at Lee Crowder construction conferences. The survey is the result of the responses received from forty-eight Main Contractors; [236]
- Four separate reports into adjudication carried out by Glasgow Caledonian University adjudication reporting centre.[237]

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[232] Klein, R (1998) A year to remember. *Building*. 11th December. p.50

[233] Carey, P (2000) *Adjudication is working*. December. (Visited 22nd June 2002) www.masons.co.uk/pdf/adjudication-is-working.pdf. Also cited by Rogers, D (2001) Adjudication: what's the verdict? *Building*. 2 March. pp.48-51 and Stewart, M (2002) *Adjudication: has it been a success?* (visited 4th May 2002) http:www.masons.co.uk/php/page.php3?page_id=adjudicati4129

[234] Cited by Cohen, L. *Article: The Technology and Construction Court – its purpose and future.* http://www.speechlys.com/solutions/displayItem.cfm?id=92 (visited 26th July 2002)

[235] Holder, L (2000) *Statutory adjudication – the success of rough justice*. Chapter 11 in Patterson, F. A & Britton, P (2000) *The Construction Act: time for review*. Centre of Construction Law and Management

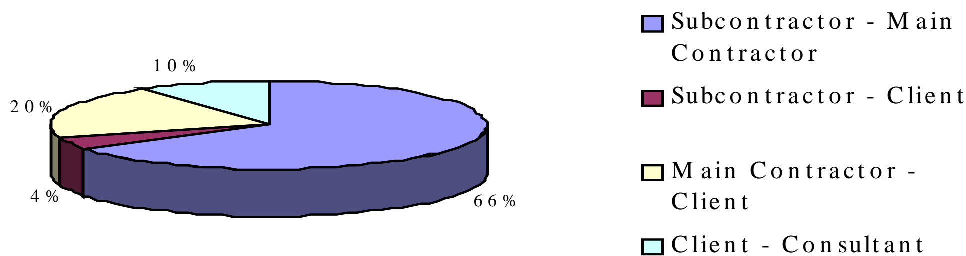
[236] *Anon* (2001) *Adjudication – a main contractor's perspective*. Bulletin published by Lee Crowder Solicitors. Also cited by Brown, J (2001) Not bad, but not perfect. *Building*. 25 May. p.56.

[237] Kennedy, P. & Milligan, J (2000) *Research analysis of the progress of adjudication based on adjudicator nominating bodies (ANB's) returned questionnaires*. Report No. 1. February. Glasgow Caledonian University; (2000) *Research analysis of the progress of adjudication based on questionnaires returned from adjudicator nominating bodies (ANB's) and practising adjudicators*. Report No. 2. August. Glasgow Caledonian University; (2001) *Research analysis of the progress of adjudication based on adjudicator nominating bodies (ANB's) returned questionnaires and an analysis of the cost of the adjudication process*. Report No. 3. March. Glasgow Caledonian University. (2002) *Research analysis of the progress of adjudication based on returned questionnaires from adjudicator nominating bodies (ANB's) and on questionnaires returned by adjudicators*. Report No. 4. June. Glasgow Caledonian University.

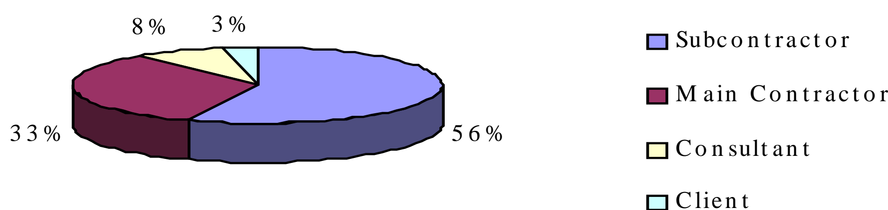
- An adjudication survey carried out by *Building* Magazine and solicitors' CMS Cameron McKenna; [238]
- Results of a survey carried out by Consultants Cyril Sweett as to the use of adjudication;[239]
- Results extracted from the JR Knowles caselog for over 70 adjudications carried out in the first eighteen months after the implementation of the Act.[240]

4.02 - Who is using it?

The University of Wolverhampton's survey [241] found that the parties to adjudication proceedings were as follows:



Similarly the J.R. Knowles caselog [242] noted the referring parties were as follows:



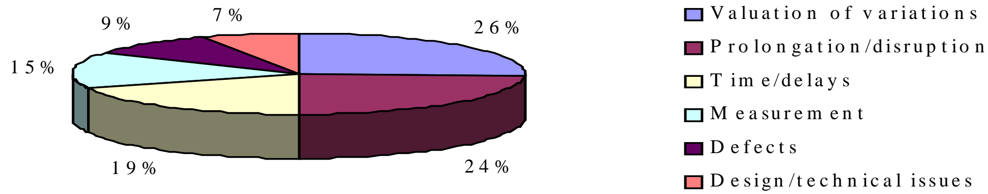
Both of these surveys indicate that sub-contractors are the main users of adjudication. This indicates a willingness on the part of sub-contractors to use adjudication in order to secure their commercial entitlement, despite anecdotal evidence of threats of omission from future tender lists.

Interestingly main contractors are also using the process, either against their client, or alternatively they may be using a tactical approach and commencing adjudication against the sub-contractor by, for instance, asking the adjudicator to decide that the sub-contractor's claim is only worth 10% of the sum claimed.[243]

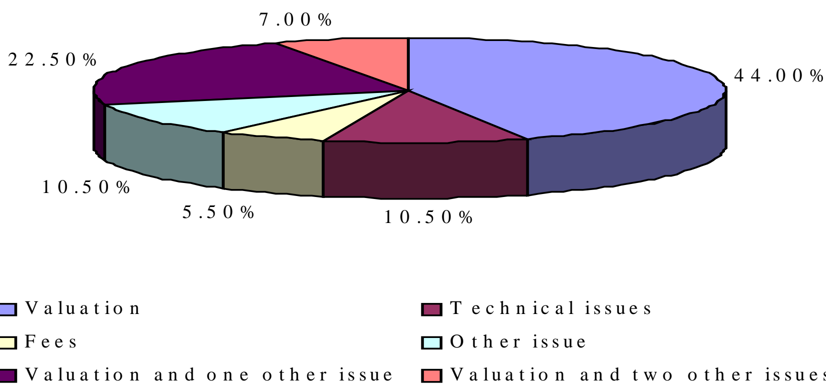
[238] Barrick A (2000) Does the Construction Act really work? Building. 12 May. pp.20-23.
[239] Cited by Hemsley, A (2001) All of a flutter. *Building*. 8 June. p.54
[240] Gracia, P (1999) Adjudication: the facts. *Building*. 8 October. p.68
[241] *Op.cit.*
[242] Gracia, P (1999) *Op. cit.*
[243] Example cited by Guppy, N (2000) *Adjudication two years on*. April. www.laytons.com

4.03 - What is it being used for?

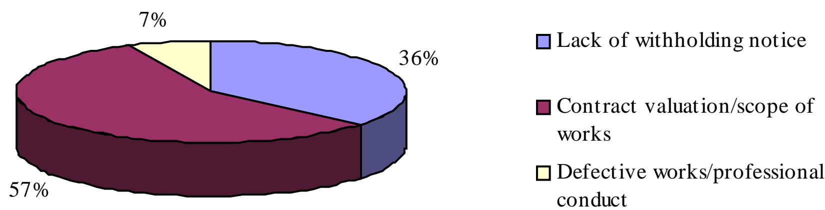
A survey carried out by Consultant, Cyril Sweett [244] noted that adjudication is being used to help resolve disputes concerning the following:



Whereas the University of Wolverhampton's survey [245] noted that the subject matter of the dispute was spread out as follows:

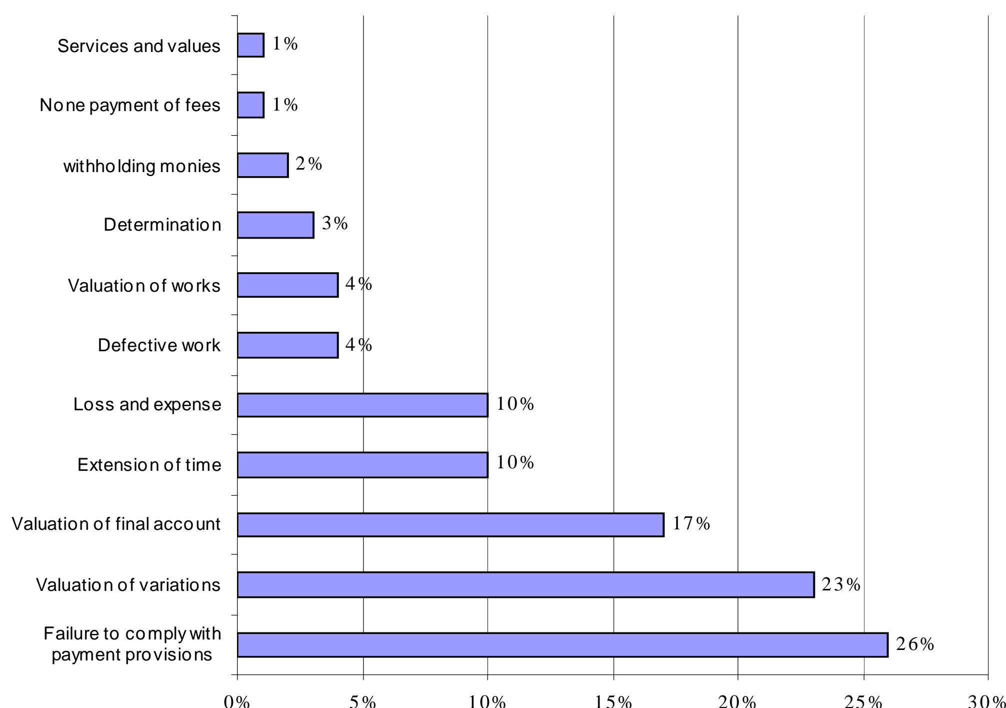


Similarly the JR Knowles caselog [246] noted the main issues disputed were: -



[244] *Op. cit.*
[245] *Op. cit.*
[246] *Op. cit.*

Glasgow Caledonian University's report no. 4 [247] observed that the main subjects of disputes were: -



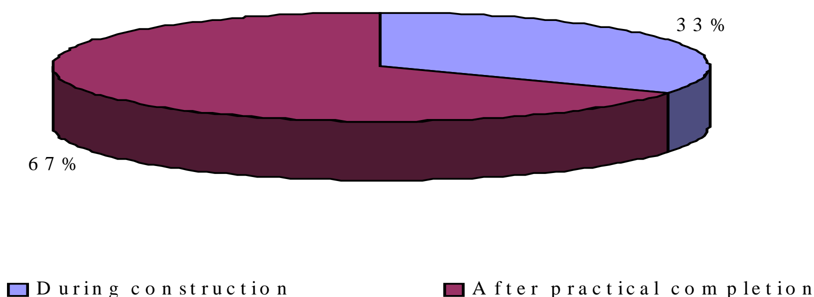
Whilst there are slight statistical variations the main themes throughout are consistent; despite the implementation of the Construction Act, the main source of dispute between main contractors and their sub-contractors relate to payment – or rather lack of it. In this respect the Act has changed little, for as *Barrett* [248] observes: -

> "the practice of main contractors offering subcontractors final settlements which fall short of the total due – 20% seems to be the favourite amount - appears as widespread as ever. Cashflow remains crucial to the financial survival of smaller companies and this fact is exploited to the full".

Consequently, whilst the adjudication provisions of the Act have created a cheaper and effective mechanism for the resolution of disputes (albeit a temporary one), the subject matters in dispute remain largely unchanged.

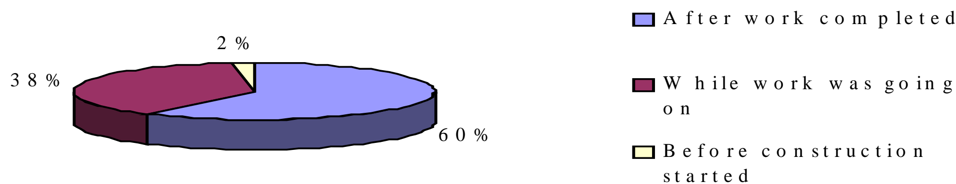
4.04 – When is adjudication initiated?

Glasgow Caledonian University's report no. 4 [249] found that adjudications were initiated at the following stages of the construction process: -



247 *Op. cit.*
248 Barrett, N (2000) No quick fix for industry attitudes. *Construction Law*. July.
249 *Op. cit.*

The survey carried out by Masons solicitors [250] also determined that the stages that adjudications were initiated:

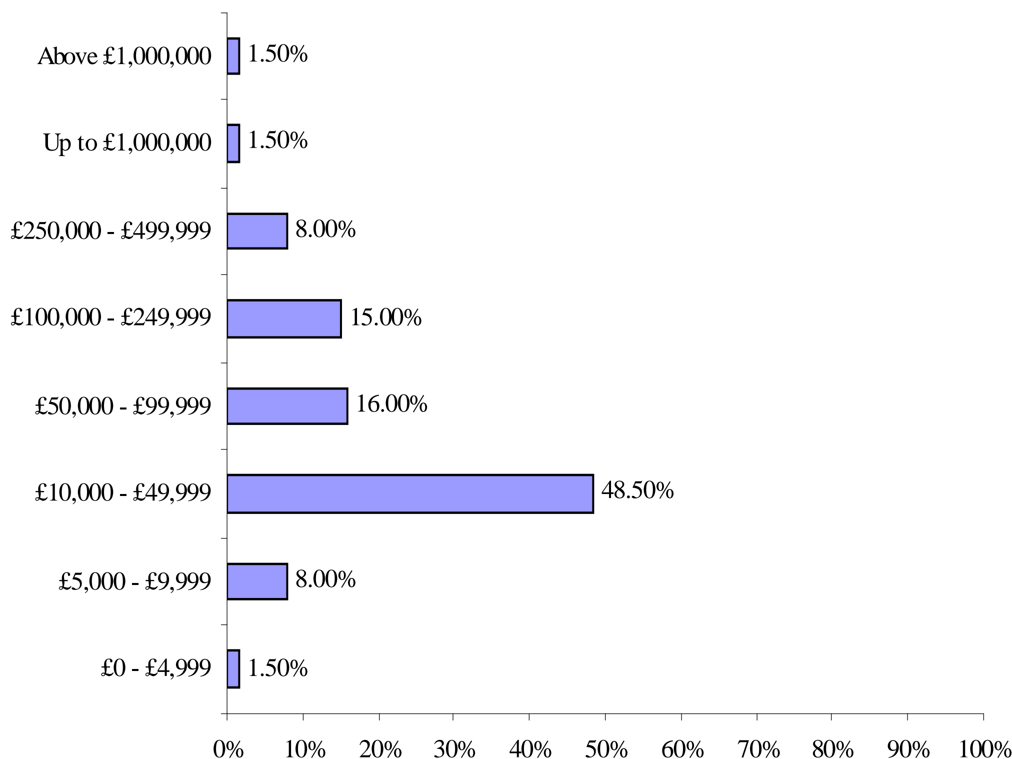


These results tend to comply with the main sources of adjudications (*i.e.* payment and valuation). 'On-account' payment against variations are generally forthcoming throughout the course of construction projects until such time as the applications for payment exceed the original contract value.

Grossman [251] observes of the high percentage of adjudications taking place after practical completion: "this seems to run across one of Latham's objective of providing a dispute resolution mechanism to deal with disputes as they arise so that working relationships do not deteriorate".

4.05 - Value of dispute

The University of Wolverhampton's survey [252] found the amount in dispute ranged from: -

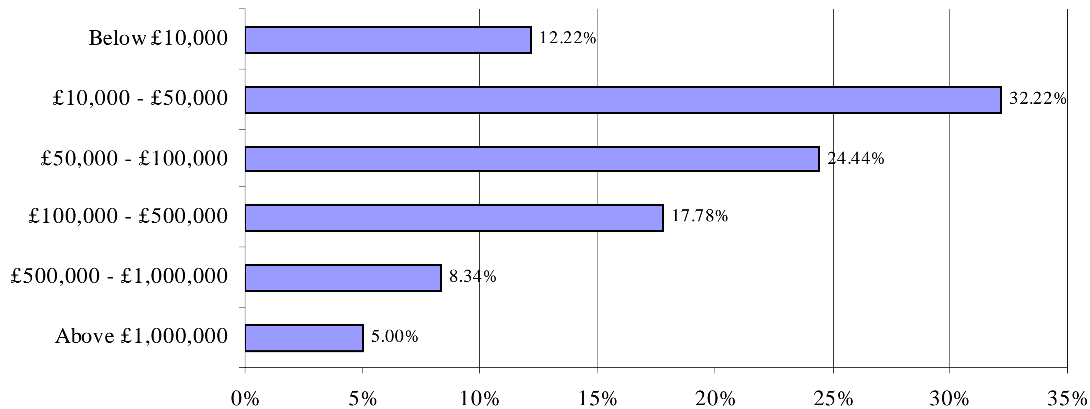


[250] Cited by Rogers, D (2001) Adjudication: what's the verdict? *Building*. 2 March. p. 51

[251] Grossman, A (2002) *Construction disputes after Latham and Egan*. (visited 3rd September 2002) www.cedr.co.uk/index.php?location=/library/articles/construction02.htm

[252] *Op. cit.*

Similarly *Holder* [253] found that the value of disputes ranged from: -

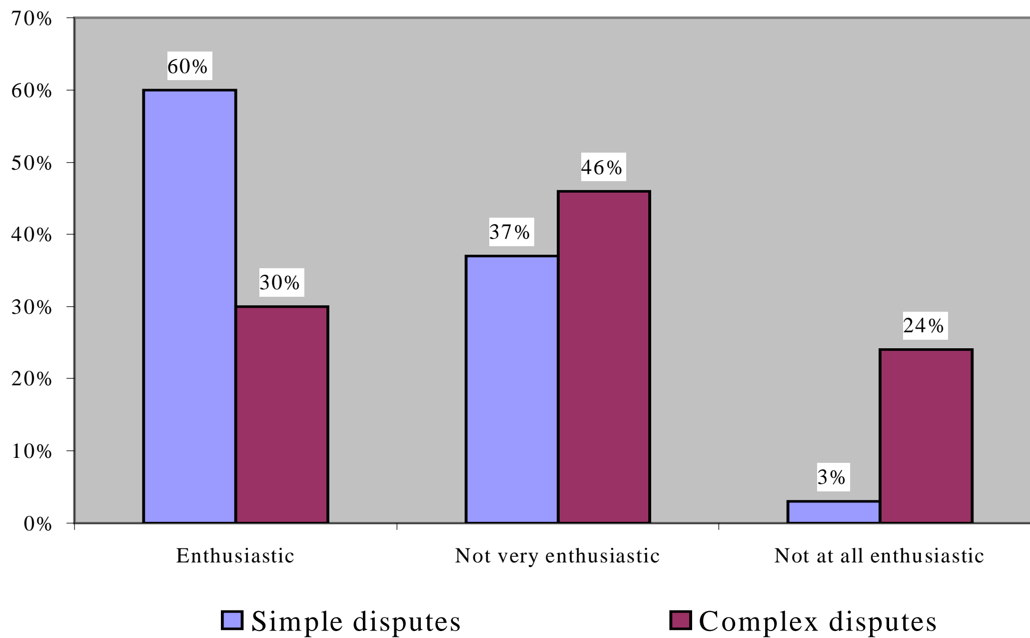


Thus it can be seen that a large percentage of adjudications took place for disputed values under £50,000. It is likely that parties are referring disputed sums to adjudication that they would have previously 'written-off' as a bad debt when faced with the less cost effective alternatives of arbitration or litigation. Indeed, *Cottam*[254] notes "arbitration has always been thought of as expensive, so parties tend to shrug their shoulders and forget it…. But the introduction of adjudication under the Construction Act, which has effectively reduced the value of disputes that are worth referring to a third party for a decision". This clearly comes some way to re-addressing the balance of power between main contractors and their sub-contractors.

Another reason for the high percentage of relatively low value disputes finding their way to adjudication is that, for complex disputes relating to large sums of money, the parties may prefer to proceed directly to arbitration or litigation in order to avoid an interim decision which, due to the sums of money involved, would almost certainly be the subject of subsequent arbitration or litigation proceedings.

The parties may also not be confident of the ability of the adjudicator to correctly decide a complex dispute in the space of twenty-eight days. In a joint survey [255] carried out by Building Magazine and solicitors CMS Cameron McKenna it was observed that the parties questioned were far less enthusiastic about using adjudication for complex disputes: -

[253] *Op. cit.*
[254] Cottam, G (2000) Keeping in the clear. *Construction News*. 20th July. p.17
[255] *Op. cit.*

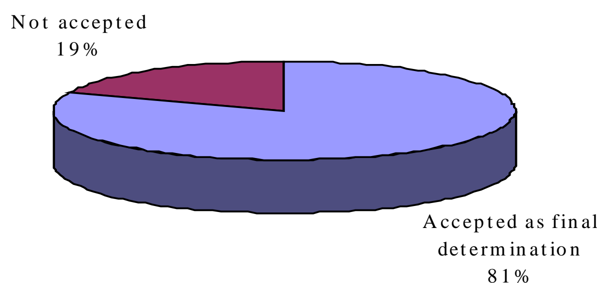


The perception that adjudication may be ill-equipped to deal with complex disputes was also addressed by Judge Lloyd, [256] who observed of the complex set of events spanning several months which made up the dispute in question: "it may well be doubted if adjudication was intended for such a situation".

4.06 – Are adjudicators decisions being challenged?

Carey [257] notes "concerns have been expressed with regard to the finality of any solution to a dispute which is provided for by adjudication. The industry wonders whether it is worth spending hard earned money on a judgment which will only bind temporarily, even if the adjudication process itself is cost effective and quick".

However, such concern appears to be largely without foundation: the Masons Survey found that the majority of adjudicators' decisions were being accepted as the final determination of the dispute: -



Lee Crowders' survey observes a slighter lower (but still very high) acceptance of the adjudicators' decision. They found that the adjudication process disposed of 73%. They note "it may be assumed from this figure that the balance of the disputes were subsequently either resolved by agreement or, alternatively, were or are the subject of ongoing arbitration or litigation proceedings." [258]

[256] Balfour Beatty Construction v London Borough of Lambeth TCC, 12th April 2002
[257] *Op. cit.*
[258] *Op. cit.*

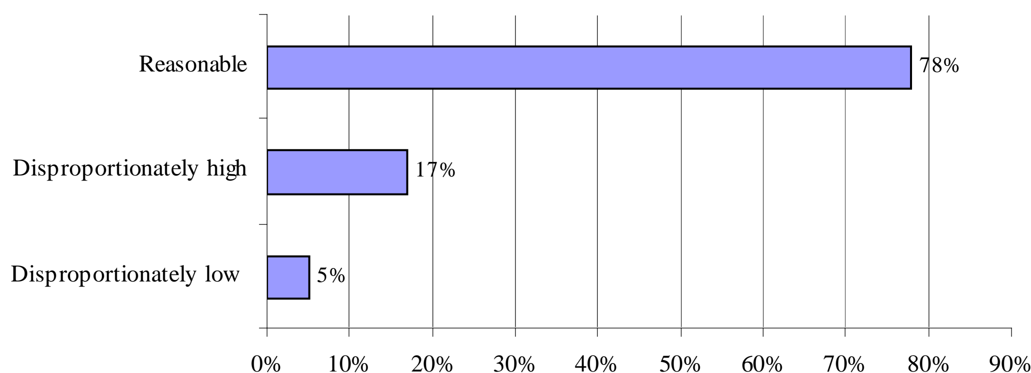
The probable reason for the high percentage of disputes that do not proceed to arbitration or litigation is the value of the disputed amount, for as *Knowles* [259] observes: -

"Many disputes are for sums of less that £10K. It would seem unlikely for the losing party to refer the matter to arbitration or litigation hoping for a more favourable result. Referrals to adjudication for sums in excess of £1m, however, are not uncommon. The losing party with sums of this nature at stake, having paid up, may seek to recover the money by way of litigation or arbitration".

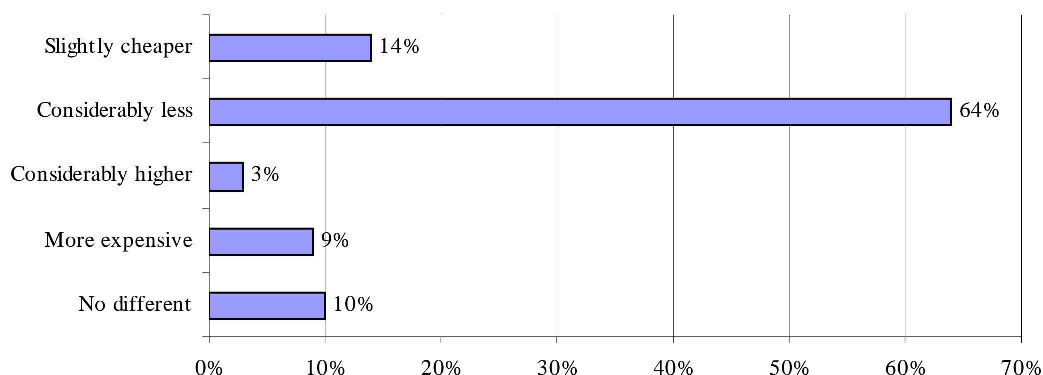
The low percentage of adjudicators' decisions which subsequently find their way to arbitration or litigation is a vital aspect in the re-addressing of the balance of power. If it had proven to be the case that the majority of disputes were being finally settled by arbitration or litigation, the purported benefits of adjudication would have been outweighed by the ultimate costs.

4.07 – Costs of adjudication

The respondents in *Holder's* [260] survey were asked if they believed that the costs of adjudication were reasonable. They responded: -



Holder [261] also asked them how their costs compared with what they would have spent in resolving disputes prior to the Act. The results were: -



The 3% of respondents who believed their costs were considerably higher is surprising and may be due to the fact those previous disputes may have been settled by negotiation.

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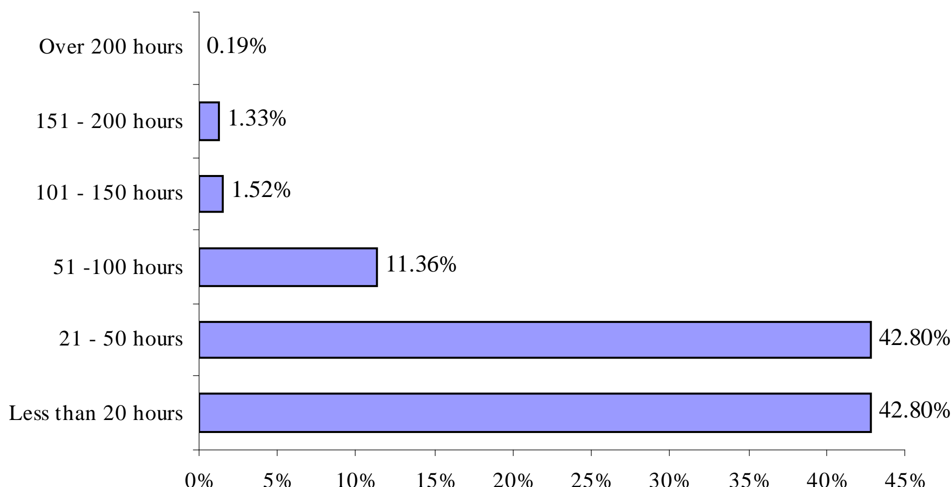
[259] Knowles, R. *Adjudication – is it a licence to print money?* www.blissuk.com/buildersbible/licence.pdf (Visited 29th June 2002).

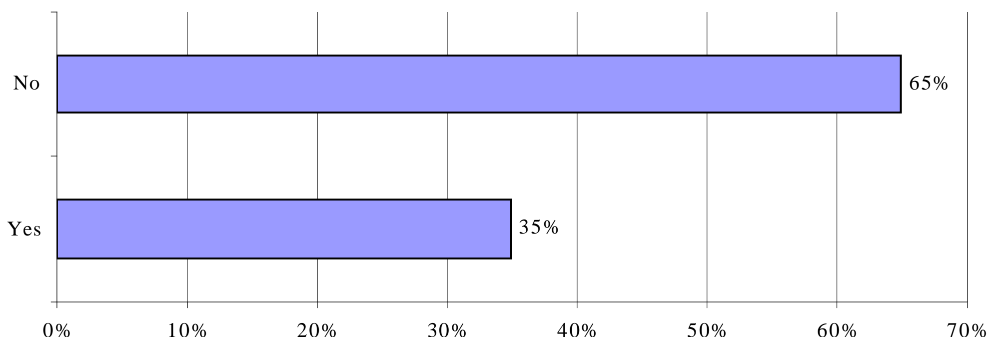
[260] *Op. cit.* p. 119

[261] *Ibid.* p. 120

The reason for the relatively low cost of the adjudication is due to the amount of time the adjudicator spends reaching his decision (bearing in mind the 28-day statutory timetable). The Glasgow Caledonian University's report no. 2 [262] notes the times spent, when expressed as a percentage, are:



Holder [263] also asked his respondents if the 28-day time period had been extended or other procedural changes made after the commencement of the adjudication. The results were: -



Thus we see that the majority of adjudications were not extended, a fact that helps to keep costs low. Indeed, Glasgow University's report no. 3 notes that the average cost of the adjudication process accounts for about 3% of the sums of money in dispute. It points out that "this appears to meet Latham's aim of an 'inexpensive system' of resolving disputes". [264]

Furthermore, when these costs are compared with other forms of dispute resolution, *Francis* [265] notes that adjudication typically costs less than 10% of the cost of litigation or arbitration. It is these costs which have served as a deterrent to sub-contractors seeking to be paid for work done, for as *Fenwick-Elliot* [266] notes of the costs involved in arbitration and litigation: "it is absurdly inefficient for the parties to spend up to 150% of the sum in dispute…particularly when the typical result of arbitration or litigation is not a judgment or award but a settlement forced on the parties by the crippling cost burden".

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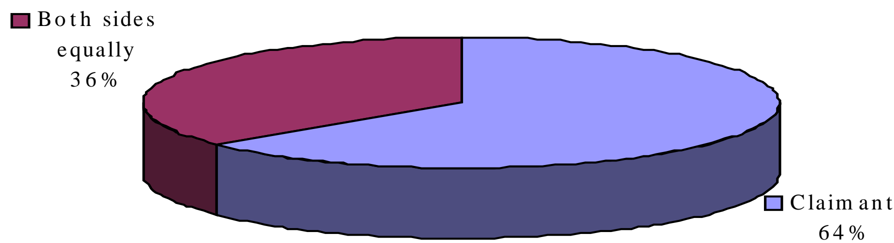
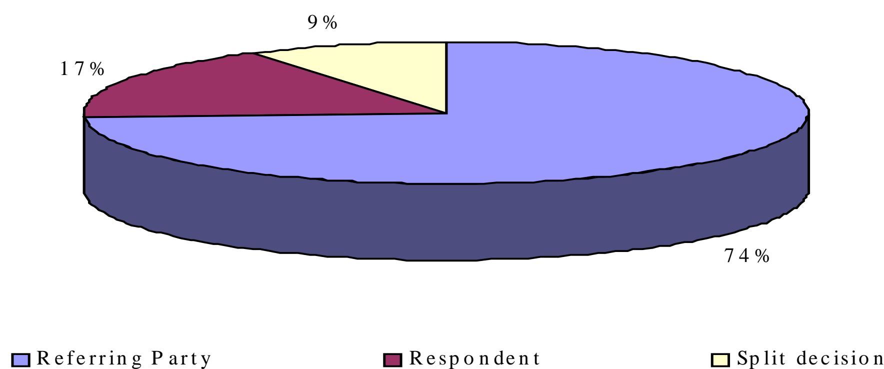
262 *Op. cit.*
263 *Op. cit.* p.121
264 *Op. cit.*
265 Francis, T. *Adjudication: Housing Grants, Construction & Regeneration Act 1996.* http://www.fenwick-elliot.co.uk/public/articles/hger96.htm (Visited 9th July 2002)

4.08 - whom does adjudication favour?

The Building Magazine/CMS Cameron McKenna survey [267] found that the majority of those asked believed that adjudication favours the claimant (whilst not one person believed it favoured the respondent): -



The Glasgow Caledonian University's report no. 4 [268] also found that the referring party had a greater chance of success, with the majority of adjudicators finding in favour of the referring party: -



The University Report notes "it would appear that the one who initiates proceedings is most likely to win. This may seem self-evident as it is he who feels aggrieved and believes he has a case before embarking upon such action. It is also the case however that the claimant has the opportunity to define the boundaries of the dispute to exclude other, perhaps parallel issues, which he may be less likely to win." [269]

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[266] Fenwick-Elliot, R (1999) We can work it out. 15th January. *Building*.www.building.co.uk/story.asp?storyType=15§ioncode=34&storyCode=8877 (Visited 7th September 2002)

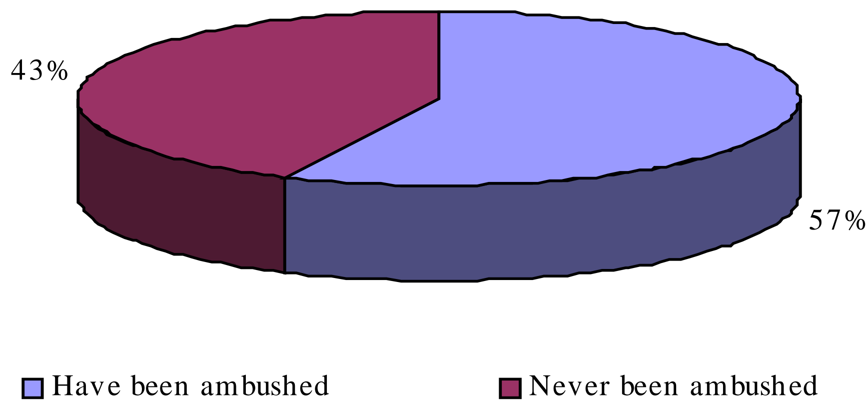
[267] *Op. cit.* p.22.

[268] *Op. cit.*

[269] *Op. cit.*

Notwithstanding, this fact the referring party is more likely to win because he has the freedom to prepare his case at his leisure, whereas the respondent only has a limited time to issue his reply. It is highly unlikely that an adjudicator will simply acquiesce to a referring party's claim.

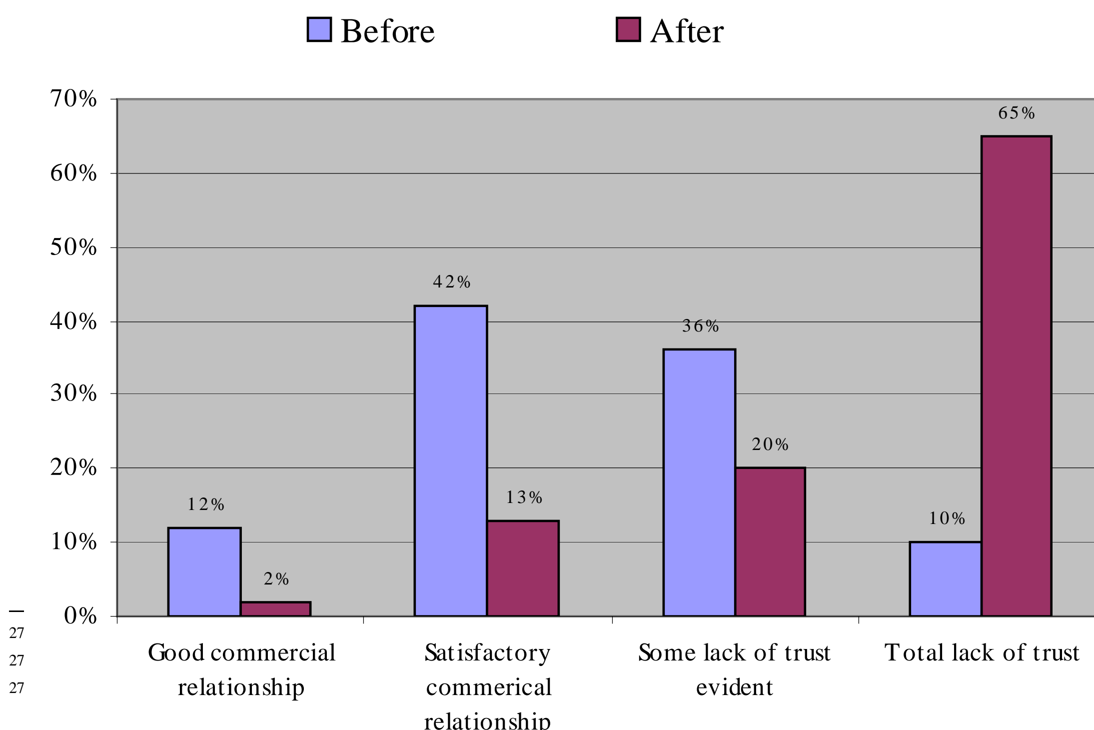
The fact that the referring party has the freedom to prepare his claim at his leisure may lead to a perception among main contractors that they are being 'ambushed'. Indeed in *Holders* [270] survey over half of the respondents stated that they had been ambushed: -



Arguably, however, this is merely a question of perception. Since a matter cannot be referred to adjudication until there is a 'dispute' and therefore the matter will have been the subject of previous discussions; it is highly unlikely that a main contractor would not be aware of, at least, the possibility of the matter being referred to adjudication. For instance, one of the respondents in *Holders* survey elaborated on his answer: "I would say ambush is too strong a word. Good time for preparation, fact finding and well presented referrals sounds much better".[271]

4.09 - Likely Effect of the Proceedings on Relationships:

Of those questioned about the likely effect of the adjudication proceedings on relationships, the University of Wolverhampton's survey [272] found that 65% of respondents believed there was a total lack of trust between the parties after adjudication: -



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Similarly, in the Building Magazine/CMS Cameron McKenna survey,[273] of those asked who believed it had an effect on the project team, 72% believed that adjudication worsens relationships.

One of the perceived advantages of the adjudication process was that its quick and impartial rulings would prevent disputes festering, thereby damaging relationships.[274] In this respect adjudication has succeeded insofar as the process is over in a relatively short period. However, this does not prevent resentment, particularly from a disgruntled losing party who may feel a sense of injustice. Similarly, the lack of trust between the parties may also be exacerbated if the losing party subsequently challenges the decision or resists enforcement. It is perhaps for these reasons that *Hill* [275] observes "adjudication does not appear to have succeeded in preserving goodwill".

That is not to say that adjudication has made matters worse: the rapid resolution of disputes clearly prevents them festering on site. However, prior to the implementation of adjudication under the Act, any resentment, which manifested itself, was probably based on both parties belief that they were in the right and that other party was in the wrong. Now, with a rapid resolution to the dispute available, there is the risk of resentment from the 'losing' who may believe he is the victim of an injustice: he may have 'lost the battle, but the war is still to be won'. *Totterdill* [276] points out that the reason for this is that adversarial attitudes are part and parcel of human nature and often stem from personality clashes: "the so-called adversarial attitudes are not just a construction industry problem. They are a feature of human behaviour and are far more prevalent in other sectors of modern society".

Notwithstanding this fact, adjudication is undeniably a deterrent to contract abuse. The threat of adjudication is undoubtedly bringing a fairer and more even handed attitude in the commercial dealings of contractors. Whilst it was originally believed sub-contractors would be reluctant to commence adjudication for fear of not being included in future tender lists, it is clear that sub-contractors are enforcing their rights, presumably on the grounds that if they cannot get paid on the current contract, they would not want to work on future ones for the same main contractor.

4.10 - Increase in formal dispute resolution?

The Glasgow Caledonian University's report no. 2 [277] indicated a 462% rise in the number of adjudications taking place between the first twelve months of the HGCR Act coming into to force and the first ten months of the following year.

Whilst this is a dramatic increase, *Draper* [278] notes that this was largely due to the industry's initial reluctance to use statutory adjudication primarily due to: -

1. Lack of familiarity with the new procedure;
2. Uncertainty over enforceability of an adjudicator's decision.

Notwithstanding this fact, it appears that with increasing familiarity has come increasing use, and the Lee Crowder survey indicated that two-thirds of the Main Contractors surveyed predicted that the volume of those adjudication's involving them would increase within 12 months.[279]

The increase in the quantities of adjudications taking place can be contrasted with a reduction in the number of cases coming before the London Technology and Construction Court. In 1997 the TCC had 721 cases set down, in 1998 the number had fallen to 615, in 1999 there were 505, and in 2000 the TCC had 488 cases set down (a drop of 32% compared to 1997).[280]

Gaitskell [281] notes one reason for the drop in the number of cases coming before the TCC: "no doubt some of this overall reduction reflects the unwillingness of parties to subject themselves to the tight timetables inherent in the new Civil Procedure Rules introduced by Lord Woolf". This is highlighted by the fact that,

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273 *Op.cit.* p 22.
274 *Anon. Rough justice*. http://www.corbett.co.uk/icr/adjudication.htm (visited 26th June 2002)
275 Hill, C (2001) Adjudication – the 7-year itch. *Construction Notes*. August. Issue 8. Norton Rose Publication.
276 Totterdill, B.W. (1997) *Dispute avoidance*. In Campbell, P (ed.) *Construction disputes – avoidance and resolution*. Whittles Publishing. p. 17.
277 *Op. cit.*
278 Draper, M (2001) Adjudication – how the euphoria started. *Construction Law*. June. pp.14-16.
279 *Op. cit.*
280 Figures supplied by TCC staff and cited by Gaitskell, R (2002) *Natural justice and adjudication*. www.watsonburton.co.uk/seminars/seminar_notes/salsart.doc (Visited 1st September 2002)
281 *Loc. cit.*

since April 1999 when the Civil Procedure Rules took effect, there has been a drop of 37% in the number of cases file on the commercial court in London.[282]

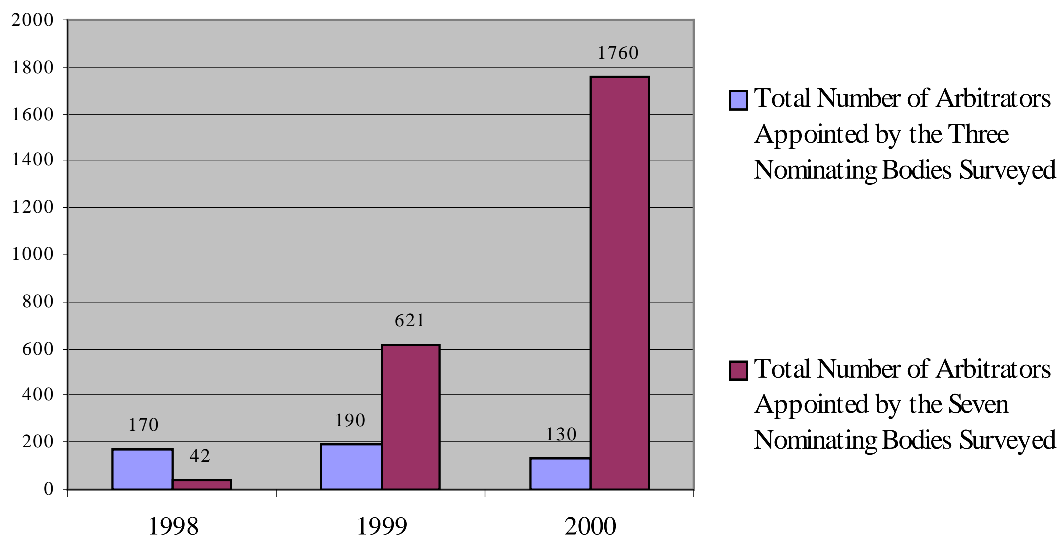
Thus, it is clear that with the advent of adjudication, the court is moving into a more supervisory role, overseeing and reviewing the work of adjudicators, rather than representing a first port of call.[283] Indeed, *Hill* notes "it appears that the Technology and Construction Court's role in now primarily to enforce an adjudicator's decision, or to test a challenge to an adjudicators decision". [284]

In addition, the rise in the number of mediations taking place has affected litigation. There was an increase in commercial mediations from 192 in the year ended March 1999 to 462 in the year ended March 2000. Of these 315 involved commercial contract disputes whilst disputes within the construction industry accounted for 17%, the second biggest total.[285] However, *Mackie* [286] notes that after a recent rapid rise (peaking with the jump of 141% in the year following the introduction of CPR) even mediation has reached a plateau, with virtually no increase in the past two years.

Contracted mediation, pioneered by Resolex Limited, is however, gaining popularity. This is a system of contracted whereby a panel of two mediators are on call throughout the construction project to mediate any disputes. The panel consists of one commercial and one legal mediator appointed at the outset of the project.[287]

In respect of arbitration, *Street* [288] notes "changes introduced under the 1996 [Arbitration] Act have provided procedures to make arbitration less legalistic and more flexible". Indeed section 1 of the Act states that the object of arbitration is "the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense".

Notwithstanding this fact, *Regan* [289] highlights that adjudication is also increasing at arbitration's expense, with the following figures: -



[282] The commercial court is, of course, unaffected by adjudication. Figure cited by Mackie, K (2001) The UK mediation market takes stock. *The Barrister*. No. 10. 1st October. pp.8-10.

[283] *Anon* (1999) *The Fenwick Elliot Summer 1999 Review* (visited 4th July 2002) www.fenwick-elliot.co.uk/public/reviews/1999.htm

[284] (2000) Silence in court. *Building*. 28 May

[285] Figures from CEDR and cited in *Anon* (2000) *The Fenwick Elliot Summer 2000 Review* www.fenwick-elliot.co.uk/public/reviews/2000.htm (visited 4th July 2002)

[286] *Op. cit.*

[287] Green P. & Woodward, S (2000) "We don't have projects on our projects. October. *Construction Law*.

[288] Street, G (1998) Courts strike back. *Building*. 4th December 1998. P.58

[289] Regan, M (2001) Adjudication goes through the roof. *Construction and Engineering Bulletin*. Issue 2. April. www.mayerbrownerowe.com/london/pdf/coneng_bull_apr01.pdf

Hill [290] comments as follows that the reason that arbitration is no longer the UK construction industry's preferred method of dispute resolution: "the advantage of arbitration over proceedings in the courts, for an industry that did not want to wash its dirty linen in public, was its privacy. The advantage has evaporated with the statutory right to adjudication, which offers the same privacy as arbitration but in a fraction of the time and at a fraction of the cost".

However, the quantity of adjudications taking place is clearly in excess of the reductions in other forms of dispute resolution, and a possible reason for this is advocated by *Henchie,* [291] who believes that as many as 80% of the disputes that are proceeding to adjudication would formerly have been resolved by negotiation between the parties.

Minogue [292] concurs, and notes that matters being referred to adjudication are:

> "…disputes that would have been sorted out informally before because there was no commercial alternative to so doing. These are the genuinely disputed entitlements of tens of thousands of pounds rather than hundreds of thousands…..Parties revert to adjudication on these because it is easily available, quick and cheap. This inevitably deters informal settlement. Perhaps this has prevented oppressive behaviour by those higher up the contractual chain, but it has increased the amount of formal dispute resolution in the country".

Thus, whilst it is undoubtedly true that the mere threat of adjudication, may have the intended result of ending a dispute, there is evidence that parties are referring matters to adjudication which previously would not have been previously settled by a formal dispute resolution process.

4.11- Conclusion

Despite minor statistical variations between the surveys undertaken, it is clear that most disputes are still occurring between main contractors and their sub-contractors, with the sub-contractor largely being the referring party.

The majority of disputes are still related to late and underpayment, generally relating to the valuation of variations. The statistics also show the main contractors are ignoring their statutory obligations to provide payment notices, particularly those seeking to withhold payment. As most adjudications are occurring after practical completion appears that the disputes relating to payment and valuation of variations are tied up with the final account valuation. Thus the implementation of adjudication has not tended to change the subject matter of disputes.

Despite the subject matter remaining the same, the value of disputes resulting in a formal dispute resolution has dramatically reduced due to the availability of adjudication, with the majority of disputes being for values under £50,000. This is clearly beneficial in re-addressing the balance of power between main contractors and their sub-contractors.

The increase in the quantity of formal disputes resolutions occurring may also be due to the smaller values in dispute being referred, but the perception that adjudication favours the referring party (backed up by the success rate) may also be a contributory factor.

The fact that adjudication is having a detrimental effect on relationships is not really surprising. By allowing sub-contractors cheap and rapid access to justice, adjudication has effectively prevented (to a certain degree) main contractors withholding monies up to a certain value without fear of recourse. Furthermore, initial beliefs that adjudication would reduce conflict were somewhat naive, given the confrontational nature of the process.

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[290] Hill, C (2000) Arbitration usurped. *Building*. 10 March. p.74

[291] Henchie, N (2001) Out of control. *Building*. 2 February. p.66

[292] Minogue, A (2002) The reckoning. *Building*. 26 April. p.55

5.00 - Conclusion

Given the nature of the UK construction industry, disputes are unavoidable. The interaction of large numbers of parties on complex construction projects will inevitably result in conflict, and it is for this reason that the UK construction industry gained a reputation for being adversarial and inefficient.

Disputes between main contractors and their sub-contractors frequently stemmed from an obvious conflict of interest regarding payment: payments made to sub-contractors reduce a main contractors' cash flow (and therefore his profit). A main contractor therefore benefits financially from making late and/or underpayments to his sub-contractors. Thus sub-contractors were frequently the subject of payment abuses, with unjustified late and/or underpayments being the norm. This resulted in high incidences of sub-contractor insolvency in the industry.

The dispute resolution procedures available in the industry were also not suitable for financially stretched sub-contractors, who were often forced to 'write-off' monies owed when faced with the alternative of protracted and expensive arbitration or litigation. This fact was frequently exploited by main contractors, who would delay proceedings at every step, safe in the knowledge the financially difficulties the sub-contractor was encountering (caused by the main contractors non-payment) would prevent the sub-contractor continuing with the proceedings. The practice of spinning out the settlement of disputed money was widespread, as a potential paying party was generally entitled to avoid payment if it could put up an apparently plausible abatement, set-off, or counter-claim.

The fact that the UK construction industry was singled out for a mandatory method of dispute resolution in the form of adjudication is an indictment of the state of the industry and the abuses that were prevalent

With the introduction of the Housing Grants, Construction and Regeneration Act 1998 it is clear that the rights of sub-contractors have been strengthened. With regard to the payment provisions of the Act, staged payments are now obligatory, conditional payment clauses are prohibited in most cases and withholding money is only possible if the right notices are served at the right time. Clearly the Act intended to prevent the payment abuses frequently perpetuated by main contractors on their domestic sub-contractors.

Furthermore, statutory adjudication has revolutionised dispute resolution procedures in the UK construction industry, and disputes which previously may have taken months, if not years, to resolve are now being concluded within twenty-eight days. Thus adjudication has provided sub-contractors with a quick, cheap and interim method of dealing with disputes (this is demonstrated by the fact that sub-contractors have been shown to be the main users of adjudication).

This is not to say that the Act is perfect, and there are a number of ambiguities in the wording of the Act (particularly relating to the scope of the work it covers). Furthermore, there are several areas where the Act does not take into account the bargaining strength of the parties to a construction contract and, some would say naively, merely specifies the minimum criteria required. This allows the main contractor to reinforce his superior bargaining position, albeit to a lesser degree than previously.

Thus, whilst the Act has clearly restricted the freedom of the parties to negotiate the terms of their contracts, it is arguable that the Act has not gone far enough in providing safeguards against abuse of bargaining power: despite having their 'wings clipped' by the Act, main contractors have become proficient at finding ever more resourceful ways of avoiding its payment and adjudication provisions.

For example, the good intentions of the Acts payment provisions have, in some cases, been thwarted by the insertion of elongated payment provisions, 'pay-when-certified' clauses, extended notice periods for suspension due to non-payment. Additionally, the statutory obligation to forward payment notices has largely been ignored.

Furthermore, as with all non-consensual forms of dispute resolution one party generally believes it is not in their best interests for the matter to proceed. Consequently, main contractors are writing into their standard terms and conditions clauses intended to hinder or prevent a sub-contractors access to adjudication. Terms such as the 're-definition' of a dispute, and the referring party (usually the sub-contractors) will pay all costs, win or lose are clearly intended to deter a party from referring a dispute to adjudication. Whereas mandatory stakeholder provisions tend to reduce the benefit of an adjudicators award.

Main contractors who are the subject of an adverse adjudicator's decision are also refusing to pay the amount awarded. Fortunately the courts have adopted a robust approach to enforcing adjudicators awards with the exception of where it can be shown that the adjudicator lacked jurisdiction, or breached the rules of natural

justice. Not surprisingly, most attempts by main contractors to resist enforcement are now on the grounds that the adjudicator lacked jurisdiction (most are unsuccessful).

The survey results show that sub-contractors are the main users of adjudication and that the traditional causes of disputes *i.e.* late, non, and under-payment, valuation of variations, etc. are still the main causes of disputes. In this respect, whereas the Act has changed both the method of resolving and the size of disputes, the subject matters largely remain unaltered.

It was originally believed that the mere availability of adjudication would deter disputes, however whilst this may be true in certain instances, it is not the case in the majority. This can be demonstrated by the fact that the number of disputes being resolved by formal dispute resolution has increased dramatically. Arguably, this is an indication that the Act has not reduced adversarialism between main contractor and sub-contractor.

Given the relatively low value of the majority of sums in dispute that find their way to adjudication (referred mostly by sub-contractors) indicates that sub-contractors are actively utilising the provisions of the Act. Indeed there is evidence that sub-contractors are actively exploiting the tactical advantages of initiating the adjudication process. Thus sub-contractors are no longer willing to have 'sand kicked in their faces', and in this respect there is a danger that the adjudication provisions of the Act have merely halted "one form of warfare only to replace it with another." [293]

The main purpose of Part II of the Act is to redress the balance between the payer and the payee under a construction contract. In this respect it has been successful and the Act has re-addressed the balance between main contractors and their sub-contractors. The Act has brought about a revolution in the UK construction industry, and the way it deals with payments and the resolution of disputes. Despite anomalies, adjudication has had a positive effect on the industry: disputes are being resolved quickly and relatively cheaply.

Despite the exploitation of loopholes the Act is undoubtedly a deterrent to contractual abuse, its provisions address many of the more onerous clauses that were widespread in the industry prior to its implementation. It is not surprising that some main contractors have sought to maintain their position of commercial superiority by attempting to circumvent the Acts provisions. However, for the most part, the Act has forced the UK construction industry to clean up its act when it comes to payment. With the implementation of statutory adjudication the Act unquestionably re-addresses the balance of power between main contractors and their sub-contractors, as payment abuses by main contractors now result in sub-contractors flexing their newly gained muscles.

The Act is novel and a great experiment, which allowed the industry to assist in making the rules. The Act and Scheme are under constant and regular review. The latest review has not produced significant changes but the next review in two years time will have a second opportunity to ensure it is working well and to ensure the balance.

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[293] *Per Anon* (1999) Protect yourself from the ambush. *Building*. 12 November. p.3

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