Construction Newsletter
Issue No. 17

HOME STRAIGHT FOR THE NEW CONSTRUCTION ACT

Part 8 of the Local Democracy, Economic Development and Construction Act 2009 ("LDEDCA") will finally come into force on 1 October 2011 (in England and Wales) and 1 November 2011 (in Scotland). Part 8 LDEDCA amends Part 2 of the Housing Grants Construction and Regeneration Act 1996 ("HGCRA"). In circumstances where the passage of the LDEDCA was preceded by lengthy periods of consultation, and having received Royal Assent almost two years ago (on 12 November 2009), this has been a long time coming.

This final period of delay has been the result of a further period of consultation relating to amendments required to the Scheme for Construction Contracts (the "Scheme"). The results of Scheme consultations were published in June 2011. Regulations amending the existing Scheme have now been published, and should, with a fair wind, come into force at the same time as Part 8 to the LDEDCA.

WHAT DOES THE NEW REGIME ENTAIL?

There are three main elements to the changes which are introduced by the LDEDCA and the revised Scheme (where applicable):

(A) Removal of the requirement for a construction contract to be in writing;
(B) (Limited) changes to adjudication procedures; and
(C) Substantive changes to terms required to be incorporated in construction contracts in relation to payment.

(A) REMOVAL OF THE REQUIREMENT FOR A CONSTRUCTION CONTRACT TO BE IN WRITING

When the Government came to consult on the HGCRA, the presiding view across the construction industry was that *some* amendment was required to militate the effects of a number of authorities (including RJT Consulting Engineers v DM Engineering (Northern Ireland) Ltd [2002] 1 WLR 2344 and Carillion Construction v Devonport Royal Dockyard [2003] BLR 79(TCC)) where the requirement for a 'construction contract' to be in writing had been construed narrowly.

Section 107 has now been repealed in full by the LDEDCA s139(1); construction contracts need no longer be in writing.

However, changes to s 108 of HGCRA mean that the construction contract (whether written, oral, or part-oral) must incorporate "*provision in writing*" enabling the parties to refer a dispute to adjudication. The requirement that the adjudication agreement be in writing somewhat dilutes the effect of the repeal of s 107 HGCRA.

(B) CHANGES TO ADJUDICATION PROCEDURE

Various changes to procedure have been introduced through the LDEDCA and Part I of the revised Scheme.

1. Adjudication timetables

It is well known that adjudication is a speedy dispute resolution process where decision making is required within 28 (or 42) days (unless agreed otherwise by the parties). One minor problem with the HGCRA, in its original form, however arose from the fact that neither the HGCRA nor the Scheme made it clear whether the 28 day period ran from the date on which the Referral Notice was sent to an adjudicator or the date on which it is received. Inconsistent judicial decisions have caused confusion[1].

Whilst the LDEDCA is silent on the topic, paragraph 7(3) of the revised Scheme now requires an adjudicator to notify the parties of the date upon which the Referral Notice is received and paragraph 19(1) now makes it clear that periods are to be calculated from the date that the referral notice is received.

2. Correction of clerical and typographical errors

An adjudicator's power to correct an accidental error in his decision (provided it is corrected within a reasonable time of making his decision) has been well established through a body of case law[2]. In Bloor Construction v Bowmer (2000) BLR 764 the court's formulation for this power was under an implied term entitling an adjudicator, on his own initiative or on the application of any party, to correct an obvious mistake arising from an accidental error or omission (and, indeed, depending on the circumstances, it was held that the term might extend to clarifying an ambiguity).

HGCRA, s108(3A) (as amended by the LDEDCA, s140) now requires a contract to include a written slip rule provision *"permitting the adjudicator to correct clerical or typographical errors arising by accident or omission"* (absent which the revised Scheme applies). This provision is akin – but not identical - to CPR r.40.12 which enables the court to *"correct an accidental slip or omission in a judgment or order"* and is broadly consistent with the decision in Bloor Construction (although the formulation in that case was broader than the language used in s.108(3A)).

There has been concern expressed that s 108(3A) has the potential to cause confusion because it does not set a time limit within which an adjudicator's corrected decision needs to be re-issued (and the effect that any delay might have on the enforcement of a decision if it pushes outside the 28 or 42 day limit). So far as contracts where the revised Scheme applies, these concerns are now answered:

- Paragraph 22A(1) repeats the essence of s 108(3A) and makes it clear that an adjudicator may correct his decision so as to remove a clerical or typographical error arising by accident or omission whether *"on his own initiative or on the application of a party"*;

- Paragraph 22A(2) requires any correction of a decision to be made *"within five days of the delivery of the decision to the party"* with delivery of a copy of the decision to be effected *"as soon as possible"* thereafter (paragraph 22A(3)); and

- Paragraph 22A(4) makes it clear that any correction forms part of the decision (effectively backdating the amendment so that it falls within the timescales required for a statutory adjudication).

It should also be noted that the suggestion (made during the consultation on the Scheme) that a 'slip' period should be introduced as a matter of course (such that parties were not required to comply with an adjudicator's decision until any slip had been corrected) was rejected; this amendment would have the practical effect of forcing a decision outside the 28 or 42 jurisdictional cap.

3. Peremptory compliance

Paragraphs 23(1) of Part I to the existing Scheme for Construction Contracts afforded power to an adjudicator to require the parties to comply with a decision peremptorily. An ancillary provision included at paragraph 24 of Part I also enabled the court to enforce the exercise of this power (akin to the enforcement powers provided by s 42 of the Arbitration Act 1996). These provisions have now been removed in their entirety and an adjudicator no longer has power to order that his decision be complied with 'peremptorily'. It

[1] Contrast, for instance, the decision in Aveat Heating v Jerram Falkus Construction 113 ConLR 13 (where the date of receipt of the notice by the adjudicator was used) with the decision (from Scotland) in Ritchie Brothers v David Philip [2003] ScotCS 103 (where the relevant date was the date the Referral Notice was sent).

[2] See, for instance, Buildability Ltd v O'Donnell Developments Ltd 128 ConLR 141, CIB Properties v Birse Construction [2004] All ER (D) 256 (Oct), YCMS Ltd v Grabiner [2009] All ER (D) 19 (Apr) and Redwing Construction Ltd v Wishart [2010] All ER (D) 305 (Dec).

is doubtful whether this amendment is unlikely to have any practical effect as the provisions appear to have been used only rarely, if ever.

4. Costs in adjudication proceedings

As originally enacted, Part II of the HGCRA was silent on adjudication costs. This silence proved to be problematic for some smaller sub contractors, as was seen in Bridgeway Construction v Tolent Construction (2000) CILL 1662, whereby a term which provided that all adjudication costs and expenses would be borne by the party referring a dispute to adjudication, irrespective of the ultimate outcome of the adjudication, was imposed (and subsequently upheld by the TCC) on a sub contractor. Such clauses came to become known as Tolent clauses and have been criticised as fettering a party's right to adjudicate.

To an extent, even absent the LDEDCA, the court has begun to address the problem caused by Tolent clauses. In Yuanda (UK) Co Ltd v WW Gear Construction Ltd [2010] EWHC 720 (TCC) (covered in Issue No. 12 of this Newsletter) the court considered a clause which required Yuanda to bear both parties' legal and expert costs if it referred a dispute to adjudication (but where there was no equivalent clause imposed upon WW Gear). The TCC held that this was an onerous Tolent clause which was inconsistent with the HGCRA s108 because (i) it would rarely be worth Yuanda referring a dispute to adjudication; and (ii) WW Gear would have no incentive to keep its costs within reasonable bounds. The court did not, however, express a view on whether Tolent clauses generally were unfair or undesirable and noted that this would be a matter for Parliament. The knowledge that Part 8 of the LDEDCA would, when in force, address this issue may have had some influence.

Section 108A of the HGCRA (as now amended) prohibits agreements as to adjudication costs. This prohibition is subject to two very narrow exceptions:

(a) Parties can agree a term which confers power on the adjudicator to allocate his *fees and expenses* as between the parties, provided the term is set out in writing and is contained in the construction contract; and

(b) Parties can agree terms which concern the allocation of the adjudicator's fees and expenses or the parties' costs relating to the adjudication provided that (i) the agreement is in writing; and (ii) is agreed after the notice of intention to refer the dispute has been given.

Care now needs to be exercised in the drafting of construction contracts to ensure that the language which is employed is sufficiently clear not to fall foul of the prohibition in s 108A(2). There is a distinction between allocation of an adjudicator's fees and expenses and other costs incurred by parties in relation to an adjudication – and the latter are only permitted if allocation is agreed after a notice of intention to refer has been given. Further explanation of the government's intention in relation to s 108A is provided in its response to the Scheme Consultation[3] which makes it clear that the exceptions which have been carved out from the general prohibition should not be circumvented.

Only ancillary amendments have been made to paragraphs 9(4)[4], 11(1)[5] and 25[6] of the Scheme for Construction Contracts (which apply if the parties have agreed a written term conferring power on the adjudicator to allocate his fees and expenses). On each occasion when an adjudicator might have cause to make an order regarding payment of his fees and expenses the revised Scheme expressly provides:

> *"Subject to any contractual provision pursuant to section 108A(2) of the Act, the Adjudicator may determine how the payment is to be apportioned and the parties are jointly and severally liable for any sum which remains outstanding following the making of such determination."*

Preservation of the status quo

On the back of the Scheme Consultation, the government has also taken the opportunity to reject a number of changes which had been mooted in relation to Part I of the Scheme for Construction Contracts. In particular:

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[3] http://www.bis.gov.uk/assets/biscore/business-sectors/docs/s/11-1013-scheme-for-construction-contracts-consultation-responses.pdf

[4] Payment of an adjudicator's fees following resignation.

[5] Payment of an adjudicator's fees following revocation of his appointment.

[6] An adjudicator's entitlement to payment of fees and expenses.

- The suggestion that the period for service of a referral notice (after notice of intention to refer has been given) should be extended from 7 to 10 days has been rejected.

- Confidentiality provisions are not to be extended; it is only where a party has indicated that information or documentation supplied is to be treated as confidential that any confidentiality provisions bite (paragraph 18 to Part I of the Scheme).

- Adjudicators continue to lack the power to adjudicate other disputes which are related to the dispute which has been referred; absent the consent of both parties to adjudication there is no power to require joinder of proceedings.

- Paragraph 20(a) of Part I to the Scheme will not be amended. Thus, an Adjudicator is not to be afforded the power to open up a decision or certificate if the underlying contract provides that it is final and conclusive.

- Notwithstanding fairly widespread support, Adjudicators continue to lack any general discretion to award interest.

- By paragraph 22 of the existing Scheme the parties can request that reasons for a decision are given; this provision remains. Calls for an express requirement for an adjudicator to give reasons (absent a request) have been rejected as superfluous.

- The suggestion that parties need not comply with an adjudicator's decision for a period of 8 days has been rejected in favour of requiring compliance when a decision has been delivered (paragraph 21).

(C) SUBSTANTIVE CHANGES TO IMPLIED TERMS – PAYMENT PROVISIONS

The most likely reason why a party may wish to argue (or strenuously deny) that the underlying contract giving rise to an entitlement to adjudicate was entered into on or after 1 October 2011 lies in the significant amendments which have now been imposed by ss 142-145 of the LDEDCA, together with ancillary amendments made to Part II of the Scheme. The amendments relate to payment provisions under a construction contract; they fall into four categories:

1) Adequate mechanisms for determining when payments become due;

2) Payment notices;

3) Payment of notified sums and withholding notices; and

4) Suspension of performance for non payment.

1) Adequate mechanism for determining when payments fall due

It is well known that the HGCRA (at s 110(1)) requires that every construction contract includes an ‘adequate mechanism’ for determining when and what payments become due under the contract. The LDEDCA, s142 now supplements this basic requirement, specifying two instances where provisions will be deemed to fall short:

- where the date on which payment becomes due is determined solely by reference to when a payment notice is provided to the party to whom payment is due (s110(1D)); and

- where payment is said to be conditional upon performance of obligations (or the decision of any person regarding whether obligations have been performed) under another contract (s 110(1A))

The provision set out in s 110(1D) is straightforward and is not expanded upon within s 110 or secondary legislation.

Section 110(1A) requires further explanation, however, not least because at first blush it might be thought to amount to no more than a reiteration of what is already stated in s 113 of the HGCRA, namely that 'pay when paid' clauses are (for the most part) ineffective. This is not, however, what s 110(1A) seeks to attack, as is made clear by s 110(1B), which explains that obligations to make payments are excluded from the

obligations referred to in ss110(1A)(a) and (b); it is, in fact, payment conditions predicated on the performance of substantive obligations under a separate contract which are outlawed.

The concerns of financiers and main contractors have not, however, gone unnoticed by the drafters of the LDEDCA, and the ambit of this provision is limited by the following:

- s 110(1C) of the LDEDCA, which provides that where a construction contract is an agreement between two parties to the effect that a third party is to carry out construction operations, it will be permissible for the parties to agree that payments are conditional upon the third party carrying out those obligations.

- The Construction Contracts (England) Exclusion Order 2011 and the Construction Contracts (Wales) Exclusion Order 2011, SI 2011/1713 which provide (in identical form) that s 110(1A) does not apply where a party to a PFI contract (as defined in paragraph 4 of the Construction Contracts (England and Wales) Exclusion Order 1998) has sub contracted some or all of its obligations to a third party.

No substantive changes have been made to the Scheme to reflect these amendments.

2) Payment notices

For contracts entered into prior to 1 October 2011, the HGCRA s110(2) stipulates – in short form - that every construction contract shall provide for a payer under a contract to give notice of the amount which it has / intends to pay and the basis upon which that amount has been calculated, absent which the provisions of the Scheme apply. Absent the parties having negotiated terms, there is no provision within the HGCRA, as originally drafted, which gives the party to whom money is owed from taking the initiative by issuing payment notices.

This basic requirement is amended by s 143 of the LDEDCA, which introduces two new sections into the HGCRA - ss110A and 110B. These provisions:

- require every construction contract to include a provision requiring either a payer (or architect / contract administrator, for example) or a payee to issue a payment notice no later than 5 days after the payment fell due; and

- introduce a statutory entitlement for the party to whom payment is to be made to issue a payment notice in the event that the payer fails to do so (where required to under the contract).

For contracts entered into after 1 October 2011, therefore, the statutory framework is as follows:

- Section 110A(1) records the nature of the provisions which are required to be incorporated into a construction contract regarding payment notices.

    - Where the construction contract does not comply with subsection (1), s 110A provides that the Scheme will apply. Paragraph 9 of Part II to the existing Scheme has been replaced in its entirety by new paragraph 9 (per paragraph 4(3) of the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011) and provides, by default, for payment notices to be issued by the payer, not later than 5 days after the payment due date including the basis on which the sum has been calculated.

    - Sub-section 110A(2) sets out the information to be included in a payer's notice; conversely sub-section 110A(3) stipulates what is to be included by a payee.[7] These provisions are important because the amount included in the notice becomes the 'notified sum' (which forms the bedrock for the obligation to make payment under new s 111(1)).

- Section 110B makes new ground and applies where the contract requires a payer (or architect / contract administrator for example) to issue a payment notice but no notice has been provided. In this situation, per s 110B(2) the payee may issue a payment notice once the time during which the payer should have issued a payment notice has expired. The following should be noted :

[7] The sum included in a payment notice may be zero (per s 110A(4)).

- This provision does not entitle a payee to a second bite of the cherry. If the contract already permits the payee to issue a payment notice (and it has done so) no further entitlement arises under s 110B(2) (per s 110B(4)).

- The contents of the notice should comply with the requirements set out in sub-s 110A(3).

- Where a notice is issued by a payee because the payer has failed to issue a notice, the final date for payment by the payer is postponed by the same number days as the period between the date on which the notice should have been given by the payer and the date on which it was actually given by the payee.[8]

- The statutory entitlement provided to a payee is not replicated in the Scheme. If a contract does not contain provisions which comply with s 110A(1) paragraph 9 of the revised Scheme applies by default (and the requirement that the payer issues a payment notice becomes an implied term). The statutory entitlement under s 110B(2) arises thereafter if the payer fails to act as obliged.

3) Payment of Notified Sums and Withholding Notices

Section 111 of the HGCRA contains provisions relating to the use by paying parties of 'withholding notices'. These provisions continue to apply to contracts entered into between 1 May 1998 and 30 September 2011.

For contracts entered into on or after 1 October 2011, the withholding notice provisions are to be changed and s 144 of the LDEDCA replaces the old s 111 with a new s 111. The emphasis of this new section is on the obligation to make payment (rather than the means by which payment might be avoided) as reflected in the title of the section (namely 'requirement to pay notified sum') and s 111(1) which emphasises that *"…where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment".*[9] The requirement to pay 'the notified sum' rather than the 'sum due' is a change from the present position.

The primary obligation to make payment is, however, made subject to two separate provisions:

- s 111(3) : where a payer has given notice of its intention to pay less;

- s 111(10) : in certain circumstances where a payee becomes insolvent.

Withholding Notices

If a payer or a specified person wishes to give notice of an intention to pay less than the notified sum it may do so (per new s.111(3)). So far as this notice is concerned it is required to:

- specify the sum that the payer considers due (new s 111(4)(a));

- specify the basis on which that sum is calculated (even if sum to be specified is zero) (new s111(4)(b));

If a party intends to pay less than the full notified sum (because of set-offs or abatements) this must now be set that out in the payment notice.

A withholding notice must be provided no later than the 'prescribed period' before the final date for payment. The prescribed period is either (i) the period agreed in the contract; or (ii) if the contract fails to specify a prescribed period, the revised Scheme provides (see new paragraph 10) that the notice shall be given not later than 7 days before the final date for payment.

Sub-sections 111(8) and (9) also set out the effects of an adjudicator's decision regarding payment where a dispute has been referred to an adjudicator for determination.

[8] Paragraph 334 of the notes to the LDEDCA 2009 provide a helpful explanation in this regard.
[9] The 'notified sum' referred to in s 111(1) is the amount indicated in the payment notices (as defined in s110A).

Insolvency

If the contract provides that the payer need not pay if the payee has become insolvent[10], then the payer need not pay if the payee becomes insolvent after the time for a withholding notice has passed. This provision incorporates the effect of Melville Dundas v George Wimpey UK [2007] 3 All ER 889 but ensures that it is confined to insolvency situations.

4) Suspension of performance for non payment

Section 112 of the HGCRA permits the suspension of work by a contractor in the event of non payment by the other party to the contract. The LDEDCA s145 introduces two material additions to this provision:

(a) to make clear that a contractor may choose to suspend work only in relation to a particular part of the works; and

(b) to provide that the party in default is liable to pay a reasonable amount by way of the costs and expenses he incurs by stopping work (e.g. redeployment or remobilisation costs).

No substantive changes have been made to the Scheme to reflect these amendments.

WILL THE AMENDMENTS HAVE RETROSPECTIVE EFFECT?

The LDEDCA, s149 makes it clear that the amendments to the HGCRA will not have retrospective effect (see sub-sections 149(3) & (4)); part 8 of the LDEDCA does not apply to contracts entered into before the day upon which it is brought into force. Whether the original or revised adjudication regime applies is therefore determined by the date upon which the relevant construction contract (giving rise to the entitlement to adjudicate) was *"entered into"* – i.e. it applies only to contracts entered into on or after 1 October 2011. Similar (but not identical) phraseology is used in the regulations which revise the Scheme. It follows from this that for some years to come **two systems** for adjudication will co-exist.

DEALING WITH PRACTICALITIES …

It would be foolish to attempt to make any concrete predictions regarding the way in which case law might develop after 1 October 2011, save to say that a number of fertile battle grounds are sure to emerge as a result of the repeal of section 107. Before battle lines are drawn, however, there are some obvious areas which parties (and their legal advisers) would be well advised to spend a moment considering:

1) Contractual negotiations

In circumstances where the entitlement to adjudicate under an oral contract hinges, essentially, on the date that the contract was 'entered into' it will only be a matter of time before the TCC will be requested to assess how the date a contract is 'entered into' should be determined. To a limited extent the courts considered ancillary aspects of this issue when the HGCRA 1996 first came into force (in relation to variations[11] and novation[12]) but the question has assumed a greater significance in light of the changes introduced in relation to written contracts, costs in adjudication and substantive rights for parties to whom payment is owed.

In many other industries determination of the date when a contract was entered into might not pose such difficulties with a traditional exchange of offer and acceptance being more commonplace before goods are supplied or services rendered. In the field of construction, however, it will be fertile ground for argument with few construction projects proceeding only once key contract terms have been agreed. Letters of intent are still commonplace and contracts are frequently executed months, if not years, after work has commenced (and sometimes after disputes have already emerged). It is currently unclear how the courts may interpret these provisions and the scope for different outcomes – and jurisdictional challenges - can be easily seen.

In the immediate term, it is likely that some parties (many of whom may already be carrying out work without terms having been agreed) may find themselves caught by the LDEDCA. Consider, for instance, a project where work has commenced but negotiations to conclude a written contract are already in train; it is quite conceivable that steps might be taken by those parties after 1 October 2011 which move things from a

[10] The definition of 'Insolvent' remains that set out in s 113(2) to (5) of the HGCRA.

[11] See HHJ Seymour QC's decision in Earls Terrace Properties Ltd v Waterloo Investments Ltd (2002) CILL 1889.
[12] Yarm Road v Costain (2001) Case No: TCC-HT 01 228.

situation where the contractor is carrying out work at its own risk to a situation where a court, looking at matters objectively, would assess a contract as having been entered into. Conversely, a savvy contractor may seek to drag out negotiations during September 2011 (particularly where a counter party is seeking to formulate adverse adjudication cost clauses) so as to ensure that reliance can be placed on the provisions of the LDEDCA.

With the introduction of oral contracts into the mix it is likely that all practitioners will deal with contracts where the Scheme automatically applies with far greater regularity. Parties may also wish to ensure (if they have not already done so) that their standard offer letters are amended to ensure full cognisance of the new requirements of s 108 (as amended by s139 of the LDEDCA)[13] if automatic application of the revised Scheme is to be avoided.

Those advising on non-contentious matters which are in negotiation stages may well wish to spend a few hours during September reviewing (with their clients) the stage reached and the desired outcome for negotiations and taking action where necessary.

2) Conduct of an adjudication

The scope for disagreement between parties in relation to the underlying contracts under which a dispute has emerged is far greater with the introduction of oral contracts. Adjudicators are likely to need to consider whether any contract has been concluded, the date that a contract was entered into, the relevant parties to a contract and the terms of construction contracts on a regular basis. This will have knock-on effects to the way in which an adjudication should be conducted:

- It will be incumbent upon parties referring a dispute to adjudication to ensure that the factual basis to the existence of an oral contract is properly set out in a referral notice;

- A referring party will probably need to include witness statement evidence more frequently under the revised procedures (not least to support its case on the existence of an oral contract, the identity of the parties to that contract and the relevant terms of that contract); and

- Adjudicators will need to ensure that sufficient opportunity is afforded to the parties to test factual evidence (such that adjudication hearings are likely to be necessary in some cases and witnesses are likely to be tested more on the evidence given).

Care will also be required (most commonly on the part of the responding party) to ensure that any entitlement to make a jurisdictional challenge to enforcement is not waived.

3) Jurisdictional Challenges and Practical Issues for the TCC

Over the last decade the TCC has presided over a number of challenges to enforcement and an enormous body of case law has developed. In recent years the embers had died down; the amendments introduced by the LDEDCA are sure to stoke the fire.

The most likely areas for fresh waves of jurisdictional challenges are:

- **No contract:** In 2003 the Court of Appeal considered the case of Pegram Shopfitters v Tally Weijl (UK) Ltd 91 ConLR 173 in which Tally Weijl argued that Pegram had not been entitled to refer a dispute to adjudication because (after a battle of forms) it contended that no agreement had been reached (such that there was no contract) and any work which had been carried out was on a quantum meruit basis. In the absence of any construction contract, the HGCRA did not apply and there was no basis upon which the adjudication could proceed. It is likely that this ground will be employed more frequently to resist applications for summary judgment to enforce adjudication decisions because there is greater scope for disagreement where contracts have been concluded orally.

- **Wrong party:** It may seem obvious, but it is worth remembering that an adjudicator only has jurisdiction to give decisions concerning the rights of the parties to a construction contract and cannot make a decision against a person who is not a party to the contract. If the contracting party is incorrectly identified any decision will be invalid (unless it can be shown that the wrong party

[13] Which requires (even for oral contracts) that a series of provisions relating to adjudication be committed to writing.

participated and agreed to be bound by the adjudication ruling) see: Thomas-Frederic's Construction v Keith Wilson 91 ConLR 161. The potential for a dispute regarding the identity of contracting parties where a contract is not in writing means that this ground of objection is likely to be more commonplace.

- **Oral contract concluded prior to 1 October 2011:** In the early days after the HGCRA came into force, Mr Justice Dyson heard an application for summary judgment where a referring party sought to enforce the decision of an adjudicator (Project Consultancy Group v Trustees of the Gray Estate (1999) BLR 377). There was, however, considerable factual dispute regarding the date that the contract was entered into – and if the responding party's arguments were successful there was no basis that the adjudicator's decision could have been enforced. These arguments are likely to emerge again.

- **Resurgence in natural justice arguments:** There is a greater potential for issues relating to oral contract terms to cause problems if active adjudication management is not employed by the Adjudicator. There is much greater scope for a party not to be properly informed of the allegations made against it, particularly if the referring party does not take care to particularise the basis upon which it is alleged that an oral contract exists. It remains the case, however, that any breach must be exceptional and serious to enable a challenge to enforcement to be mounted successfully.

The most significant effect that the repeal of s 107 is likely to have is in relation to the current fast track procedures available to the parties through the TCC. As things currently stand, paragraph 9.1.1 of the TCC Guide sets out the steps available to parties seeking to enforce an adjudicator's decision. In cases where there is a dispute relating to whether a contract exists, the date a contract was concluded or the terms of that contract, Part 7 procedures are unlikely to be at all suitable and Part 8 procedures will need to be followed instead to enable substantial disputes of fact to be considered properly.

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