Statutory payment provisions, adjudication process and enforcement proceedings in the construction industry of the United Kingdom and New South Wales: a comparative legal analysis from the perspective of mitigating the injustice caused by adjudication's pseudo-temporary nature

Thesis submitted for the degree of
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by

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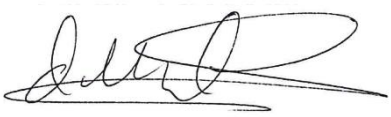
Declaration

I hereby declare that this thesis represents solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it). This work has been done after my registration for the Degree of Doctor of Philosophy at the University of Leicester and has not been previously included in a thesis or dissertation submitted to this or any other institution for a degree, diploma, or other qualifications.

I confirm that the abstract of this thesis consists of 298 words, and that main body of this thesis consists of 79,994 words including footnotes but excluding tabulated data, diagrams and the bibliography section.



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Abstract

This thesis involves a comparative study between Part II of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) of the United Kingdom (UK) and the Building and Construction Industry Security of Payment Act 1999 (BCISPA(NSW)) of the Australian state of New South Wales (NSW). It argues that HGCRA and BCISPA(NSW), and in fact every legislation introducing statutory payment provisions and adjudication in a jurisdiction, suffer from a common problem. That is, in tackling the injustice caused by the advantages that one party can get from delaying dispute resolution, the legislation creates a different kind of injustice caused by adjudication's 'pseudo-temporary' nature. This thesis aims to recommend how to better resolve this problem.

This thesis uses the term 'pseudo-temporary' to describe the phenomenon whereby an adjudicator's decision is in practice final, albeit in principle temporary. Injustice arises when the cause of this phenomenon is the insolvency, or the risk of intervening insolvency, of (usually) the winning party in an adjudication before the conclusion of subsequent arbitration or litigation (other than adjudication enforcement proceedings) and actual repayment of any sums ordered, thereby deterring the other party from pursuing such proceedings.

Chapter One reviews the legislation's purpose. Chapter Two expounds on this phenomenon of adjudication's pseudo-temporary nature and examines possible countermeasures. It argues that this problem is better resolved through statutory intervention, amending the legislation to the version that promotes the highest degree of procedural justice whilst preserving its speed.

This thesis then comparatively analyses the components forming HGCRA's and BCISPA(NSW)'s three fundamental pillars, namely, statutory payment provisions including remedies available for non-payment or under-certification (Chapters Three to Five), adjudication process (Chapters Six and Seven) and enforcement proceedings of an adjudicator's decision (Chapter Eight), recommending the version that promotes the highest degree of procedural justice whilst preserving the legislation's speed.

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I dedicate this thesis to my family back home in Cyprus – my father Nicos, my mother Nicoletta and my sister Anna Maria.

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HL Deb 19 June 2019, vol.798, cols.813&814

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HL Deb 23 July 1996, vol.574, cols. 1336, 1345&1346

HL Deb 28 March 1996, vol.570, cols. 1838, 1886&1887, 1923-1925

HL Deb 29 April 1996, vol.571, col.1460

Abbreviations

AA(EW)	Arbitration Act 1996, England and Wales
ACLN	Australian Construction Law Newsletter
AFCC	Australian Federation of Construction Contractors
Annu. Rev. Law Soc. Sci.	Annual Review of Law and Social Science
BCIPA(QLQ)	Building and Construction Industry Payments Act 2004, Queensland
BCISPA (Singapore)	Building and Construction Industry Security of Payment Act 2004, Singapore
BCISPA (South Australia)	Building and Construction Industry Security of Payment Act 2009, South Australia
BCISPA (Tasmania)	Building and Construction Industry Security of Payment Act 2009, Tasmania
BCISPA (Victoria)	Building and Construction Industry Security of Payment Act 2002, Victoria
BCISPA(WA)	Building and Construction Industry (Security of Payment) Act 2021, Western Australia
BCISPA(NSW)	the Building and Construction Industry Security of Payment Act 1999, New South Wales
BEIS	The Department for Business, Energy and Industrial Strategy

BERR	Department for Business, Enterprise and Regulatory Reform
BIF(QLD)	Building Industry Fairness (Security of Payment) Act 2017, Queensland
BIS	Department for Business, Innovation and Skills
CA	Court of Appeal
CAA(NSW)	Commercial Arbitration Act 2010, New South Wales
CDA(NSW)	Contractors Debts Act 1997, New South Wales
CIArb	Chartered Institute of Arbitrators
CIB	International Council for Research and Innovation in Building and Construction
CIC	Construction Industry Council
CPA(NSW)	Civil Procedure Act 2005, New South Wales
CPR	Civil Procedure Rules, England and Wales
CUB	the Construction Umbrella Bodies
DJSB	Department of Jobs and Small Business (Australia)
DTI	Department of Trade and Industry
EWCA	Court of Appeal (England and Wales)
HGCRA	the Housing Grants, Construction and Regeneration Act 1996

HC	House of Commons
HL	House of Lords
HMIP	Her Majesty’s Inspectorate of Probation
IBA	International Bar Association
ICE	Institution of Civil Engineers
JCT	Joint Contracts Tribunal
LAH	Legislative Assembly Hansard
LCH	Legislative Council Hansard
LDEDCA	Local Democracy, Economic Development and Construction Act 2009
LPCDIA	Late Payment of Commercial Debts (Interest) Act 1998
Malaysia Act	Construction Industry Payment and Adjudication Act 2012, Malaysia
NEC	New Engineering Contract
New Zealand Act	Construction Contracts Act 2002, New Zealand
Northern Territory Act	Construction Contracts (Security of Payments) Act 2004, Northern Territory
NSW	New South Wales
NSWCA	New South Wales Court of Appeal

NSWFT	NSW Fair Trading, Government Department
PLCB	Practical Law Construction Blog, Thomson Reuters
POCA	Proceeds of Crime Act 2002
PWG	the Payments Working Group
Republic of Ireland Act	Construction Contracts Act 2013, Republic of Ireland
Scheme	The Scheme for Construction Contracts (England and Wales) Regulations 1998 as amended by The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011
SCL	Society of Construction Law
TCC	Technology and Construction Court
TeCSA	The Technology and Construction Solicitors' Association
TIC/HC	Trade and Industry Committee appointed by the House of Commons
UCPR(NSW)	Uniform Civil Procedure Rules 2005 (NSW)
UK	United Kingdom
UKSC	Supreme Court of the United Kingdom
WAG	Welsh Assembly Government
Western Australia Act	Construction Contracts Act 2004, Western Australia

Introduction

The legislation's competing models and rationale for selecting HGCRA and BCISPA(NSW) as research objects

HGCRA has been in force in England and Wales since 1998[1], and, among other things, enables either party to a construction contract to refer any dispute arising under the contract to a rapid adversarial dispute resolution procedure called 'statutory adjudication'[2]. Parallel legislation with minor differences exists in Scotland and Northern Ireland since 1998[3] and 1999[4] respectively.

Adjudication is an expedited process prioritising speed and efficiency over thoroughness and finality. It is designed to deliver a quick interim decision to parties engaged in a construction project, to avoid unnecessary delays, while nonetheless protecting their right to insist on a more thorough procedure via litigation or arbitration if they are unhappy with adjudication's outcome. Famously described with the phrase 'pay now, argue later'[5], adjudication is often seen as 'a rough and ready process'[6] producing 'rough justice'[7].

Since its adoption in the UK[8], comparable legislation gradually developed around the world, particularly to jurisdictions sharing England's common law tradition. The first, and of particular interest to this thesis, was NSW with BCISPA(NSW). Comparable legislation continued to spread to, among other jurisdictions, New

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[1] HGCRA (England and Wales) (Commencement No. 4) Order 1998.

[2] reference to 'adjudication' means 'statutory adjudication' unless otherwise specified.

[3] HGCRA (Scotland) (Commencement No. 5) Order 1998.

[4] Construction Contracts (1997 Order) (Commencement) Order (Northern Ireland) 1999.

[5] see ch.2/s.2.4.

[6] *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2019] EWCA 27, para.37 (Coulson LJ).

[7] see ch.2/s.2.3.

[8] Although it is acknowledged that England and Wales, Scotland and Northern Ireland are separate legal jurisdictions, they are collectively referred to as 'the UK' for adopting the same regime on the legislation's core aspects that this thesis is concerned with.

Zealand[9], Victoria[10], Queensland[11], Western Australia[12], Northern Territory[13], Singapore[14], Tasmania[15], South Australia[16], Malaysia[17] and the Republic of Ireland[18].

While these jurisdictions adopted their own legislation, broadly two main models exist, largely reflecting a division between those jurisdictions that followed HGCRA and those that followed BCISPA(NSW). Regarding adjudication process, the primary difference is that HGCRA permits either party to a construction contract to refer a dispute arising under the contract for adjudication.[19] By contrast, BCISPA(NSW) only permits the party that undertook to carry out work under the contract to refer a progress payment dispute for adjudication.[20] That is, the main contractor may commence adjudication against the employer, or a sub-contractor commence adjudication against the main contractor, but not vice versa. Consequently, while adjudication under BCISPA(NSW) covers a relatively narrow range of disputes, adjudication under HGCRA is more inclusive.

[9] Construction Contracts Act 2002, New Zealand (NZ Act).

[10] Building and Construction Industry Security of Payment Act 2002, Victoria (BCISPA (Victoria)).

[11] Originally pursuant to the Building and Construction Industry Payments Act 2004, Queensland (BCIPA(QLQ)); superseded by the Building Industry Fairness (Security of Payment) Act 2017 (BIF(QLD)).

[12] Construction Contracts Act 2004, Western Australia (Western Australia Act); superseded by Building and Construction Industry (Security of Payment) Act 2021, Western Australia (BCISPA(WA)).

[13] Construction Contracts (Security of Payments) Act 2004, Northern Territory (Northern Territory Act).

[14] Building and Construction Industry Security of Payment Act 2004, Singapore (BCISPA (Singapore)).

[15] Building and Construction Industry Security of Payment Act 2009, Tasmania (BCISPA (Tasmania)).

[16] Building and Construction Industry Security of Payment Act 2009, South Australia (BCISPA (South Australia)).

[17] Construction Industry Payment and Adjudication Act 2012, Malaysia (Malaysia Act).

[18] Construction Contracts Act 2013, Republic of Ireland (Republic of Ireland Act).

[19] HGCRA, s.108(1).

[20] BCISPA(NSW), ss.8(1),13(1)&17(1).

In the UK, statistical evidence suggests that for every one adjudication brought by an employer against a main contractor there are 2.65 adjudications brought the other way, whilst for every one adjudication brought by a main contractor against a sub-contractor there are 6.25 adjudications brought the other way[21]. Clearly most adjudications are brought by the party doing the work under the contract. However, the party receiving the work often commences adjudication too, involving issues of contract interpretation, defective work, liquidated damages, extension of time and valuation of works[22].

Jurisdictions which subsequently introduced adjudication followed, broadly, either the UK or the NSW adjudication regime. New Zealand, Northern Territory, Malaysia and the Republic of Ireland followed the UK regime, in that they permit either party to a construction contract to refer a dispute arising under the contract for adjudication[23]. By contrast, Victoria, Queensland, Singapore, Tasmania and South Australia followed the NSW regime, since they only permit the party undertaking to carry out work under the contract to refer a progress payment dispute for adjudication[24]. Western Australia originally followed UK's regime but later adopted NSW's regime[25]. Therefore, the rationale for undertaking a comparative study between HGCRA and BCISPA(NSW) is because they are representative of the two different adjudication regimes currently existing around the world.

It is important to recognise that these legislations also introduce changes to the substantive law, intending to assist adjudication in addressing identified issues within the construction industry. Importantly, both BCISPA(NSW) and HGCRA

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[21] Ratios calculated from data in: JL Milligan and LH Cattanach, *Research analysis of the development of Adjudication based on returned questionnaires from Adjudicator Nominating Bodies (ANBs) and from a sample of Adjudicators* (Report no.14, April 2016), p.11.

[22] ibid, p.9.

[23] NZ Act, s.25(1); Northern Territory Act, ss.8,19&27, Schedule Division 4; Malaysia Act, ss.5&7; Republic of Ireland Act s.6.

[24] BCISPA (Victoria), ss.9(1),14(1)&18(1); BCIPA (QLD), ss.12,17&21; BIF(QLD), ss.70,75&79(1); BCISPA (Singapore), ss.2,5&12; BCISPA (Tasmania), ss.12,17&21; BCISPA (South Australia), ss.8,13&17.

[25] Western Australia Act, ss.6,16,25, sch.1/div.4; BCISPA(WA), ss.27(2)&28.

introduce statutory payment notification obligations (SPNO), albeit governed by different rules, establishing the payment amount and its final date for payment. Provided the payee has complied with its SPNO, failure of the payer to adhere to its SPNO renders the payer liable to pay the full sum notified by the payee.[26] This compels the payer to notify the payee in writing, and by a certain deadline, of the reasons for paying any lesser amount than that claimed. This enables early identification of disputes and their prompt referral for adjudication. This also resulted in what has come to be called a 'smash-and-grab' adjudication, where the subject matter is whether a timely and valid notification was issued.[27]

Another commonality is the right to suspend performance when a sum due is not paid by the final date for payment[28], while both models also prevent parties contracting out of the applicable legislation.[29] A thread running through both BCISPA(NSW) and HGCRA is their aim to increase transparency in the exchange of information relating to payments and facilitate better cash flow management[30].

Research questions

The argument of this thesis will be built by answering three research questions:

1. *'What was the legislation's purpose when introduced in the 1990s and is it still relevant today?'* – answered in Chapter One.

[26] HGCRA, ss.110A,110B&111; BCISPA(NSW), ss.15&17(2).

[27] *Grove Developments Ltd v S&T (UK) Ltd* [2018] EWHC 123, para.13.

[28] HGCRA, ss.111&112; BCISPA(NSW), ss.15(2)(b),16(2)(b),23(1)(a)&24(1)(b).

[29] BCISPA(NSW), s.34; HGCRA, ss.108(5),109(3),110(3),110A(5),111(7)(b),113(6)&114.

[30] BEIS, *2011 Changes to Part 2 of the Housing Grants, Construction and Regeneration Act 1996: A consultation to support a Post Implementation Review: Summary of responses* (February 2020, Crown), p.2.

2. *'What is the legislation's biggest disadvantage and how can it be mitigated without compromising the legislation's effectiveness?'* – answered in Chapter Two.

3. *'What version of the legislation promotes the highest degree of procedural justice whilst preserving its speed?'* – answered in Chapters Three to Eight.

Methodology and key sources of data

The first section addressed the methodological issue of why HGCRA and BCISPA(NSW) are used as research objects in this comparative legal study: they are representative of the two different adjudication regimes currently existing around the world.

Chapter One investigates HGCRA's and BCISPA(NSW)'s history, which is imperative in any comparative legal study for enabling a thorough understanding of where the law 'comes from and why it is as it is today'[31]. In fact, the historical method is present throughout this thesis, investigating the development of the legislation's components and justifying their present status.

The next section explains that Chapters Three to Eight dissect the legislation into its three fundamental pillars and summarises their components. The theoretical framework adopted in the comparative analysis of each component is recommending the version that promotes the highest degree of procedural justice, whilst preserving or even improving the legislation's speed[32].

This thesis adopts a doctrinal methodology complemented by socio-legal data including reports and debates of the pre-legislation era, surveys on the

[31] Mark Van Hoecke, 'Methodology of Comparative Legal Research' [2015] LaM <https://www.lawandmethod.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001.pdf> accessed 16 October 2022.

[32] see ch.2/s.2.7.

legislation's performance, and consultations concerning amendments. Whilst the doctrinal approach, namely analysis of statutes and case law, dominates this thesis, its limitation is being 'too constricting'[33] when evaluating the legislation's effect upon the real world. Supplementing doctrinal methodology with such interdisciplinary socio-legal literature enables overcoming this constraint and provides 'additional ballast'[34] to the recommendations of this thesis, for example, related to the significance of procedural justice[35].

This thesis is completed through library-based research. The latest and historic versions of HGCRA and BCISPA(NSW) were retrieved from the respective government websites[36]. Parliamentary debates were retrieved from the respective Hansard websites[37]. The full transcript of court cases was retrieved from the 'British and Irish Legal Information Institute' (BAILII)[38] website and Westlaw database[39] for UK caselaw, and 'Judgments and Decisions Enhanced' (JADE)[40] and 'Australasian Legal Information Institute' (AustLII)[41] websites for Australian caselaw.

The Latham Report[42] published in 1994 was pivotal for HGCRA's introduction. In 2004, the government re-engaged Latham to review HGCRA's performance and propose improvements[43]. Latham's findings[44] together with the accompanying

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[33] Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' [2015] Erasmus Law Review 130, p.130.

[34] ibid.

[35] see ch.2/s.2.7.

[36] HGCRA <https://www.legislation.gov.uk/ukpga/1996/53/contents>; BCISPA(NSW) <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1999-046>.

[37] UK Parliament, Search Hansard <https://hansard.parliament.uk/search>; Parliament of NSW, Advance Search <https://www.parliament.nsw.gov.au/search/Pages/AdvancedSearchHome.aspx#/search>.

[38] BAILII, Search BAILII <https://www.bailii.org/>.

[39] Westlaw Edge UK (Thomson Reuters).

[40] JADE, <https://jade.io/t/home>.

[41] AustLII, <http://www.austlii.edu.au/>.

[42] Michael Latham, *Constructing the Team* (Crown, 1994).

[43] HM Treasury, *Economic and Fiscal Strategy Report and Financial Statement and Budget Report* (Crown, March 2004), para.3.59.

[44] Letter from Michael Latham to Nigel Griffiths MP (17 September 2004).

reports from the Construction Umbrella Bodies (CUB)[45] and Payments Working Group (PWG)[46] and the minister's response[47], triggered two major public consultations and four corresponding reports. The Department of Trade and Industry (DTI) and Welsh Assembly Government (WAG) jointly published reports in March 2005[48], January 2006[49] and June 2007[50]. DTI was thereafter replaced by the Department for Business, Enterprise and Regulatory Reform (BERR) hence the fourth report was published by BERR and WAG in July 2008[51]. The outcome was the first (and only one to date) amendment of HGCRA pursuant to the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA). A post-implementation consultation was conducted between 24 October 2017 and 19 January 2018, with the outcome published in February 2020[52].

A report that led to BCISPA(NSW)'s introduction was published in 1998[53]. BCISPA(NSW) has been amended several times. BCISPA(NSW)'s government website indicates fifteen historic versions, although some of these revisions relate to the same set of amendments implemented in parts. Significant reports for BCISPA(NSW)'s amendments include the Collins Report[54] and the Murray

[45] Letter from Graham Watts to Michael Latham (29 July 2004) enclosing CUB, Report of the Construction Umbrella Bodies Adjudication Task Group on adjudication under the Construction Act (July 2004).

[46] Letter from Richard Haryott to Michael Latham (06 September 2004) enclosing PWG, Review of Part II of the Housing Grants Construction and Regeneration Act 1996 (PWG, 2004).

[47] Letter from Nigel Griffiths to Michael Latham (21 October 2004).

[48] DTI and WAG, *Improving Payment Practices in The Construction Industry: Consultation on proposals to amend Part II of the Housing Grants Construction and Regeneration Act 1996 and Scheme for Construction Contracts (England and Wales) Regulations 1998* (Crown, 2005).

[49] ——, ——: *Analysis of the consultation on proposals to amend* —— (Crown, 2006).

[50] ——, ——: *2nd Consultation on proposals to amend* —— (Crown, 2007).

[51] BERR and WAG, ——: *Analysis of the 2nd Consultation on proposals to amend* —— (Crown, 2008).

[52] BEIS, (February 2020) (n.30), p.3.

[53] Edward Obeid, 'Security of Payment for the New South Wales Building Industry' (ACLN, Issue 63, 1998) pp.38-43.

[54] Bruce Collins, *Inquiry into Construction Industry Insolvency in NSW: Final Report* (NSW Government, November 2012).

Report[55]. Most articles cited in this thesis were sourced from the databases LexisNexis, Journal Storage (JSTOR) and Westlaw.

Structure

In addition to this introduction and the final conclusion, this thesis is formed by eight chapters.

Chapter One explores the legislation's genesis, providing deeper insights into HGCRA's and BCISPA(NSW)'s common aim, namely tackling the advantages that 'haves' get from delaying dispute resolution. In the context of construction industry, 'haves' are primarily the parties receiving the work under the contract whilst 'have-nots' are the parties providing the work. Chapter One analyses the pre-legislation era of the UK and NSW in conjunction with Galanter's seminal literature on litigation[56], supporting the notion that 'haves' exploited the legal system, with litigation and arbitration being unable to eliminate their incentive to delay and complicate the process.

Consequently, 'have-nots' settled for much less than they considered their claim to be worth, or even went bankrupt, causing severe social problems. Chapter One finally explains that, to this day, the legislation still plays an important role in tackling this injustice; therefore, the legislation should be preserved, and, where appropriate, improved.

Chapter Two examines the legislation's effect, arguing that its most profound disadvantage is adjudication's pseudo-temporary nature. It then evaluates possible countermeasures, arguing that the legislation would be undermined if additional barriers in the enforcement of an adjudicator's decision were to be introduced. Therefore, the injustice caused by the phenomenon of adjudication's

[55] John Murray, *Review of Security of Payment Laws: Building Trust and Harmony* (Australian Government Department of Jobs and Small Business, December 2017).

[56] Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 95.

pseudo-temporary nature can only be mitigated by amending the legislation to the version that promotes the highest degree of procedural justice whilst preserving its speed.

This speed preservation ensures that the legislation's advantages as an equalising reform are maintained, while the benefits of achieving a high degree of procedural justice are twofold. Firstly, improving the accuracy of the outcome, or, in other words, increasing the likelihood that the outcome is substantively just. Secondly, it ensures that the parties experience a procedurally just treatment throughout all the processes surrounding the legislation, which in turn increases the likelihood of achieving substantive justice in the disputants' eyes.

The operation of both HGCRA and BCISPA(NSW) rests on three fundamental pillars:

1. Statutory payment provisions
2. Adjudication process
3. Enforcement of an adjudicator's decision.

Statutory payment provisions include the right to interim payment, SPNO in respect of each payment and remedies available for non-payment or under-certification. SPNO set a deadline for the payer to notify written reasons for certifying any lesser amount than the payee's claim, which in turn facilitates early commencement of adjudication by identifying the issues in dispute. Adjudication's significance is obvious, since it produces a binding decision until the dispute is finally determined by agreement, litigation or arbitration. However, an adjudicator's decision would have little value if a party is unwilling to comply and there is no quick process to enforce compliance. This brings us to the third pillar, namely enforcement of an adjudicator's decision.

If any of these three pillars fails to operate quickly and effectively, then the entire legislation is undermined. Therefore, this thesis analyses the components forming these pillars recommending the version that promotes the highest degree of procedural justice whilst preserving the legislation's speed. An overview of the associated chapters is provided hereunder.

Chapter Three reviews the legislation's components associated with the right to interim payments (commencement of payment cycle and maximum intervals between interim cycles), valuation methods (periodic and milestone) and prohibition of conditional payment provisions (pay-when-paid and pay-when-certified), along with relevant case law. It analyses the interplay between these rules, which reveals significant differences between HGCRA and BCISPA(NSW), as well as conflicts between the aforesaid rules themselves.

Chapter Four examines the components forming SPNO. HGCRA's mandatory payment regime is contrasted with BCISPA(NSW)'s that runs parallel to any contractual payment provisions. Chapter Four then reviews their procedure and rules for instigating a payment cycle including the date to which each interim payment shall be valued up to, whether the payee can issue only one payment application per cycle and if it must state that is made under the legislation and the applicable payment terms. Finally, it examines the payer's deadline for issuing its payment notification, and whether a payee shall remind a payer who has not issued a payment notification, thereby giving the payer a second opportunity to comply, and associated timeframes.

Chapter Five investigates the remedies for non-payment of a sum due, or under-certification. The remedy of adjudication is analysed in Chapters Six and Seven. Chapter Five focuses on the payee's remedies of requiring the principal contractor to retain money from the payer to cover the payee's claim, suspending performance and charging interest. It also explores the matter of retentions and the defence of pay-when-paid in the event of an upstream insolvency.

Chapter Six explores HGCRA's and BCISPA(NSW)'s components related to the right to commence adjudication, nature of disputes that can be referred and timing in which they can be referred. These components include the right to adjudication being asymmetric or equal; whether the adjudicator or the nominating body can be contractually agreed, or unilaterally chosen by the claimant; whether only payment disputes can be referred, or any dispute arising under the contract; whether the adjudicator shall have jurisdiction to decide

issues of fraud, negligence and misrepresentation; deadlines and limitations associated with the timing in which a dispute can be referred.

Chapter Seven reviews HGCRA's and BCISPA(NSW)'s components associated with adjudication process, including adjudication's timetable and parties' key submissions; parties' right to legal representation, introducing new arguments and evidence, and withdrawing from adjudication; adjudicator's duties and powers; recoverability of costs; contents and effect of an adjudicator's decision, and whether an adjudicator can exercise a lien over his/her decision.

Chapter Eight analyses HGCRA's and BCISPA(NSW)'s distinctive enforcement process of an adjudicator's decision. It also examines the grounds for resisting enforcement.

Contribution to knowledge

This thesis primarily contributes to the discipline of statutory payment provisions and adjudication by providing a comparative analysis between HGCRA and BCISPA(NSW), which are representative of the two legislative frameworks currently existing around the world. The novelty of this thesis is found both in the submitted research problem, namely that whilst the legislation tackles the injustice caused by the advantages that one party can get from delaying dispute resolution it creates another injustice caused by adjudication's 'pseudo-temporary' nature, and the approach to mitigating this problem, namely amending the legislation to the version that promotes the highest degree of procedural justice whilst preserving its speed.

This thesis also contributes to the broader socio-legal literature surrounding such equalising reforms and their correlation with adjudication. Chapter One examines the extent to which Galanter's theory, namely that the architecture of the legal system benefits certain litigants, applies to the real case studies of the UK and NSW construction industries before their legislation's introduction. Chapter Two

then examines how the legislation, as an equalising reform, creates a new kind of injustice caused by adjudication's pseudo-temporary nature.

Many great books focus on the discipline of construction statutory payment provisions and adjudication regimes[57]. This thesis contributes to the existing literature by going beyond a 'compendious comparative analysis'[58], to a more in-depth discussion. Issues examined in greater depth include the interplay between the legislation's provisions and key valuation methods of interim payment (Chapter Three), SPNO and remedies for non-payment of a sum due or under-certification (Chapters Four and Five), the right to commence adjudication (Chapter Six), adjudication process (Chapter Seven) and enforcement of an adjudicator's decision (Chapter Eight).

Although the legislation was introduced over twenty years ago, the law is still rapidly developing, whether by means of case law or amendments to the relevant statutes. Such contemporary developments are often reviewed in specialised blogs and journal articles by recognised practitioners and academics. Albeit highly informative, their limitations often include descriptive writing and confinement to the development examined. This thesis contributes to the literature by offering an up-to-date critical review of the entire legislation.

Furthermore, none of the existing literature recommends the legislation's optimal version from the theoretical perspective adopted in this thesis, namely, promoting the highest degree of procedural justice whilst preserving or even improving the legislation's speed. Finally, this thesis distils the main strengths and weakness of the legislation's two main models. This helps inform the adoption of an adjudication model in other jurisdictions or industries that do not currently operate

[57] e.g. Andrew Burr, *International Contractual and Statutory Adjudication* (Routledge, 2017); Darryl Royce, *Adjudication in Construction Law* (Routledge, 2016); James Pickavance, *A Practical Guide to Construction Adjudication* (Wiley Blackwell, 2016); Peter Coulson, *Coulson on Construction Adjudication* (4th edn, Oxford University Press, 2018).

[58] Expression used by Robert Akenhead in the Foreword of Burr (n.57) to acknowledge the book's contribution.

comparable legislation, as well as implementing changes in those jurisdictions where comparable legislation currently exists.

Chapter One: The genesis of statutory payment provisions and adjudication[59]

1.1 Introduction

Chapter One investigates the legislation's purpose and whether is still relevant. The legislation introduces a rapid adversarial dispute resolution procedure designed to deliver an interim decision. Therefore, broader literature on the consequences of delay in the resolution of civil disputes is reviewed, importantly Galanter's seminal submission that the architecture of the legal system benefits certain litigants.[60] The legislation under review represents a real-life equalising reform akin to those envisioned by Galanter, and therefore an enquiry into the legislation's history and purpose acts as a case study for testing Galanter's theory.

To this end, a review of Galanter's categorisation of litigants between 'haves' and 'have-nots' is provided, followed by an overview of the UK and NSW construction industry and the sequence of events leading towards the legislation's introduction. These are traced back to the 1970s, and the conflicting jurisprudence on whether a set-off claim should suffice in preventing summary judgment of a sum otherwise due. The term 'set-off' is therefore examined for its historical importance, followed by an analysis of this conflicting jurisprudence and the prevailing position that a set-off claim shall indeed suffice in preventing summary judgment.

Chapter One then explains that litigation and arbitration were unable to eliminate a party's incentive to delay the dispute resolution process, and the consequential social problems. It then reviews reports and parliamentary debates that gave rise

[59] This Chapter draws in part on: Harry Meliniotis, Tony Cole, Arran Dowling-Hussey, and Tariq Mahmood, 'Introducing Statutory Construction Adjudication to India: Drawing from International Experience' in Yashraj Samant and Chirag Balyan (eds), *Specialized Arbitration: Emerging International Trends and Practices* (Thomson Reuters, 2021).

[60] Galanter (n.56).

to HGCRA and BCISPA(NSW). Finally, Chapter One examines whether the legislation, as an equalising reform, is still required.

1.2 Consequences of delay in the resolution of civil disputes

'Delay too often defeats justice'[61] is the title of a lecture by Lord Dyson MR, delivered during the celebrations for the 800th anniversary of the sealing of Magna Carta. The lecture focuses on the importance of timely justice, a right enshrined in Chapter 40 of Magna Carta[62]. Delay tends to defeat justice in two ways.

Firstly, when a judgment is delivered too late to benefit the successful party. This occurs when the losing party has become insolvent or 'spirited away his assets so that they are beyond the reach of the successful claimant'[63].

Secondly, delay is interrelated with procedural complexity and excessive costs, which in turn impair access to justice. Complex, long and expensive legal battles may be a joy for lawyers but can cause dismay to litigants, or even denial of justice altogether. For example, when a claimant cannot afford the court process and therefore gives up the claim or settles for a significantly lesser amount than what he considers the claim to be worth.

Galanter's discussion on litigation offers deeper insights into this second consequence of delay. Galanter distinguished litigants between two groups. Those 'who have only occasional recourse to the courts', called 'one-shotters', and those 'who are engaged in similar litigations over time', called 'repeat players'.[64] This context alone gives 'repeat players' an advantage over 'one-

[61] Lord Dyson, *Delay too often defeats justice* (The Law Society, 22 April 2015).

[62] 'To no one will we sell, to no one deny or delay right or justice', as it proclaims: British Library, 'English translation of Magna Carta 1215' (28 July 2014), cl.40 <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation> accessed 09 June 2023.

[63] Dyson (n.61) p.8.

[64] Galanter (n.56), p.97.

shotters', due to their greater understanding of the legal system and how it can be exploited.

Furthermore, Galanter argued that the group of 'repeat players' largely corresponds to another classification of 'haves', or parties with significant amounts of wealth and resources. The additional resources of 'haves' increase the likelihood of becoming engaged in a dispute, while their additional wealth enables funding repeated disputes. In turn, the group of 'one-shotters' largely correlates with the group of 'have-nots', who lack comparable wealth and resources.[65]

Galanter's central argument is that 'the architecture of the legal system tends to confer interlocking advantages on… the "haves"'[66]. When acting as defendants in a lawsuit, the most successful 'haves' are those who utilise their resources to slowly drag claims through the long processes surrounding litigation, thereby forcing their antagonists to settle, withdraw or discontinue their claim[67].

Described as 'one of the most influential pieces of legal scholarship ever written'[68], Galanter's work was ranked as 'the 37th most-cited law review article'[69]. It has been applied in several jurisdictions outside of the United States, as well as numerous industries such as employee versus employer and consumer versus automobile manufacturer disputes[70]. However, no literature could be found involving a detailed application of Galanter's work to the construction industry.

While this supports the proposition that this thesis makes a novel contribution, care had to be taken to ensure that such an application is done appropriately. To

[65] ibid, p.103.

[66] ibid, p.149.

[67] ibid, p.98.

[68] Expression used by Shauhin Talesh in the Foreword of: Marc Galanter, *Why the Haves Come out Ahead: the Classic Essay and New Observations* (Quid Pro Books, 2014).

[69] ibid, p.iii.

[70] ibid, pp.iv-vii.

this end, this Chapter does not take Galanter's conclusions for granted, but instead tests in an uninfluenced manner the extent to which they apply to the pre-legislation era of the UK and NSW construction industries.

In summary, this Chapter finds that construction projects involve hundreds of contracts procured over several contracting tiers. Most contractors in this cascading payment system possess little or no capital, and, therefore, having incurred the expense of carrying out their contracted works, prompt payment is crucial for their survival. In the pre-legislation era, the party receiving the work under the contract (the payer) abused the prevailing legal position that a payer's set-off claim shall suffice in preventing summary judgment of a claim by the party providing the work (the payee). In turn, both litigation and arbitration were unable to eliminate the payer's incentive to delay and complicate the dispute resolution process. By exploiting the legal system, the payer forced the payee to abandon its claim or settle for much less than the payee considered its claim to be worth, causing severe social problems.

Therefore, larger payer contractors were the archetypal 'haves' / 'repeat players', while smaller payee contractors were the 'have-nots' / 'one-shotters'. As an equalising reform, the adjudication process introduced by the legislation is considerably quicker and cheaper than litigation or arbitration, and, therefore, eliminates a have's incentive to delay dispute resolution.

1.3 The multiplicity of contracts in construction projects

The ambit of the construction industry is wide-ranging, covering the construction of new buildings and civil engineering works, as well as their fit out, repair, extension, alteration, maintenance and disposal. Projects range from residential accommodations, offices, hospitals, shopping malls and warehouses, to motorways, railways, harbours, stadiums, power and telecommunication apparatuses and sewerage systems. Specialised activities and trades required to deliver such projects also form part of the construction industry. Examples

include demolitions, excavations, foundations, scaffolding, frameworks, cladding, internal partitions, building services installations, glazing, joinery, and painting.[71]

In early 20th century, UK contractors directly employed a comprehensive workforce ranging from managers to craftsmen, enabling them to procure most elements of a project 'in-house'. However, by the 1950s this trend began to subside, with self-employment substituting permanent employment.[72]

Both companies and workforce favoured this shift. Companies mitigated the costs of directly employing staff while securing financial certainty and flexibility, in that a self-employed workforce was engaged as and when required, usually being paid a pre-agreed lump sum for a specified piece of work.[73] The self-employed benefited from a favourable taxation status compared to that of permanent employment, whilst having the opportunity to earn more money by entering the competitive market as small-sized contractors. Furthermore, they enjoyed greater job satisfaction and independence.[74]

By 1995, 95% of construction companies had eight employees or less. Most main contractors and even specialist sub-contractors had transformed from actual constructors to mere managers of the construction process.[75] Consequently, labour gangs and craftsmen were shifted further down the supply chain and the contracting tiers required for their procurement increased.

A typical £25 million construction project usually has a main contract between the employer and main contractor. The main contractor has around 50 to 70 sub-

[71] Office for National Statistics, *UK Standard Industrial Classification of Economic Activities 2007: structure and explanatory notes* (Palgrave Macmillan, 2009) pp.149-155; BCISPA (NSW), s.5.

[72] David Richbell, *Mediation of Construction Disputes* (2008, Blackwell), p.9.

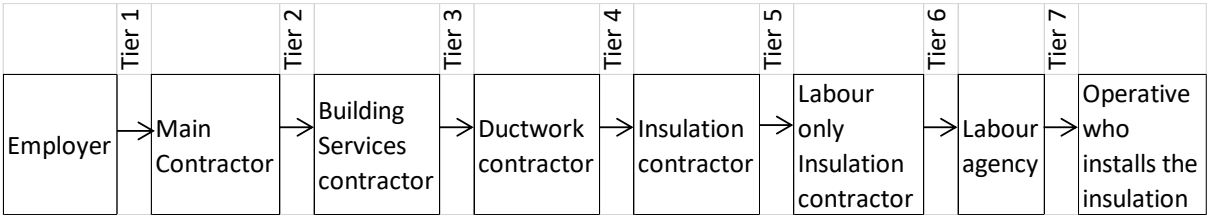
[73] Timothy Pitt-Payne and Anne Fairpo, *An Assessment of False Self-Employment in Construction: taxation of workers* (2011) <https://webtest03.trusttheguild.com/wp-content/uploads/2020/06/Self-employment-in-Construction.pdf> accessed 18 October 2022, p.7

[74] Peter Nisbet, 'Dualism, Flexibility and Self-Employment in the UK Construction Industry' (1997) 11 Work, Employment & Society 459, p.462.

[75] Richbell (n.72), p.9.

contracts with different specialist trade contractors and suppliers.[76] Most sub-contracts have a relatively small value i.e. below £50,000[77]. However, there are some major sub-contracts, such as the substructure, superstructure and building services packages, which value a few million pounds each[78].

These major sub-contractors often enter into fifty sub-sub-contracts with different specialist trade contractors and suppliers, with the contracting chain extending further. The figure below illustrates a hypothetical example of a seven-tier contracting chain for the procurement of the labour required to install ductwork insulation.



The Latham Report identified up to nine contracting tiers for the procurement of certain elements of work[79]. Therefore, over a thousand different contracts can exist in the procurement of a typical £25m project. Consequently, payments made from the employer to the main contractor should flow through the contractual arrangements to all those thousand different parties. Most contractors have little or no capital, hence any payment delays in this 'cascade system of payment' can jeopardise their survival.[80]

The structure of NSW's construction industry is similar to the UK's, described as fragmented with strong reliance on sub-contractors in the 1990s[81]. Construction projects involve a hierarchical chain of contracts with payment obligations that

[76] EC Harris LLP, *Supply Chain Analysis into the Construction Industry: a report for the construction industry strategy* (BIS, October 2013), p.7.

[77] ibid, p.39.

[78] ibid, p.7.

[79] Latham (n.42), para.10.1.

[80] ibid, paras.7.4&10.1.

[81] ACLN, 'NSW Government Green Paper: Security of Payment for Subcontractors, Consultants and Suppliers in the New South Wales Construction Industry' (ACLN, Issue 51), p.42.

resemble a cascade. Most parties have low capital and reserves; therefore, their business model relies on prompt payment. A payment default by a party in the chain can cause a domino effect to those below.[82]

In this context, most contractors personify Galanter's group of 'have-nots' explained in the previous section. The remainder of this chapter tests Galanter's theory by examining the extent to which the civil justice system of the UK and NSW disadvantaged 'have-nots' and advantaged 'haves' in practice.

1.4 Equitable set-off claims in the context of resisting summary judgement

A 'have' defendant may exploit the civil justice system by delaying judgement, and by implication payment, via slowly dragging the case through all the procedures of full trial and resorting to delay tactics. In principle, the courts of both jurisdictions have powers to prevent unrealistic defences from delaying judgement. For example, entering summary judgment in the claimant's favour without full trial when satisfied that the defence has no real prospect of success[83].

Therefore, resisting summary judgment is a tactical victory for the defendant since the claimant must undergo full trial to pursue its claim. A set-off claim by the defendant is considered a defence to the claimant's claim, and therefore shall suffice in dismissing a summary judgment application, provided that the set-off has a real prospect of success and is at least of equal value to the claimant's claim[84]. Typical causes of set-off claims in construction projects include defective work, delays to the project or following trades, damage to the work of other trades, and attendances. 'Attendances' denote works that the claimant was

[82] Terence Cole, *Final Report of the Royal Commission into the Building and Construction Industry*, vol.8 (Commonswealth of Australia, 2003), pp.236; HC Deb 19 December 1994, vol.251, col.1431 (Tom Cox).

[83] UCPR(NSW), r.13.1; CPR 24.

[84] CPA(NSW), s.21; CPR 16.6.

responsible to provide but were provided by the defendant instead, for example, provision of scaffolding or rubbish clearance.[85]

The right to set-off can be created by a contractual term, or, if the contract is silent, via the common law principle of equitable set-off provided there is 'some equity, some ground for equitable intervention'[86] between the claim and the set-off. In *Dole Dried Fruit and Nut Company v Trustin Kerwood Limited*[87], the test was whether the claim and set-off are sufficiently closely connected making it unjust to allow the former without considering the latter[88].

NSW endorses a stringent test, requiring the set-off to be so closely connected to the claim as to 'impeach' it. This impeachment test derives from the 19th century English case of *Rawson and Another v. Samuel*[89], which has been upheld by NSW courts ever since. *Rawson* was upheld in *Hill v Ziymack*[90], with the impeachment test being approved in cases such as *Galambos & Son Pty Ltd v McIntyre*[91] and *Smith v Acquire Asia Pacific Philippines Inc*[92]. By contrast, the UK shifted to the proximity test described in *Dole*, by discarding the impeachment test, and requiring a close connection between the claim and set-of, but not an inseparable one[93].

Nevertheless, the NSWCA confirmed that an equitable set-off exists 'where a builder has a claim for money due under a building contract and there is an unliquidated claim against the builder for damages for breach of that contract'.[94]

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[85] P. Kennedy, A. Morrison and D.O. Milne, 'Resolution of disputes arising from set-off clauses between main contractors and subcontractors' [1997] Construction Management and Economics 527, pp.534&535.

[86] *Aries Tanker Corporation v Total Transport Ltd.* [1977] 1 W.L.R. 185, p.191 (Lord Wilberforce).

[87] (1990) WL 753384.

[88] *ibid.*

[89] (1841) Cr & Ph 161.

[90] [1906] HCA 19, pp.360&361.

[91] (1974) 5 ACTR 10, para.18, cited in *Primus Telecommunications Pty Limited v Kooee Communications Pty Limited & Anor* [2007] NSWSC 374, para.12.

[92] [2016] NSWSC 1084, para.91.

[93] *Geldof Metaalconstructie NV v Simon Carves Ltd* [2010] EWCA 667, para.43.

[94] *Hawes v Dean* [2014] NSWCA 380, para.64 (Barrett JA).

Therefore, both in the UK and NSW, set-off claims arising from the same project as the claim should ordinarily amount to equitable set-off.

In determining whether to dismiss summary judgment, UK courts apply the test prescribed under CPR r.24.2, namely, whether the set-off claim has a real prospect of being successful at trial. Since the court is asked to deprive 'a party of its normal entitlement to a full trial… the court must have a high degree of confidence that the [set-off] will not succeed at the trial'[95]. Similarly, NSW case law requires 'exceptional caution'[96] in upholding summary judgment applications. The courts shall refuse summary judgment 'once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it'[97].

This test intends to distinguish 'a "realistic" as opposed to a "fanciful" prospect of success'[98]. A fanciful prospect exists if the court can say confidently that the set-off's factual basis is entirely without substance and its statement of facts is clearly contradicted by all available evidence[99].

The court shall not conduct a 'mini trial upon affidavits of the rival contentions of the parties'[100], which supports the notion that complex cases shall not be disposed of summarily[101]. The nature and complexity of construction projects presents multiple situations where a set-off claim can be made, with sufficient evidence, to be deemed as realistic. Furthermore, courts are loath to resolve disputed claims without full examination. Even a rather thin set-off claim would

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[95] *Barrett v Universal-Island Records Ltd & Anor* [2003] EWHC 625, para.43 (Laddie J).

[96] *General Steel Industries Inc. v Commissioner for Railways (N.S.W.)* [1964] HCA 69, para.10 (Barwick C.J.).

[97] *Dey v Victorian Railways Commissioners* [1949] HCA 1 (Dixon J), quoted in *General Steel industries*, para.10.

[98] *Swain v Hillman & Anor* [1999] EWCA 3053, para.7 (Woolf MR), affirmed in *ED&F Man Liquid Products Ltd. v Patel & Anor* [2003] EWCA 472, para.7 (Potter LJ).

[99] *Three Rivers District Council v. Governor and Company of The Bank of England* [2001] UKHL 16, para.95; *Ugur v Attorney General for New South Wales* [2019] NSWCA 86, para.117.

[100] *North East Lincolnshire Borough Council v Millenium Park (Grimsby) Ltd* [2002] EWCA 1719, para.13 (Rix LJ).

[101] *Three Rivers*, para.95; *Yesilhat v Calokerinos* [2015] NSWSC 1028, para.14.

suffice in resisting summary judgment[102]. The following section reviews the conflicting jurisprudence on whether a set-off claim should suffice in preventing summary judgment of a sum otherwise due, which led to the introduction of contractual adjudication.

1.5 The historic right to set-off versus its potential for abuse

Although HGCRA was enacted in 1996, the steps towards its adoption can best be traced back to the conflicting jurisprudence about set-off, which occurred between the CA and the HL in the 1970s. First was the CA's decision in *Dawnays Ltd v F.G. Minter Ltd*[103]. Dawnays was a steelwork sub-contractor and Minter the main contractor. While an interim certificate had been issued and Minter received payment from the employer, Minter refused to pass on payment to Dawnays, arguing that the payment could be set-off against a greater claim it possessed against Dawnays for delay.

While under the contract Minter was entitled to 'deduct from or set off against any money due… any sum or sums which the sub-contractor is liable to pay to the contractors under this sub-contract', the CA interpreted this as applying only to 'liquidated and ascertained sums established or admitted to be payable', not 'claims which are unliquidated and are still matters of dispute'.[104] Since the main contractor could 'assert no definite and liquidated sum as being unquestionably due to them'[105], the CA ordered that the sub-contractor receives the interim payment sought[106]. In short, the CA read into the contract a restriction that prevented the main contractor avoiding passing on payments to a sub-contractor simply by raising a set-off claim; if the set-off was disputed by the sub-contractor, the sub-contractor was entitled to full payment, and the main contractor needed to pursue the set-off in separate proceedings.

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[102] Coulson (n.57) para.1.03.

[103] [1971] 1 W.L.R. 1205.

[104] *ibid*, pp.1208&1209, (Lord Denning).

[105] *ibid*, p.1211 (Davies LJ).

[106] *ibid*, pp.1210&1211.

The importance of *Dawnays*, however, was not the interpretation of the contract in question, but the broader rationale on which the judgement was based. The CA emphasised the importance of cashflow in the construction industry and the power that the hierarchical nature of construction contracting gave to those higher in the contract chain. Per Lord Denning:

> Payment must not be withheld on account of cross-claims [meaning set-off claims], whether good or bad… Otherwise any main contractor could always get out of payment by making all sorts of unfounded cross-claims.[107]

The main contractor's petition for leave to appeal was dismissed[108]. Therefore, the prevailing law at the time was that an interim payment could not be withheld on account of a set-off claim. In 1972, the CA followed the *Dawnays'* decision in five more cases before it was reversed by the HL the following year in *Gilbert-Ash Ltd v Modern Engineering Ltd*[109].

The HL found that the CA had adopted an unjustifiable interpretation of the contractual language in question, which rather than restricting the main contractor's power to exercise a set-off, confirmed that power expressly (albeit unnecessarily)[110]. Noting that the right to equitable set-off for defective work dated back to 1841 and the case of *Mondel v Steel*[111], as well as Section 52 'Remedy for breach of warranty' of the Sale of Goods Act 1893, Lord Diplock rejected that this rudimentary economic proposition of cash flow escaped the court's attention for 130 years between the *Mondel* and *Dawnays* cases[112]. In fact, the statutory right to set-off can be traced back to 1734[113].

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[107] *ibid*, pp.1209&1210.

[108] *ibid*, p.1211.

[109] [1974] AC 689, p.713.

[110] *ibid*, pp.718-19.

[111] (1841) 8 M&W 858, 151 ER 1288.

[112] *Gilbert-Ash*, p.718.

[113] Set-off Act 1734, 8 Geo. 2, c. 24

Addressing directly Lord Denning's rationale, Lord Diplock stated:

> I accept the importance of 'cash flow' in the building industry. In the vivid phrase of Lord Denning MR: 'It is the very lifeblood of the enterprise'. But so it is of all commercial enterprises engaged in the business of selling goods or undertaking work or labour… 'Cash flow' is the lifeblood of the village grocer too… It is also the lifeblood of the contractor whose own cash flow has been reduced by the expense to which he has been put by the sub-contractor's breaches of contract.[114]

The HL held that *Dawnays* and the cases that followed its principles were wrongly decided[115], and restored the payer's historic right to deduct from a sum otherwise due a quantified[116] set-off claim, irrespective of whether the set-off was for a liquidated or unliquidated sum[117], or whether the payee was disputing it[118]. The HL also verified that set-offs constitute sufficient defence for dismissing summary judgment applications[119].

1.6 The situation after *Gilbert-Ash*, and litigation's inability to eliminate a party's incentive to delay and complicate the dispute resolution process

Following *Gilbert-Ash*, main contractors could withhold interim payments from sub-contractors merely by alleging a set-off claim. In turn, the set-off sufficed in preventing the sub-contractor from procuring summary judgment on its own claim, even if the main contractor had no defence other than the set-off. Similarly, employers could withhold payments from main contractors, exercising their own

[114] *Gilbert-Ash, p.*718.

[115] *ibid*, pp.713,720,722&727.

[116] *ibid* pp.704,713,715,719&726.

[117] *ibid*, p.693.

[118] *ibid*, pp.698,719&726.

[119] *ibid*, pp.694,726.

superior position. Importantly, even a relatively weak set-off claim would suffice in withholding moneys otherwise due.

To rebut this presumption the contract must contain clear unequivocal words precluding the remedy of set-off[120]. This was seldom, if ever, found in construction contracts. The standard forms of construction contracts did not contain such provisions, and the sub-contractor did not have the bargaining strength to agree bespoke amendments to this effect with the main contractor. Therefore, following *Gilbert-Ash* an aggrieved party had to go through full trial of the claim and set-off claim.

The civil justice system was unable to prevent parties from purposely delaying the litigation process. The 1990s saw various legislative interventions attempting to improve the performance of the civil legal system and enhance access to justice. The legislation under review is of course one such example relating specifically to construction disputes. The Civil Procedure Rules 1998 (CPR) is another important example, which however applies to the overall civil litigation. In 1996, Lord Woolf published a pivotal report[121] for the introduction of the CPR that replaced the Rules of the Supreme Court 1965 and the County Court Rules 1981[122]. It provides helpful insights into the realities of litigation at the time, submitting that the civil justice system:

> is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of civil justice; and too

[120] *Gilbert-Ash*, p.718 (Lord Diplock); for NSW see CPA(NSW), s.21(3).

[121] Lord Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Crown, 1996).

[122] CPR, Explanatory Note.

> adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court.[123]

This statement was supported by a survey on the costs and duration of litigation involving a sample of 2,184 cases divided between 10 types[124]. Some of these types, like medical negligence and personal injury, are not relevant to construction disputes, whereas some others, like breach of contract and commercial, may be relevant, although details of each case are unavailable. The most relevant type is the Official Referees' Business, which dealt with construction disputes prior to the formation of the specialist Technology and Construction Court (TCC) in 1998[125].

The sample included 206 Official Referees' cases[126], split under 6 categories based on the amount claimed[127]. Their mean duration from instruction to conclusion of proceedings was 34 months[128]. Conclusion of proceedings did not necessarily mean handing of judgement. In fact, only 25% of the cases in the entire study were concluded with a judgment being handed down. Most commonly, proceedings concluded with a consent order, recording an agreement reached between the parties.[129] Therefore, it would normally take over 34 months to obtain judgment. Consent orders are, however, unavoidably more subject to power imbalances between the parties than is a judgement, and often reflect the

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[123] Woolf (n.121), s.I/para.2.

[124] medical negligence, personal injury, professional negligence, Official Referees', breach of contract, judicial review, Chancery, Queen's Bench 'other', Commercial, and bankruptcy/Companies Court cases: Hazel Genn, 'Annex 3: Survey of Litigation Costs', para.3, in Woolf (n.121).

[125] Judiciary, *Technology and Construction Court History* (Judiciary, 2022) <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/queens-bench-division/courts-of-the-queens-bench-division/technology-and-construction-court/history/> accessed 06 November 2022.

[126] 51no ≤12,500; 38no >£12,500 to ≤£25,000; 41no >£25,000 to ≤£50,000; 25no >£50,000 to ≤£100,000; 36no £100,000 to ≤£250,000; 15no <£250,000.

[127] Genn (n.124), tbl.5.

[128] ibid, tbl.5.

[129] ibid, para.8.

limited resources of one party as much as they do the merits or otherwise of a claim.

The Official Referees' sample included 51 cases with claim value of £12,500 or less. The median costs allowed to the winning party were £12,245[130]. The median costs allowed as a percentage of the claim value were 158%[131]. Therefore, a small sub-contractor with a £12,000 claim against a main contractor, to have its claim reviewed by the court, would have to embark into a legal battle likely lasting over 3 years, and allow a budget, should it lose the case, of £18,960 for the main contractor's legal costs, plus its own legal costs, plus court fees. The outcome was to 'contaminate the whole civil justice system'[132], with the overreaching consequence being that it:

> deters some litigants from litigating when they would otherwise be entitled to do so and compels other litigants to settle their claims when they have no wish to do so. It enables the more powerful litigant to take unfair advantage of the weaker litigant.[133]

A survey conducted in 1995 throughout central Scotland reinforces this statement. It included 47 sub-contractors, who recorded 427 disputes involving set-off by the main contractor. 93% of these disputes were resolved via negotiations, though the sub-contractors were dissatisfied in 62% of those negotiated settlements, but nevertheless settled mainly due to the high costs associated with pursuing the matter further.[134]

Clearly, the expense and length of litigation prohibited small businesses from perusing their claim through full trial. However, it is noteworthy that dissatisfaction with the civil justice system was not exclusively expressed by 'have-nots'. Bigger firms favoured a change in civil litigation too. For example, although not confined

[130] ibid, tbl.3.

[131] ibid, tbl.4.

[132] Woolf (n.121) ch.7, para.3.

[133] ibid.

[134] Kennedy, Morrison and Milne (n.85), p.535.

to the construction industry, a survey conducted in 1995 involving 400 companies from The Times Top 1,000 revealed that 70% of these firms found the civil justice system to be too lengthy, with over 60% suggesting that would prefer a paper only trial than oral arguments and evidence. Even at this top level, around 50% of the companies described the cost and delay as a barrier to pursuing their rights through litigation.[135]

1.7 Arbitration's inability to eliminate a party's incentive to delay and complicate the process

Prior to statutory adjudication's introduction in 1998, arbitration was widely used for resolving construction disputes, and even regarded as 'the favoured form of dispute resolution'[136]. Contrary to litigation and the Official Referees' Court, arbitration not only provided the standard benefits of confidentiality and procedural flexibility, but also the ability to select individuals with desirable expertise. As reported in 1994, '[n]one of the official referees is a registered architect, chartered engineer, chartered surveyor or otherwise professionally qualified in one of the many disciplines which are involved in cases'[137].

Despite these advantages, conventional arbitration was not any quicker, cheaper or less complex than litigation, due primarily to the tendency of those involved to undertake arbitration with the same procedures and techniques used in litigation. Per Lord Donaldson MR, '[a]rbitration is usually no more and no less than litigation in the private sector'[138]. The procedural flexibility of arbitration means that, in principle, it can be faster and less expensive than litigation if the parties adopt a collaborative and sensible approach in their procedural requests.

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[135] Frances Gibb, 'Big companies find civil justice takes too long' *The Times Digital Archive* (London, 24 January 1995), p.2.

[136] Daniel Atkinson, *Arbitration is learning from adjudication* (Construction News, 14 August 2003).

[137] John Newey, 'Constructing solutions – the work undertaken by the London official referees' courts' (1994) 91 LS Gaz 23.

[138] *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] Adj.L.R. 02/17, para.62.

However, in practice, several tactics were employed by an unwilling party in an arbitration to delay and complicate its process.

A party with negotiating power could insist on a contractual clause providing that a dispute can only be referred to arbitration after practical completion of the works, thereby obligating the sub-contractor to complete the contract before being able to bring a claim. In fact, many sub-contracts took it a step further, providing that a dispute could only be referred to arbitration after practical completion of the main contract works. Such clause was present in *Dawnays*, and was a contributing factor in finding that the main contractor could not withhold payment on account of a set-off, since the main contractor could delay dispute resolution indefinitely by relying on matters outside the sub-contractor's control[139].

Once arbitration has commenced, an unwilling party can delay the process through such mechanisms as acting uncooperatively during the arbitrator's appointment, raising jurisdictional and discovery matters, and requesting extensions to timetables or permission to amend pleadings. Jurisdictional challenges may question, inter alia, the validity of the contract containing the arbitration clause relied on by the party that brought the proceedings, whether the dispute falls within the ambit of the arbitration clause, or, the law and rules governing the arbitration procedure and whether these have been correctly followed, for example, when appointing the arbitrator.[140]

A party can employ delaying tactics both when it is on the receiving end of, or making, a discovery request. During the former, it may claim that the document sought is missing or privileged, or that certain witnesses are unavailable. When requesting discovery, it can delay the process through burdensome requests by, for example, using broad wording to define the documents sought, resulting in large data having to be located and disclosed by the other party.[141]

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[139] *Dawnays*, p.1209.

[140] Alain Frecon, 'Delaying tactics in arbitration' [2004] DRJ 40, p.42.

[141] ibid, pp.43&44.

Harris argues that arbitration, as existed in the 1990s, offered greater opportunities for delaying tactics than litigation[142]. He distinguished delaying tactics between pre-award and post-award[143]. Pre-award tactics could start during the tribunal's appointment. The course of action would depend on the wording of the arbitration clause. For example, if it required parties to agree a sole arbitrator, the respondent could refuse all persons proposed by the claimant. If no arbitrator nominating body was prescribed in the agreement, the claimant would have likely needed to resort to the court for appointing an arbitrator under the Arbitration Act 1950 s.10. Assuming the respondent played its cards right, this could take 'twelve months purely to get the arbitration tribunal established'[144].

During interlocutory stages, the experienced respondent would ensure that the arbitrator's directions include 'liberty to apply'[145], meaning that a party could apply to the arbitrator for, among other things, extension of time to the timetable, permission to amend pleadings, meetings or hearings, or an order requiring the other party to take some action, for example, disclose a document[146]. The process could be further delayed by failing to meet deadlines, requesting extensions, changing lawyers mid-stream, introducing new evidence, and converting what initially appeared as a simple arbitration to a complex one. The latter was achieved by initially exchanging informal submissions, then at a later stage, which could be before, during or after the hearing, argue that the case has become considerably more complex, legally or factually, than originally envisaged, requiring that the parties set out their case in formal pleadings.[147]

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[142] Cedric Harris, 'Abuse of the Arbitration Process-Delaying Tactics and Disruptions: A Respondent's Guide' [1992] J.Int.Arbitr. 87, p.94.

[143] ibid, p.88.

[144] ibid.

[145] ibid, p.89.

[146] Douglas Stephenson, *Arbitration Practice in Construction Contracts* (3rd edition, Routledge, 1993), p.41.

[147] Harris (n.142) pp.88-90.

Penalties for the above were usually modest because the arbitrator would not want to risk enforcement[148]. In Harris' words, 'a skilled respondent (or his lawyers) can normally cling onto his rights by his fingernails'[149].

Furthermore, the respondent could request security for its costs. Especially if the claimant was shown to be in financial difficulty, the arbitration could be stayed until the claimant provides appropriate guarantee.[150] Opportunities for delaying tactics continued to exist post-award, by challenging the award's validity, appealing from an award, and resisting enforcement proceedings[151].

It is acknowledged that contemporary arbitration has come a long way in addressing many of these problems, for example with the introduction of the Arbitration Act 1996. Therefore, it is reminded that this section involves a historical discussion of arbitration as existed before the legislation's introduction in 1996.

Regarding arbitration's costs, a study was conducted in 1993 focusing on the perceptions of actors in the field of construction arbitration, including lawyers, architects, civil engineers and quantity surveyors[152]. It argues that lawyers aimed to *'juridify'* the field to dominate it. Even back then, hourly rates of £350 per hour were common for senior lawyers[153]. A party in a typical five-day hearing would require £34,000 preparation costs for its solicitor and counsel, plus another £8,200 for their services during the hearing[154]. These figures in 2022's value

[148] ibid, p.90.

[149] ibid, p.89.

[150] ibid, p.90.

[151] ibid, p.91-94.

[152] John Flood and Andrew Caiger, 'Lawyers and Arbitration: the juridification of construction disputes' [1993] The Modern Law Review 412.

[153] ibid, p.427.

[154] ibid, p.432.

would be £75,004.58 and £18,089.34 respectively[155]. The arbitrator's fees shall also be considered when estimating the cost of the process.

1.8 The introduction of contractual adjudication and its limitations

The previous sections explained two different matters, which in combination, resulted in the bigger social problem of 'haves' exploiting the legal system. Firstly, the ease in which payment could be withheld on account of a set-off claim, with the aggrieved party having to undergo full trial to pursue its claim. Secondly, the inability of litigation and arbitration to eliminate a party's incentive to delay and complicate the process.

Following *Gilbert-Ash*, the producers of standard forms of construction contracts, like the Joint Contracts Tribunal (JCT)[156], recognised the need to protect sub-contractors from unjustified set-offs. Therefore, they introduced provisions rendering the right to set-off conditional upon giving advance notice while also entitling the payee to forthwith have the set-off reviewed by an independent third party.[157] For example, if the main contractor considered that the sub-contractor was late in completing or that its workmanship was defective, the main contractor could set-off the associated amount against the sub-contractor's application for payment, however, the sub-contractor could forthwith refer the resulting dispute for resolution. This new developing dispute resolution procedure was given the name adjudication.

Provisions for contractual adjudication can be traced back to 1976, when the JCT 1963 editions of the Green and Blue forms of sub-contract were amended to incorporate an identical adjudication procedure under clauses 13B and 16

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[155] Using calculator available in: <https://www.thisismoney.co.uk/money/bills/article-1633409/Historic-inflation-calculator-value-money-changed-1900.html> accessed 06 November 2022.

[156] JCT produces standard forms of construction contracts since 1931 and consists of seven member bodies: JCT, About JCT <https://corporate.jctltd.co.uk/about-us/> accessed 06 November 2022.

[157] John Redmond, *Adjudication in construction contracts* (Blackwell, 2001), pp.4&5.

respectively[158]. Some authors suggest that the adjudicator's jurisdiction was limited to set-offs made by the main contractor[159]. However, the clauses entitled the sub-contractor to refer to adjudication any set-off applied by the main-contractor, together with any counterclaim the sub-contractor may have had against the main contractor[160].

To commence adjudication, the sub-contractor should, at the same time, give notice of arbitration to the main contractor. The adjudicator did not have to give reasons for his/her decision, which was binding until reversed by arbitration or litigation. The sub-contractor had to pay the adjudicator's fees, although the arbitrator could order repayment in his/her award.[161] This first contractual adjudication procedure had its peculiarities, for example, having to issue an arbitration notice with the adjudication notice and being liable for the adjudicator's fees irrespective of the adjudication's outcome.

In 1993, the first edition of the New Engineering Contract (NEC) was published by the Institution of Civil Engineers, becoming the first contract allowing all contractual disputes to be referred to adjudication by either party[162]. However, it had a tough limitation period, requiring commencement of adjudication within four weeks from the dispute arising. Contrary to the aforementioned JCT provisions, it did not require issuing arbitration notice when commencing adjudication. A dissatisfied party had to issue notice of intention to refer the dispute to arbitration or litigation within four weeks of the adjudicator's decision. However, such proceedings could commence only after the completion of the works or any earlier termination of the contract.[163]

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[158] Although the contracts could not be obtained, these adjudication clauses are quoted in Burr (n.57), pp.2-4.

[159] Issaka Ndekugri and Michael Rycroft, *The JCT 05 Standard Building Contract Law and Administration* (2nd edition, Elsevier, 2009), p.469.

[160] Burr (n.57), p.2.

[161] ibid, pp.2-4.

[162] John L. Riches and Christopher Dancaster, *Construction Adjudication* (2nd edition, Blackwell, 2004), p.3.

[163] Adjudication clause is quoted in Burr (n.57), pp.13-15.

Although several dispute resolution options existed by the 1990s, they required both parties' agreement. Such quick and inexpensive procedures, albeit arguably fair[164], were beneficial for the payee under the contract. There was no apparent reason for an employer or a main contractor to include such provisions into the main contract and sub-contracts respectively because they would likely be the defendant in an adjudication. Therefore, they normally deleted such clauses when standard form contracts incorporating them were used[165].

When a contract did not include adjudication provisions, or when adjudication clauses within a standard form of contract were deleted, the only dispute resolution methods available for the payee were litigation or, if opted for by the parties, arbitration. Both methods failed to eliminate a party's incentive to delay and complicate their process. This rendered them prohibitive for most payees, who simply could not afford to pursue their rights via these methods.

1.9 The turning point with the Latham Report

It was against this background that in 1993 Sir Michael Latham was asked to produce a report on increasing the construction industry's effectiveness. While these problems had been longstanding, the government was newly motivated to address them following a recession that produced profound economic and social consequences. For example, between 1989 and 1994, over 35,000 small construction enterprises became insolvent and around 500,000 jobs were lost[166]. While several comprehensive reports of the UK construction industry were published since 1944[167], this section reviews the Latham Report due to its catalytic role in introducing HGCRA.

[164] HL Deb 28 March 1996, col.1838; HL Deb 23 July 1996, col.1336.

[165] HC Deb 07 May 1996, vol.277, col.52.

[166] Latham (n.42), p.9.

[167] see: Mike Murray and David Langford (eds), *Construction Reports 1944-98* (Blackwell Science, 2003);

In announcing the commencement of Latham's review, minister Tony Baldry stated that it aimed to identify 'reforms to reduce conflict and litigation and to encourage productivity and competitiveness'[168]. Published in 1994, the Latham Report became a turning point for the legislation's introduction, and, to this day, is cited by courts at the highest level.[169]

The Latham Report has a broad scope, addressing several matters within its twelve chapters. From the role of clients, consultants, and contractors to strategies for the successful delivery of projects from inception through to design, tendering, construction, and post completion. The main problem identified in Latham's interim report[170] was the lack of trust within the industry. The Latham Report makes several recommendations to reduce the inherently adversarial relationships between contracting parties and promote teamwork[171]. From this perspective, it parallels other important reports on civil litigation of that time, like the Woolf Report, since both introduce a new duty for parties to cooperate[172]. It is beyond the scope of this thesis to analyse Latham's overall recommendations and the extent to which they have been implemented[173].

Relevantly, the Latham Report recommended introducing a 'Construction Contracts Bill' rendering the right to set-off conditional upon giving a notice, prohibiting provisions that make payment contingent on the payer receiving payment from another party (pay-when-paid), and introducing adjudication[174]. These changes were seen as contributing towards the central aim of reducing conflict and promoting teamwork, because these fairer contractual arrangements

[168] HC Deb 05 July 1993, vol.228, cols.4-5W.

[169] *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, para.11.

[170] Michael Latham, *Trust and Money: interim report of the joint government/industry review of procurement and contractual arrangements in the United Kingdom construction industry* (HMSO 1993).

[171] Latham (n.42), ch.8.

[172] Woolf (n.121), s.I/para.9; Latham (n.42), para.5.18.1.

[173] see: Joey Gardiner, *Latham's report: Did it change us?* (Building, 27 June 2014).

[174] Latham (n.42), pp.viii,84&85.

would boost cooperation and confidence between parties, with adjudication resolving any disputes as they arise[175].

Regarding 'pay-when-paid' provisions, historically the courts would uphold a contractual clause providing that 'payments to the subcontractor for work done or materials provided are contingent upon the [main] contractor receiving payment from the employer'.[176] In discussing the reasonableness of pay-when-paid, Humphrey Lloyd J said that it 'is not only not unreasonable but a fair apportionment of some of the common risks of contracting'[177].

The inclusion of pay-when-paid clauses rendered the fate of payees' cashflow contingent on events beyond their control. A sub-contractor would incur expenses performing work, but if the employer did not pay the main contractor, then the sub-contractor would have no entitlement to be paid. This was because the sub-contractor had no direct contractual relationship with the employer and therefore could not bring a claim against the employer, whilst also could not bring a claim against the main contractor because under the sub-contract payment was not due as it had not been received by the main contractor. The main contractor, however, had much less incentive than the sub-contractor to commence a dispute with the employer because the main contractor had not incurred the same costs as the sub-contractor. Consequently, the sub-contractor was placed in a position that potentially jeopardised its survival, without having any remedy.

Although the Latham Report does not offer the explanation given in the preceding paragraph, it criticises pay-when-paid provisions for detracting from the real business of construction[178]. Despite the disagreement of the Construction Industry Employers Council, which argued that pay-when-paid provisions should

[175] ibid, paras.5.18.11,9.8.

[176] *Taymech Ltd v Trafalgar House Construction (Regions) Ltd*, 1995 SLT 202, p.204 (Lord Abernethy).

[177] *Durabella Ltd v J. Jarvis & Sons Ltd* [2001] EWHC 454, para.20.

[178] Latham (n.42), pp.34-35.

be preserved,[179] the Latham Report recommended that 'pay-when-paid' conditions should be explicitly declared unfair and invalid'[180].

Regarding set-off, although the Latham Report does not cite the conflicting jurisprudence of *Dawnays* and *Gilbert-Ash*, nor provides an analysis of the two matters summarised in the first paragraph of the previous section, it does recognise the central problem argued in this chapter. It cites the case of *Ellis Mechanical Services v Wates Construction Limited*[181] to support the notion that senior judges were aware of disputants' practice to withhold cashflow by slowly dragging cases through the courts or arbitration, aiming 'to exhaust the other by delays in settlement'[182]. Latham recommended rendering the right to set-off conditional upon the payer:

> a. giving notification in advance; b. specifying the exact reason for deducting the set-off; and c. being prepared to submit immediately to adjudication and accepting the result.[183]

The latter recommendation brings us to the statutory right to refer a dispute for adjudication. Latham commended the adjudication procedure existing in several standard forms of contract, suggesting it should become the normal method for resolving all kinds of disputes, not only those related to set-offs[184]. Latham recommended that legislation should render invalid any contractual terms seeking 'to deny or frustrate the right of immediate adjudication to any party'[185].

1.10 The situation in NSW before BCISPA(NSW)'s introduction

[179] ibid, p.35.

[180] ibid, p.85.

[181] (1976) 2 BLR 57.

[182] Latham (n.42), para.9.13.

[183] ibid, p.84.

[184] ibid, p.viii, para.9.4-9.7.

[185] ibid, p.84.

Disputes were an endemic problem of NSW's construction industry too, with reports exploring the cause and remedial actions[186]. A research project found that NSW's contracting system was influenced by, and was very similar to, that of the UK[187]. Contributing factors included the parties' adversarial approach, seeking lump sum tenders with inadequate information, improper understanding of risk involved in projects, and poor contract documentation.[188] The Latham Report identified similar matters five years later[189].

Historically, English case law has been highly persuasive in Australia. The conflicting jurisprudence of *Dawnays* and *Gilbert-Ash* was discussed in the Australian courts[190], however, no conflicting decisions could be found in NSW. This is possibly due to lack of relevant cases during the short-lived 'Dawnays' era between 1971 and 1973, or simply because there was no willingness to override precedent as the EWCA did in *Dawnays*.

Consequently, judgments often turned on whether the parties agreed to exclude the remedy of set-off. This stems from Diplock's jurisprudence in *Gilbert-Ash*, which Australian courts have followed.[191] Therefore, cases involved interpretation of the specific contract, particularly whether parties agreed to forfeit the right to set-off on the circumstances, which usually involved interim payment certification[192].

Qualitative data indicates that NSW had similar social problems to the UK, all caused by the inability of litigation and arbitration to eliminate a party's incentive

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[186] e.g. NPWC/NBCC, *No dispute: strategies for improvement in the Australian building and construction industry* (National Public Works Conference, 1990).

[187] John Tyrril and others, *Claims and Disputes* (ACLN, Issue 3, 1989).

[188] ibid, pp.1-5.

[189] Latham (n.42) paras.3.4, 6.2-6.6, 6.33-6.37.

[190] *Novawest Contracting Pty Ltd v Taras Nominees Pty Ltd* [1998] VSC 205, paras.65-69; *Waterways Authority of New South Wales v Coal & Allied (Operations) Pty Limited* [2007] NSWCA 276, paras.220&221.

[191] *Novawest*, paras.28&55; *Waterways*, para.221; *Leighton Contractors Pty Ltd v East Gippsland Catchment Management Authority* [2000] VSC 26, para.14.

[192] For a discussion of relevant cases see: David Rodighiero, *Responsibility for Failure to Certify Progress Payments - Where are we now?* (ACLN, Issue 115, 2007).

to delay and complicate the process. A case study involving five sub-contractors working on a shopping mall constructed between 1996 and 1997[193], provides helpful insights on how 'haves' exploited the justice system. Although this project was in the State of Queensland, it is representative of NSW because it served as illustration of an endemic problem throughout Australia[194]. Also, this case study was part of a report spanning 23 volumes that investigated broader unlawful or inappropriate practices in the Australian construction industry[195].

The consensus was that the main contractor underpaid sub-contractors' interim applications by raising set-off claims while disputing the sub-contractors' claims for varied or additional work. The sub-contractors did not stop work due to fear of damages for breach of contract or delayed completion, and to maintain goodwill. This caused an increasing shortfall throughout the project, which manifested into large final account disputes when the project was completed.[196]

At final account stage the main contractor offered to settle for significantly lesser sums than the sub-contractors' claims, even applying psychological manipulation by saying that the offer is open only for 24 hours. An example from the case study was a settlement offer of $200,000 against a claim of $1,183,745, accompanied by the following statement:

> This is our final offer, that's all you're going to get. You can fight us for more if you want, but we have got a building full of lawyers and we can stretch this thing out for years. So even if by chance you were to win, the cost of winning will send you broke long before you get any money.[197]

This approach proved successful for the main contractor. A sub-contractor settled a $310,000 claim for $95,000, because he 'didn't have the money to keep the business afloat for the years it would take to run a court case, let alone have any

[193] Cole (n.82), vol.8/p.232.

[194] ibid, p.235.

[195] Cole (n.82), vol.2/p.3.

[196] Cole (n.82), vol.8/pp.232-234.

[197] ibid, p.233.

money to fund legal costs'[198]. This impacted the director's personal life, in that his 'wife gave up her career to access $100,000 of redundancy money, and… remortgaged their house for $140,000'[199].

Another sub-contractor settled to avoid litigation, notwithstanding that this caused $400,000 loss on the project[200]. A third sub-contractor pursued litigation after estimating the associated legal costs at $80,000. However, years later the case was still at pre-trial stage and the sub-contractor's costs amounted $132,067.93, with future costs estimated at $170,000 assuming a two-week trial. Consequently, the sub-contractor settled for a significantly lesser amount than what it considered its claim to be worth, since it was 'not viable to take the matter to trial'[201].

These incidents were not isolated, but an endemic problem throughout Australia's construction industry. The Civil Contractors Federation submitted that such tactics were 'in fact common practice throughout the contract chain commencing with [the Employer]'[202]. The Commission concluded that the overreaching effect was that contracting parties, often small businesses, were not rewarded for work they performed, or worst, failed to make a living, due to lack of:

> resources to enforce their legal rights, because enforcement would require protracted litigation against much better resourced and more sophisticated companies. Consequently, subcontractors that have operated profitably and well for many years can be forced into liquidation through no fault of their own, often with devastating consequences for the owners of these businesses, their families, their employees and their creditors.[203]

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[198] ibid.

[199] ibid, p.234.

[200] ibid.

[201] ibid, p.233.

[202] ibid, p.231.

[203] ibid, p.262.

Arbitration was equally unable to eliminate a party's incentive to delay and complicate the process. By the 1980s arbitration had already 'broken down as a cheap and efficient means of resolving construction dispute… [due to] the strenuously adversarial manner in which the disputants themselves pursue the arbitral process'[204]. Consequently, parties were forced 'to settle, as they could not afford to continue with the arbitral process… There have also been situations where a claimant has spent more on legal costs than the amount claimed, which to the casual observer appears as the ultimate absurdity'[205]. Back in 1989, the role of the contract adjudicator was recommended, who would be independent from the contract administrator and provide an interim determination of disputes[206].

1.11 Parliamentary debates in the UK and NSW

The Latham Report provided impetus for drafting HGCRA. The UK parliament started promoting Latham's recommendations shortly after their publication.[207] The proposed Bill's aim was twofold. Firstly, balance the advantage that 'haves' obtained due to the nature of the legal system. Secondly, improve co-operation between contracting parties, and reduce conflict and expensive disputes altogether.

Regarding the former, parliamentary debates verify the construction industry's problems identified by Latham. Business was conducted in an adversarial manner with the industry having a record of disputes ending to courts. Although the right to set-off was well-established, payers abused it to delay dispute resolution and payment, thereby compromising payees' cash flow.

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[204] Tyrril (n.187), p.10; AFCC, *Strategies for the reduction of claims and disputes in the construction industry: a research report* (1998, Australia), p.70.

[205] AFCC (n.204), p.70.

[206] Tyrril (n.187), pp.8&10.

[207] HC Deb 19 December 1994, vol.251, cols.1430-1432 (Tom Cox).

Consequently, thousands of companies entered liquidation because they were unable to pursue and enforce their rights.[208]

As an equalising reform, the Bill prohibited ‘pay-when-paid’ and introduced a mechanism for determining the value and timing of payments whilst rendering the right to set-off conditional on giving written notice by a prescribed date. Furthermore, it entitled parties to refer disputes to adjudication and suspend performance for non-payment of a sum due.[209] The combination of the aforesaid would ‘speed up the flow of payments and information about payments’[210], 'provide greater certainty of cash flow and greater payment security'[211], and tackle the insolvency domino effect[212].

For the second objective, namely improve co-operation and reduce conflict, it was promoted throughout the debates that the legislation would ‘provide a framework for fairer contractual arrangements and better working relationships in the construction industry’[213], assist the industry in becoming ‘less adversarial and confrontational’[214], promote 'the ethos of "working together"'[215], and ‘improve relations between clients, contractors and subcontractors’[216]. The adjudication procedure was central to this aim, casually described as a ‘prompt and informal action at the time when a dispute first arises… to nip the problems in the bud’[217] and produce ‘a decision which will enable work on the contract to continue’[218],

[208] HL Deb 20 February 1996, vol.569, cols.1005-1007 (Viscount Ullswater); Cox (n.207) col.1431; HC Deb 05 April 1995 vol.257, col.1655. (John Cope); HL Deb 20 February 1996, vol.569, col.977 (Earl Ferrers).

[209] HL Deb 20 February 1996, vol.569, cols. 977-979,1005-1008.

[210] Earl Ferrers (n.208), col.978.

[211] Cox (n.207), col.1431.

[212] ibid.

[213] Ullswater (n.208), col.1005.

[214] Earl Ferrers (n.208), col.978.

[215] ibid.

[216] HC Deb 19 July 1995, vol.263, col.1606 (Tom Cox).

[217] Earl Ferrers (n.208), col.979.

[218] ibid.

and ultimately ‘save a great number of disputes finding their way into the courts’[219].

Adjudication was further described as ‘a simple, effective, cheap and, most importantly of all, non-legalistic procedure for the resolution of disputes’[220]. It would ‘reduce the amount of paperwork as well as the amount of argument, both of which bedevil the construction industry… [due to] the present contractual arrangements’[221].

Moving to the debates in NSW, their distinction is that the proposed legislation only had one purpose, namely, balance this power advantage of the ‘haves’. The absence of the objective of improving co-operation between parties, again[222] supports the notion that, in the UK, the proposed legislation and the way it was advanced were influenced by other larger changes occurring in the English legal system at that time, such as those proposed by the Woolf Report.

In introducing the Bill to the NSW Parliament, the minister for Public Works and Services said that it was in:

> support of the long fight by subcontractors in the construction industry for justice and security of payment… [aiming] to stamp out the unAustralian practice of not paying contractors for work they undertake… small subcontractors - such as bricklayers, carpenters, electricians and plumbers - are not paid for their work. Many of them cannot survive financially when that occurs, with severe consequences for themselves and their families.[223]

The debates progressed along the lines of the above extract. Several statements are quoted below due to their vividness and self-explanatory nature. The Bill’s

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[219] ibid.

[220] HL Deb 29 April 1996, vol.571, col.1460 (Lord Berkeley).

[221] Cope (n.208), cols.1654&1655.

[222] see ch.1/s.1.9.

[223] LAH 29 June 1999 (Iemma).

purpose was ‘to overcome delays in payments… [sub-contractors] invest labour and materials… and are left to the whims of builders whether they receive payment and the time of that payment. Obviously, we seek to redress that power relationship’[224]. ‘The biggest weapon that an unscrupulous builder has… is the weapon of delay.[225]’ ‘It is time for legislation to... remove any incentive to delay payment. Thousands of small subcontractors… carry out work in good faith and battle regularly to be paid for it... [they] will finally receive some protection from unscrupulous operators.’[226] ‘No longer will… developers and builders be able to finance their excesses at the expense of subcontractors and their families.’[227]

Parliament wanted to ensure that:

> builders cannot extract concessions from subcontractors who have already done the work… A subcontractor has serious cash-flow problems because he has invested all of his resources… The builder has an obvious power advantage… then extracts a discount from the subcontractor… The bill examines timeliness of payment, correcting duress and bringing industrial justice... speedy justice. We will not allow the legal system to work in favour of the builder and exploit the subcontractor.[228]

Furthermore, an example was made of three major projects whose contracting chains were affected due to the collapse of the leading contractors. The Bill would contribute to protecting smaller sub-contractors from ‘suffering at the hands of collapsed building companies who break their agreements and leave subcontractors without payment’[229].

[224] LAH 15 September 1999 (Tripodi).

[225] ibid, (Merton).

[226] ibid, (Oakeshott).

[227] ibid, (Greene).

[228] LAH 15 September 1999 (Tripodi).

[229] LAH 13 September 1999 (Smith).

1.12 The need for preserving the legislation

This chapter argued that, in both the UK and NSW, the legislation's primary aim was to tackle the advantages that 'haves' get from delaying dispute resolution, and, consequentially, the social problems and injustice caused to their 'have-not' opponents. The discussion focused on the period preceding the legislation's introduction, particularly from the 1970s to the 1990s.

Unquestionably, the last 25 years have seen several developments in the field of construction dispute resolution. For example, both jurisdictions have revised their civil procedural rules[230] and arbitration legislation[231], aiming to improve the efficiency of litigation and arbitration respectively. A party may be penalised with adverse costs order for any disobedience to the applicable rules and the tribunal's directions[232]. The average litigation length for a first instance court case is 437 days and 402 days for the UK and Australia respectively[233].

However, despite these improvements, the underlying risk of 'haves' exploiting the civil justice system still exists. But for the provisions of HGCRA and BCISPA(NSW), a set-off claim would still be a valid defence for preventing summary judgment of a sum otherwise due. Therefore, a 'have-not' would require going through full trial to pursue its claim.

In addition to the right to immediate adjudication, both legislations entitle contractors to interim payments, coupled with a payment notification mechanism establishing the sum that must be paid and by when, as well as the right to suspend performance for non-payment. These provisions enable prompt identification of disputes, with the payee being able to resort to adjudication and/or suspension with the least amount of committed costs for works already carried out.

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[230] CPR; UCPR(NSW).

[231] AA(EW); CAA(NSW).

[232] CPR, r.3.9; UCPR(NSW), r.42.10.

[233] World Bank, 'Time required to enforce a contract' (*World Bank*, 2022) <https://data.worldbank.org/indicator/IC.LGL.DURS> accessed 23 October 2022.

Moreover, from a case management perspective, most construction disputes are currently resolved via adjudication, with courts being involved in a relatively small number of those adjudications, primarily by means of summary enforcement proceedings. Repealing the legislation would see many disputes presently resolved via adjudication being litigated instead, thereby causing a congestion of workload, and, consequently, increase the current length of litigation.

Regarding arbitration, despite its advantages, it requires both parties' consent, and therefore it is unlikely to prevent the court overload explained in the above paragraph as many parties will not agree to it. Furthermore, an arbitrator cannot order a provisional award unless the parties have agreed to confer such power upon him/her[234]. Additionally, the law of set-off supports the notion that an arbitrator must not order a provisional award for payment of a claim if there is a set-off claim of at least equal value operating as a defence, and instead decide both under the same (final) award[235].

Therefore, a have-not still must go through the detailed arbitration process, which presents opportunities for delaying tactics. While as a formal matter arbitrators have the power to resist such tactics, concern by arbitrators over the possibility of a successful challenge to the award if a party can argue that it was not given the opportunity to properly present its case often makes arbitrators less willing than judges to constrain parties in their procedural requests. This phenomenon is often referred to under the label 'due process paranoia'.[236]

Therefore, the legislation's contribution in tackling the aforesaid social problems and injustice is, to this modern day, as significant as it was back in the 1990s. The benefits for preserving the legislation are clear.

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[234] AA(EW), s.39.

[235] This proposition is also supported in: Robin Oldenstam and Johann von Pachelbel, 'Sweden' in Frank-Bernd Weigand (ed), *Practitioner's Handbook on International Commercial Arbitration* (OUP, 2009) p.791.

[236] Rutger Metsch & Rémy Gerbay, 'Prospect Theory and due process paranoia: what behavioural models say about arbitrators' assessment of risk and uncertainty', [2020] Arb.Int'l 233.

1.13 Conclusion

This chapter reviewed the legislation's genesis, aiming to establish its primary purpose and whether it is still relevant. The findings support the proposition that the reality of the UK and NSW construction industry prior to the introduction of HGCRA and BCISPA(NSW) respectively parallels closely with Galanter's theory. In both jurisdictions, large contractors became the personification of Galanter's 'haves'. They usually enjoy financial strength, and the disputed amount in each individual case is generally small compared to their overall worth[237]. Smaller sub-contractors personified Galanter's 'have-nots', with their claims being too large relative to their capital strength, or too small compared to the cost of pursuing them[238]. A 'have-not' contractor would have already incurred expense for carrying out the work, therefore, considering its small capital and lack of liquidity, prompt resolution of disputes and actual payment of sums due are crucial to its survival.

The courts in both jurisdictions recognise that a defendant's set-off claim can suffice for resisting summary judgment. Parties withheld payment on account of relatively weak set-off claims, until the full trial was complete, which could last years. The legal system of both jurisdictions conferred advantages to 'haves', since litigation and arbitration failed to eliminate a 'have's' incentive to delay and complicate the process.

A major advantage of 'haves' is their ability to conduct prolonged litigation/arbitration without interfering with their normal day to day business. They may even have a legal team dedicated in running such proceedings, with the associated costs being included within their overall overhead expenses. By contrast, for a 'have-not', lengthy and complex procedures are a big hurdle to overcome. The 'have' invests in the expectation that the 'have-not' will abandon or settle the claim before the judgment/award is handed down. Even after the

[237] Galanter (n.56), p.4.

[238] ibid, pp.3&4.

judgment/award, the ‘have’ may still delay actual payment through appeal avenues.

Although Galanter argues that ‘haves’ are normally ‘engaged in many similar litigations over time’[239], this chapter’s findings support the notion that actual litigation is not a prerequisite for a ‘have’ to exploit the legal system. The real requirement is the ‘have’s’ ability (or persuading its antagonists that it has the ability) to delay any prospective litigation/arbitration through the motions of defending. For example, in the shopping mall case study[240], only one sub-contractor engaged in actual litigation, and the matter did not even make it to trial. Nevertheless, the main contractor still managed to take advantage of the legal system when settling the accounts of all its sub-contractors.

The concept of whether a party is deemed a ‘have’ or ‘have-not’ is not constant, but instead depends on the dispute’s nature and value, as well as its counterparty’s resources. For example, in a £50,000 dispute between a sub-sub-contractor and a sub-contractor, the sub-sub-contractor is normally deemed as ‘have-not’ and the sub-contractor as ‘have’. However, in a £1,000,000 dispute between that same sub-contractor and a main contractor, the sub-contractor is normally deemed as ‘have-not’ and the main contractor ‘have’.

Both jurisdictions realised that the situation required addressing through legislative intervention. Albeit with different rules, both jurisdictions introduced a statutory right to interim payments together with a payment notification mechanism establishing the sum that must be paid and the date by which it must be paid, as well as a fast-track quasi-judicial procedure called adjudication and a right to suspend performance for non-payment of a sum due. All these changes aimed to achieve what litigation and arbitration could not, namely, eliminate a party’s incentive to delay the dispute resolution process.

[239] ibid, p.3.

[240] see ch.1/s.1.10.

To this day, HGCRA and BCISPA(NSW) play a pivotal role in tackling the aforesaid injustice and therefore must be preserved. The next chapter reviews adjudication's advantages as an equalising reform. Importantly, it also examines the legislation's limitations and explains that its greatest disadvantage is the potential injustice caused by adjudication's pseudo-temporary nature.

Chapter Two: The pseudo-temporary nature of adjudication and how to best resolve this problem[241]

2.1 Introduction

Chapter One argued that both HGCRA and BCISPA(NSW) tackle the same kind of injustice, namely, the advantages that 'haves' get from delaying dispute resolution. Despite improvements in the civil justice system over the last 25 years, the legislation still plays a vital role in tackling this injustice and therefore shall be preserved[242]. Chapter Two first examines the legislation's advantages as an equalising reform, followed by a review of its disadvantages, arguing that its greatest downside is the potential injustice caused by adjudication's pseudo-temporary nature.

While in principle a 'have' or a 'have-not' that has lost an adjudication may, after complying with the adjudicator's decision, submit the dispute for final determination by litigation or arbitration, this very rarely occurs in practice. Of course, the parties may be content with the adjudicator's decision or have otherwise utilised it to amicably settle their dispute. However, this chapter argues that even if a party is dissatisfied with the adjudicator's decision, it is deterred from pursuing litigation/arbitration.

A dissatisfied 'have-not' payee that has either lost the adjudication or awarded less than it considers the claim to be worth, will have to face the challenges of a full trial explained in the previous chapter. By contrast, a dissatisfied 'have' payer has the additional risk that the have-not will become insolvent before repaying any sums ordered. This context disincentivises both parties from pursuing litigation/arbitration. Accordingly, an adjudicator's decision is pseudo-temporary, in that its temporary status is only superficial, whilst in reality it is permanent.

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[241] This Chapter draws in part on: Harry Meliniotis and others (n.59).

[242] ch.1/s.1.12.

Chapter Two then explores possible countermeasures against this injustice, including introducing additional barriers in the enforcement of an adjudicator's decision and amending the legislation to the version that promotes the highest degree of procedural justice whilst preserving its speed, aiming to recommend the optimal approach. That is, a solution that considers both adjudication's pseudo-temporary nature and the legislation's purpose. Finally, this chapter outlines the legislation's ambit.

2.2 Legislation's advantages as an equalising reform

Chapter One argued that the situation in the UK and NSW construction industries before the legislation's introduction parallels closely with Galanter's proposition that the architecture of the legal system benefits the 'haves'. After setting this proposition, Galanter considered the extent to which reforms of the legal system might dispel those advantages[243]. An equalising reform envisioned by Galanter, was to increase institutional facilities processing claims to enable 'timely full-dress adjudication of every claim put forward – no queue, no delay, no stereotyping'[244]. Of course, Galanter acknowledged the utopian nature of his vision and accepted that real life reforms will be more pragmatic.[245]

This thesis is relevant to Galanter's literature, in that the legislation under review is an actual reform dispelling the advantages of 'haves'. Adjudication balances the parties' inequality, through its speed, predictability of cost, and the 'pay now, argue later'[246] status of its outcomes. Adjudication's speed is clear, given the short time limits laid down in the applicable legislation. For example, HGCRA provides for a 28-day procedure from referral of dispute to the decision being

[243] Galanter, (n.56), p.149.

[244] ibid, p.139.

[245] ibid, p.149.

[246] see ch.2/s.2.4.

issued[247], whilst BCISPA(NSW)'s timescales depend on the kind of payment dispute and can be as quick as 10 business days[248].

This speed itself, of course, also contributes to lowering the cost of adjudication, as both in terms of costs likely to be incurred for legal representation and in terms of the less formal opportunity costs that can be a significant consideration with longer disputes. This benefit was also envisioned by Galanter because of reforms increasing institutional facilities[249]. Moreover, each party bears its own costs incurred during adjudication[250], thereby eliminating the risk inherent in the 'costs follow the event' approach common in commercial disputes in both jurisdictions. Furthermore, it is more realistic to participate in adjudication without any representation than is the case for arbitration/litigation.

Consequently, as also envisioned by Galanter, claimants are inclined to pursue their rights through the available dispute resolution procedure instead of settling for a lesser amount than they consider to be just[251]. Adjudication has become a primary method for resolving construction disputes in both the UK and NSW. For example, for year ending April 2019 the UK had 1905 reported adjudications[252], whilst for year ending June 2019 NSW had 961 adjudications[253]. Furthermore, adjudication's mere availability encourages amicable settlements without actual resort to adjudication.

Moreover, the legislation introduces an entitlement to interim payment and imposes statutory payment notification obligations (SPNO) for each payment. These rules are critical for adjudication's operation because they compel payers

[247] HGCRA s.108(2)(c).

[248] BCISPA(NSW), s.21(3)(a)(ii).

[249] Galanter, (n.56), p.139.

[250] see ch7/s.7.8.

[251] Galanter, (n.56), p.139.

[252] J.L. Milligan and A.L. *Jackson, Research analysis of the development of Adjudication based on returned questionnaires from Adjudicator Nominating Bodies (ANBs) for the year 1 May 2018 to 30 April 2019, and from practicing Adjudicators for the year 1 January 2018 to 31 December 2018* (Report No. 18, Adjudication Society, December 2019), p.4.

[253] NSWFT, *BCISPA(NSW): Adjudication Activity Statistics: Quarterly Report No. 4, 1 April 2019 to 30 June 2019* (Department of Finance, Services and Innovation, January 2020), p.2.

to specify the reasons for any under-certification by a given deadline, thereby promptly establishing the issues in dispute.

Of course, adjudication's advantages extend beyond its contributions as an equalising reform. Adjudication provides an expedited interim resolution of disputes, which assists projects to progress with minimum disruption. Furthermore, an adjudicator's decision, whether it concerns a narrow issue[254], or a broader dispute[255], aids parties in resolving their disputes without engaging in further proceedings.

2.3 Legislation's disadvantages

It is unavoidably true that no dispute resolution system will suit all parties and be perfect for every dispute. Adjudication is no different and unquestionably has disadvantages.

Adjudication's statutory timescales render it an extremely fast process. While this is an advantage from one perspective, as discussed above, it also means that for the parties and the adjudicator to prepare their submissions and decision respectively, they may have to consider complicated issues of fact and law, and examine large amounts of supporting documentation, in a noticeably short period. This unsurprisingly can lead to representations and decisions which reflect the time span in which they were made. Consequently, adjudication has been described as 'rough justice', a term mentioned by Akenhead J in *Gipping Construction Ltd v Eaves Ltd*[256] and later quoted by NSW courts[257].

Moreover, whilst adjudication is quicker than litigation or arbitration, it requires intense focus while taking place. Therefore, considerable legal costs can arise in

[254] e.g. if a party is in breach or entitled to certain remedy.

[255] e.g. final account valuation.

[256] [2008] EWHC 3134, para.8.

[257] *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151, para.130.

that short period, and the process can be stressful for the parties. Additionally, despite the intention that adjudication be a quick process, a phenomenon has evolved in England of what might be termed 'arbitration-style' adjudications, in which both parties agree to extend the statutory time limits so that complex issues can be properly addressed. This can result in adjudications lasting 6-9 months, rather than the 28-days contemplated by HGCRA, thereby depriving adjudication of its primary benefit.[258] Although such extensions require both parties' agreement, a party may consent out of fear that 'failure to agree extensions sought by the adjudicator might ultimately rebound to their detriment'[259]. Adjudication's short timescale also creates another disadvantage in the possibility created for ambush tactics[260].

Although SPNO are crucial for the legislation's successful operation, they have draconian consequences. A payer who failed to comply with its SPNO due to an administrative oversight becomes liable to pay the full sum notified by the payee even if the payer has a contractual defence or set-off. In the ensuing 'smash-and-grab'[261] adjudication, the subject matter is whether timeous and valid notifications were issued, and any other defences raised should ordinarily be dismissed by the adjudicator.

It is, however, submitted that adjudication's greatest disadvantage is caused by what this thesis terms as the 'pseudo-temporary' nature of adjudication. The following section explains this term.

2.4 Adjudication's 'pay now, argue latter' premise, and the emergence of its 'pseudo-temporary' reality

[258] Meliniotis and others (n.59), p.232.

[259] *Enterprise Managed Services v Tony McFadden Utilities* [2009] EWHC 3222, para.96 (Coulson J).

[260] see ch.7/s.7.6.3.

[261] see ch.4/s.4.1.

Adjudication tackles the injustice caused by the advantages that 'haves' get over 'have-nots' from delaying dispute resolution by producing:

> a quick, binding interim decision that is not final… what is sometimes described as a "pay now, argue later" decision.[262]

In 1996, the term 'pay now, argue later' originated in discussions between Robert Fenwick Elliott and Lord Howie of Troon[263]. It has since been mentioned and upheld in cases of both jurisdictions[264]. Adjudication was not designed to replace litigation or arbitration, as it does not preclude them. Rather, adjudication is intended to be a quick method of dispute resolution that is binding until litigation/arbitration concludes, if started, and the dispute is not settled by agreement.

In principle, this sounds fair; in the context of an adjudication between a 'have-not' payee and a 'have' payer, the 'have-not' contractor receives any adjudicated amount on an interim basis, which the 'have' contractor (or employer) can then reclaim in litigation/arbitration if dissatisfied. However, in practice, HGCRA and BCISPA(NSW) have caused the undesirable phenomenon of adjudication's 'pseudo-temporary' nature. The prefix 'pseudo-' is of Ancient Greek origin and denotes that the marked noun or adjective is not what it pretends to be, but something else[265]. In the case of adjudication, an adjudicator's decision, which superficially appears to be temporary, is, in fact, permanent.

While technically any adjudication decision can be reversed through a subsequent litigation/arbitration, a 'have-not' claimant contractor that has not succeeded in the adjudication may lack the funds to support a subsequent litigation/arbitration, or even just to remain in business long enough for this

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[262] HC Deb 07 May 1996, vol.277, col.65 (Frank Dobson).

[263] Robert Fenwick Elliott, 'Pay now argue later' (Designing Buildings, 2020) <https://www.designingbuildings.co.uk/wiki/Pay_now_argue_later> accessed 23 October 2022.

[264] *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 140, para.44; *Bresco* (UKSC), para.12; *Grove v S&T* (n.27), para.102.

[265] Macmillan Dictionary, 'Definitions and Synonyms' (Macmillan Education Limited 2009–2020) <https://www.macmillandictionary.com/dictionary/british/pseudo> accessed 23 October 2022.

second, longer process to conclude. Additionally, both litigation and arbitration also bring the risk of a 'cost follows the event' judgement, in which an unsuccessful claim by a contractor would result in the contractor also being liable for the costs incurred by the respondent in defending against the action. This context provides significant incentives for a 'have-not' contractor to simply accept an unfavourable adjudication decision.

Additional obstacles also exist for the 'have' employer or contractor that has not succeeded in the adjudication defending a claim against it. The 'have-not' contractor, who has been paid on an interim basis an adjudicated amount that may be too large relative to its capital[266], has no incentive to defend its case in arbitration/litigation against the 'have' contractor or employer. Instead, the 'have-not' has an incentive to opt for insolvency rather than participating in litigation/arbitration proceedings. Moreover, even if the 'have-not' participates, and the proceedings conclude in favour of the 'have', by that time the 'have-not' may have already spent the money it received in the adjudication, meaning that the 'have-not' will not have the assets to repay the 'have', and the 'have-not' will declare insolvency then. This possibility of insolvency, therefore, significantly undermines the rationale for a 'have' to spend more money in proceedings against the 'have-not', even if the 'have' has a strong case.

Furthermore, the amount awarded by an adjudicator may be so large that even a relatively wealthy employer or contractor cannot afford to pay in the interim and then have sufficient funds to remain in business, even more so pursue a subsequent litigation or arbitration. In *Galliford Try Building Ltd v Estura Ltd*[267] the court enforced £1,500,000 out of a 'smash-and-grab' adjudicated amount of £3,928,227 because ordering full payment would force the payer into insolvency[268]. However, the court stressed that this case had very unusual circumstances hence such an approach of granting a stay of execution for a

[266] Galanter (n.56), p.98.

[267] [2015] EWHC 412.

[268] *ibid*, paras.1,78-98.

portion of the adjudicated amount would be appropriate rarely[269]. The court's power to stay the execution of summary judgment arising out of an adjudicator's decision, typically abbreviated as 'stay', stems from CPR 83.7 and effectively suspends the obligation of the losing party in an adjudication to pay the relevant amount until the stay is lifted.

In NSW, a stricter approach was adopted in *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd*[270]. The payer similarly sought a stay based on its inability to pay the $6,355,352.46 that arose from its failure to comply with its SPNO, arguing that, should stay is refused, it would become insolvent and therefore unable to pursue its legitimate set-off claims. However, the NSWCA dismissed the stay application, thereby enforcing the entire amount.[271]

The existence of the phenomenon of adjudication's pseudo-temporary nature is further supported by empirical evidence of companies that successfully enforced the adjudicator's decision whilst persuading the court to decline stay of execution, which nevertheless became insolvent shortly thereafter. Taking as example the UK case law on stay cited in section 2.6.1 below, all companies that successfully enforced the adjudicator's decision and persuaded the judge to decline stay of execution subsequently became insolvent in the following periods (calculated between judgment and appointment of liquidator/administrator or strike-off):

- Farrelly (M&E) Building Services Ltd: 15 days[272];
- Berry Piling Systems Limited: around 3 months[273];

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[269] *ibid*, para.91.

[270] [2020] NSWCA 118.

[271] *ibid*, para.21.

[272] *Farrelly (M&E) Building Services v Byrne Brothers (Formwork) Ltd* [2013] EWHC 1186; Companies House, *Farrelly (M&E) Building Services Limited: Filing History: Appointment of an administrator* <https://beta.companieshouse.gov.uk/company/03033409/filing-history> accessed 06 November 2022.

[273] *Berry Piling Systems Ltd v Sheer Projects Ltd* [2012] EWHC 241; Companies House, *Berry Piling Systems Limited: Filing history: Appointment of an administrator* <https://beta.companieshouse.gov.uk/company/05488695/filing-history> accessed 06 November 2022.

- Herschel Engineering Ltd: around 7 months[274];
- True-Fix Construction Limited: around 1 year[275];
- Wimbledon Construction Company 2000 Limited: around 29 months[276];

Additional insights can be drawn from reviewing one such case, namely, *Berry Piling Systems Ltd v Sheer Projects Ltd*[277], which involved a committal application for contempt of court. The adjudicator awarded BPS the relatively modest amount of £20,551.87 on 30 November 2011. Sheer disagreed that the adjudicator's decision represented the true state of the parties' account and therefore commenced arbitration on 12 December 2011, whilst BPS commenced enforcement proceedings seeking summary judgment for the adjudicator's decision on 06 January 2012.[278]

Relying on expert accounting evidence, Sheer sought stay of execution of the summary judgment pending the arbitration's outcome on the basis that, should the arbitrator award repayment of the judgment sum, BPS would be unable to repay. By contrast, to persuade the judge to refuse Sheer's stay application, BPS's director served a witness statement verified by a statement of truth stating that:

- '[BPS] is well able to repay the sum sought should it be required to do so';
- 'Should an [arbitration] award be made against [BPS] to repay… [BPS] would do so'.

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[274] *Herschel Engineering Ltd v Breen Properties Ltd* [2000] BLR 272; UK Companies List, *Herschel Engineering Limited: Extraordinary Resolution to Wind Up* <https://www.companieslist.co.uk/03729575-herschel-engineering-limited> accessed 06 November 2022.

[275] *True Fix Construction Ltd v Apollo Property Services Group Ltd* [2013] EWHC 2524; Companies House, *TRUE-FIX CONSTRUCTION LIMITED: Filing History: Notice for Compulsory Strike-off* <https://beta.companieshouse.gov.uk/company/06729303/filing-history> accessed 06 November 2022.

[276] *Wimbledon Construction Company 2000 Ltd. v Vago* [2005] EWHC 1086; Companies House, *Wimbledon Construction Company 2000 Limited: Appointment of voluntary liquidator* <https://find-and-update.company-information.service.gov.uk/company/04222754/filing-history> accessed 06 November 2022.

[277] [2013] EWHC 347.

[278] *ibid*, paras.1-3.

- BPS's accounts 'for the year ended 30.06.2011 show a profit of £18,000 and management accounts for the six months ended 30.12.2011 show a profit of about £13,500… for the 12 months up to December 2012 indicate a projected profit of well over £50,000'.
- BPS 'has a full order book'.[279]

The judge enforced the adjudicator's decision and dismissed the stay application. Consequently, Sheer paid the judgment sum on 17 February 2012. However, on 29 March 2012, BPS' director met with administrators, who found the company to be insolvent, advising its immediate administration. Meanwhile, the arbitration was progressing, albeit BPS taking no further part. In July 2012, the arbitrator awarded Sheer c.£100,000.[280]

Believing that the statements made by BPS's director were false, Sheer sought the court's permission to make an application for committal for contempt against him. Such proceedings are rare in the context of construction disputes, because, even if successful, Sheer would receive no material benefits. Granted, should BPS's director be found guilty, his vilification and potential imprisonment might have alleviated Sheer's frustration and provided a sense of justice. Nevertheless, Sheer would have not recovered the sums paid pursuant to the adjudicator's decision. Sheer's application was dismissed because, although established a prima facie case against BPS's director, it did not establish a 'strong' such case and it would therefore be against public interest to allow the application considering the associated costs[281].

This case supports the notion that adjudication's pseudo-temporary nature also exists in small value adjudications. An example of a larger company comes from *M I Electrical Solutions Limited v Elements (Europe) Limited*[282]. With judgment dated 01 May 2018, the court ordered the main contractor (Elements) to pay the

[279] *ibid*, paras.3-5.

[280] *ibid*, paras.9-12.

[281] *ibid*, paras.35&39.

[282] [2018] EWHC 1472.

sub-contractor (M I Electrical) the outstanding adjudicated sum of £168,452.33, refusing to allow any deduction for the main contractor's set-off for defective work[283]. M I Electrical appointed administrators on 25 July 2019[284].

Another example is *M Davenport Builders Ltd v Greer & Anor*[285], where the court refused to set-off the decision of a 'true value' adjudication against the decision of a preceding 'smash-and-grab' adjudication, because the employer failed to discharge its immediate payment obligation arising from the smash-and-grab adjudication. With judgment dated 20 February 2019, the court ordered the employer to pay the contractor £106,160.84 plus interest and costs.[286] The contractor then appointed liquidators on 07 May 2019.[287]

A more recent example is *Bexheat Ltd v Essex Services Group Ltd*[288]. With judgment dated 19 April 2022, the sub-sub-contractor (Bexheat) persuaded the judge to decline the sub-contractor's (Essex) application for stay, and accordingly summarily enforced the smash-and-grab adjudication amounting £724,827.88.[289] The court accepted the witness statement of Bexheat's director that he plans 'to expand the business… absolutely no intention at all to dissipate the hard-won resources or ruin the hard-won reputation of the business'[290]. However, Bexheat appointed an administrator on 01 Jun 2022.[291] The administrator's interim report confirms that in a subsequent adjudication Bexheat was ordered to repay Essex

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[283] *ibid*, paras.3&37.

[284] Companies House, *M I ELECTRICAL SOLUTIONS LTD: Appointment of an administrator* <https://find-and-update.company-information.service.gov.uk/company/05596357/filing-history> accessed 06 November 2022.

[285] [2019] EWHC 318.

[286] *ibid*, paras.2,21&39.

[287] Companies House, *M. DAVENPORT BUILDERS LTD: Appointment of a voluntary liquidator* <https://find-and-update.company-information.service.gov.uk/company/04770500/filing-history> accessed 06 November 2022.

[288] [2022] EWHC 936.

[289] *ibid*, paras.98&99.

[290] *ibid*, paras.92&94.

[291] Companies House, *BEXHEAT LTD: Appointment of an administrator* <https://find-and-update.company-information.service.gov.uk/company/09019868/filing-history> accessed 20 December 2022.

£690,858.48, and that Essex was a creditor in the administration[292]. It also reveals '£742k in dispositions that could be voidable'[293] and that the director's conduct in this regard would be investigated[294].

Moving to NSW, in *YTO Construction Pty Ltd v Innovative Civil Pty Ltd*[295] the primary judge enforced the adjudicator's decision and accordingly Innovative received c.$1,500,000. However, nine months later the NSWCA severed the adjudicator's decision and ordered Innovative to repay c.$400,000 pending final determination.[296] Innovative did not pay, which led to further proceedings[297] revealing that Innovative had no more than $64 in its bank account, had ceased trading, and was prima facie insolvent[298].

In *Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd*[299], the contractor obtained an ex parte court order, meaning proceedings conducted without the defendant's knowledge or participation, to garnish an adjudicated amount of c.$11 million from the employer's bank. The employer's bank duly paid the contractor without the employer's knowledge. Upon realising, the employer sought an order that the contractor pays the money into the court pending conclusion of the adjudication enforcement proceedings. The primary judge dismissed the employer's application because, inter alia, 'there was no evidence that the builder would not, if called upon, be able to repay the $11 million'[300]. The NSWCA also dismissed the employer's appeal[301].

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[292] ——, ——*: Statement of administrator's proposal* <https://find-and-update.company-information.service.gov.uk/company/09019868/filing-history> accessed 20 December 2022, p.4.

[293] ibid, p.6.

[294] ibid, p.8.

[295] [2019] NSWCA 110.

[296] *ibid*, paras.2&93.

[297] *YTO Construction Pty Ltd v Innovative Civil Pty Ltd (No 2)* [2019] NSWSC 1330.

[298] *ibid*, paras.2&5.

[299] [2017] NSWCA 53.

[300] *ibid*, para.7.

[301] *ibid*, paras.3,9,87&88.

However, the contractor declared insolvency the next year. A series of litigations ensued involving issues of replacing the liquidators[302], discovery and privileged documents[303], and notices to produce for tracing payment of dividends[304]. All this culminated with a judgment[305] confirming that the day the primary judge rejected the employer's application for the money to be paid into the court, the contractor held a directors' meeting deciding to pay $3,957,795.61 in tax and $6,781,559 as dividend to shareholders, with $400,000 being left into the company as contingency[306]. Furthermore, the contractor wrote off a $455,085 loan given to its shareholders[307] and ceased trading[308]. The court found that by declaring the dividend and causing the loan to be written off the directors breached their fiduciary duties and the Corporations Act 2001[309]. Consequently, those transactions were held voidable, and their beneficiaries ordered to pay the liquidator a sum representing that benefit[310].

Although some cases involve dissipation of assets, the phenomenon of adjudication's pseudo-temporary nature also arises without such misconduct. That is, the adjudicated amount being spent in the ordinary and proper course of business. These examples demonstrate that the phenomenon can occur in cases involving both large and small amounts. However, it is more likely to arise when the adjudicated amount represents a significant percentage of the winning party's capital. Therefore, its likelihood increases when the winning party in an adjudication is a have-not.

The outcome of all the above is that neither party in an adjudication has much incentive or financial ability to pursue their claim or defence beyond the original

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[302] *Atlas Construction Group Pty Ltd (in liquidation) – Fitz Jersey Pty Limited v Fraser* [2018] NSWSC 1189.

[303] *Atlas Construction Group Pty Limited (in liquidation)* [2019] NSWSC 1656.

[304] *Fitz Jersey P/L v Atlas Construction Group P/L (in liq) & Ors* [2020] NSWSC 833.

[305] *Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd (in liq)* [2021] NSWSC 1692.

[306] *ibid*, paras. 422-428,441.

[307] *ibid*, para.442.

[308] *ibid*, para.896-899.

[309] *ibid*, paras.40-43.

[310] *ibid*, para.45.

adjudication, even if they disagree with the adjudicator's decision. This is consistent with reports from adjudication practitioners of having almost no experience with arbitration or litigation following on from an adjudication, and of adjudication having resulted in a radical decline of construction arbitration[311].

The UKSC described adjudication as achieving de facto final resolution of disputes[312]. Whilst this may support the notion that adjudication has been successful[313], it does not consider the phenomenon of adjudication's pseudo-temporary nature. This does not automatically disprove the success of adjudication. However, it is a factor that ought to be considered, namely, whether parties are content with the adjudicator's decision, or simply do not commence further proceedings as they would be pointless.

Although this theory of adjudication's pseudo-temporary nature could not be found in any other literature, the risk of a party receiving an adjudicated amount becoming unable to repay any sum ordered in subsequent litigation/arbitration has been recognised by courts and practitioners alike[314]. For example, Bowling argues that the payee in an adjudication is usually:

> a small or medium sized construction business without the wherewithal to repay a substantial sum, rendering any final determination and order for repayment theoretical only… this is not a good reason for a dispute not going on to final resolution. It means that economics, as opposed to statutory policy or subsequent agreement, renders an adjudicator's decision de facto final, when it is de jure only temporary.[315]

[311] Meliniotis and others (n.59), p.234.

[312] *Bresco* (UKSC), paras.13&15.

[313] *ibid*, para.10; Robert Gaitskell, *Adjudication: its effect on other forms of dispute resolution (the UK experience)* (Keating Chambers, 20 September 2005).

[314] see ch.2/s.2.6.

[315] James Bowling, 'Adjudication enforcement and insolvent companies - the unsatisfactory state of the law' [2016] Const. L.J. 167, pp.167&168.

2.5 Injustice caused by adjudication's pseudo-temporary nature

The examples provided in the previous section can sadly bring the legislation into disrepute. Furthermore, a dissatisfied party in an adjudication is practically deprived of its right to have the dispute finally determined by litigation/arbitration since such proceedings would be meaningless. That is, even if successful in subsequent litigation/arbitration, it would simply be another unsecured creditor in the liquidation process of the party that won the adjudication.

Another potential injustice caused by adjudication's pseudo-temporary nature is when the adjudicator's decision contains an error or concerns a successful smash-and-grab adjudication. The latter, although not necessarily involving any error on the adjudicator's part, has a greater potential for injustice since it awards the referring party the full amount claimed without consideration of any contractual defences or set-off other than whether the required payment notifications were duly served.

Regarding adjudication decisions that may contain errors, both the UK and NSW courts will ordinarily enforce them without investigating potential errors, insofar as the adjudicator acted within jurisdiction[316]. In *Macob Civil Engineering Ltd v Morrison Construction Ltd*[317], the first case concerning enforcement of an adjudicator's decision, Dyson J acknowledged that adjudication's timetable 'is very tight… Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this'.[318]

[316] *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4; *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA 1358, para.52; but also see ch.8/s.8.5 for errors that do not involve a substantial dispute of fact.

[317] [1999] EWHC 254.

[318] *ibid*, para.14.

Therefore, even if the adjudicator made a mistake related to facts, law or procedure, his/her decision is still enforceable summarily[319]. In *Bouygues UK Ltd v Dahl-Jenson UK Ltd*[320], Dyson J further acknowledged that:

> The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation… Sometimes, they will not be able to do so, where, for example, there is intervening insolvency, either of the victim or of the fortunate beneficiary of the mistake.[321]

Dyson J said that the payer will 'usually' be able to reclaim the adjudicated amount, with an intervening insolvency only occurring 'sometimes'. However, in the context of 'have-not' versus 'have' adjudications, a 'have-not' beneficiary is more likely than 'sometimes' to become insolvent before the conclusion of a subsequent litigation/arbitration and actual repayment of any sum ordered[322].

2.6 The countermeasure of introducing additional barriers in the enforcement of an adjudicator's decision

The potential injustice explained in the previous section would be prevented if additional barriers are introduced in the enforcement of an adjudicator's decision. These include the courts more readily upholding an application to stay the enforcement of an adjudicator's decision, making enforcement conditional on the provision of security for the adjudicated amount and more easily imposing a freezing injunction for the adjudicated amount. This section explains that the law's current state opposes these countermeasures, and concludes with a discussion on their effect, if implemented.

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[319] *ibid*, para.18,19&34.

[320] [1999] EWHC 182.

[321] *ibid*, para.35.

[322] for reasons explained in ch.2/s.2.4.

2.6.1 Stay the enforcement of an adjudicator's decision

In the UK, stay shall be granted when the payee 'is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent'[323]. The stay may be lifted if the insolvent party provides appropriate security[324]. Similar jurisprudence exists in NSW[325]. Furthermore, BCISPA(NSW)'s amendments exclude parties in liquidation from BCISPA(NSW)'s ambit[326]. Therefore, both jurisdictions have appropriate safeguards to prevent this potential injustice when the payee is insolvent at enforcement stage.

However, the argument about the injustice caused by adjudication's pseudo-temporary nature is not for parties that are insolvent at enforcement stage. Instead, the argument is based upon the likelihood that solvent parties at enforcement stage, will become insolvent before repayment of moneys due pursuant to a subsequent litigation or arbitration. As explained in the next two paragraphs, whilst such probable inability to repay may constitute special circumstances for granting a stay, in practice it is exceedingly difficult to persuade the court to do so.

NSW courts shall consider the prejudice to the payee if a stay is granted and BCISPA(NSW)'s policy[327]. Therefore, the risk that a have-not payee may become insolvent if stay is granted, weighs in favour of rejecting the stay[328]. The NSWCA affirmed that 'the risk of inability to repay, in the event of successful action by the other party, must be regarded as one that the legislature has assigned to that other party'[329]. Consequently, BCISPA(NSW) shifts the insolvency risk from a

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[323] *Wimbledon*, para.26(e) (Coulson J).

[324] *Meadowside Building Developments Ltd v 12-18 Hill Street Management Company Ltd* [2019] EWHC 2651.

[325] *Paul Michael Pty Ltd (subject to deed of company arrangement) v Urban Traders Pty Limited* [2010] NSWSC 1246.

[326] BCISPA(NSW)(Amendment)(2018), para.33; BCISPA(NSW), s.32B.

[327] *RSA v VDM CCE* [2012] NSWSC 861, para.17.

[328] *Hakea Holdings Pty Limited v Denham Constructions Pty Ltd* [2016] NSWSC 1120, para.6.4.

[329] *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, para.207 (McDougall J).

sub-contractor to a main contractor[330]. Therefore, stay of execution shall not be granted simply because a solvent have-not may become unable to repay a sum ordered in subsequent litigation/arbitration.

Similarly, UK courts shall make 'an informed estimate as to when it is likely that a judgment will be given that would result in the relevant liability arising'[331]. Therefore, a payee's healthy current trading position and future trading prospects may suffice for rejecting a stay, even if its latest published accounts show losses[332]. Also, the payee is not obliged to disclose confidential information of its financial and business position[333]; therefore, the payer may only rely on the payee's published accounts or other credible information the payer obtained. Even if such information suggests the payee is financially poor, it shall be construed in the context of the construction industry where most companies have low financial strength; hence is unlikely to suffice[334]. Furthermore, the court will likely refuse a stay when the payee's financial position is similar, or would become similar if the adjudicated amount is paid, to its financial position when entering the contract related to the dispute[335].

2.6.2 Requiring security for the adjudicated amount

Bowling criticises the courts' approach for deciding stay applications, which involves predicting the payee's future ability to repay by largely relying on its directors' witness statements. He submits that ineffective sanctions for misrepresenting their company's ability to repay encourage directors to lie.[336] He recommends that courts 'get out of the predictions business entirely' and instead

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[330] *Silver Star Construction Pty Limited t/as Genesis Construction Australia v Denham Constructions Pty Limited* [2011] NSWDC 254, para.41.

[331] *Berry* (n.273), paras.15&17 (Edwards-Stuart J): 18 months estimated for a simple dispute already referred to arbitration.

[332] *ibid*, paras.18&25.

[333] *Farrelly*, para.91.

[334] *True Fix*, paras.15&16&26.

[335] *Wimbledon*, para. 26(f); *Herschel*, paras.9&19.

[336] Bowling (n.315), pp.168,169&176-179.

require the payee to produce a third-party guarantee for the adjudicated sum, for example, a commercial guarantor or insurance company underwriting the risk of repayment. Failure to procure such guarantee should result in stay of execution.[337]

Although Bowling's recommendation addresses the problem of adjudication's pseudo-temporary nature, this thesis does not endorse it because, as explained below, it undermines the legislation and raises practical concerns. As Bowling accepts, his recommendation creates:

> a market in the sale of [discounted] judgments otherwise stayed subject to enforcement… [which] will see the successful party to the adjudication receive less than the adjudicator decided they were entitled to[338].

This is due to the additional expense incurred by the winning party for procuring the required security. Bowling does not investigate the cost of such securities. For example, if an adjudicator orders a 'have' to pay a 'have-not' £100,000, how much would it cost the 'have-not' to obtain a third-party guarantee for that £100,000 to prevent stay of execution?

To mitigate this limitation, and prevent every payer requiring security, Bowling recommends two safeguards. First, should the payee succeed in obtaining a third-party guarantee, the payer shall pay the payee's costs of the stay proceedings plus a contribution to the costs of procuring the security. Second, payees that were 'impecunious' when entering contract with the payer shall be excluded from this security requirement because the payer is deemed to 'have contracted for the risk of having to make an interim binding payment to his impecunious contractual counterpart'.[339]

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[337] ibid, pp.182-183.

[338] ibid, p.184.

[339] ibid, pp.183-184.

Bowling does not opine on the bindingness of contractual provisions requiring the 'impecunious' party seeking payment pursuant to an adjudicator's decision to provide, at its own cost, a third-party guarantee. If binding, then the legislation's purpose is undermined, and Bowling's abovementioned caveats become pointless, because it will become common practice for 'haves' to force such provisions into their contracts with 'have-nots'.

Conversely, if the legislation is deemed to prohibit contractual provisions mandating guarantees for releasing an adjudicated sum, and if Bowling's recommendations and caveats are followed, then adjudication's pseudo-temporary nature is not tackled. That is, if a third-party guarantee is required, but such requirement is waived if the payee's financial state is similar to when entering into contract with the payer, or, any deterioration is due to the unpaid adjudicated sum, then such principles differ very little from present jurisprudence on stay.

Bowling's recommendation raises further practical concerns. Firstly, should the guarantee cover the adjudicated amount only, or the adjudicated amount plus the costs of prospective arbitration/litigation? In *John Doyle Construction Ltd v Erith Contractors Ltd*[340], in determining whether an insolvent party's third-party guarantee was sufficient to prevent granting a stay, Fraser J categorised security for costs as a 'secondary concern', whereas security for the adjudicated sum was 'primary'[341]. This suggests refusing the stay when guarantee is provided for the adjudicated sum excluding costs of subsequent proceedings. Although this renders the guarantee's procurement more affordable, it hinders the payer in subsequent litigation/arbitration because the payee (as defendant in the arbitration/litigation) is entitled to security for its costs whereas the payer (as claimant in the arbitration/litigation) is not ordinarily entitled[342].

[340] [2020] EWHC 2451.

[341] *ibid*, paras.80-81.

[342] If the defendant is unwilling to defend the claim economically and expeditiously, the tribunal may order him to provide security for costs or have his defence struck out: *Komcept Solutions Ltd v Prestige Group UK Ltd* [2018] EWHC 1550, paras.9&14.

Secondly, does the guarantor have to be a regulated financial institution or insurance company, or can it be any 'wealthy' company/individual? If the latter, what is the test for establishing whether the guarantor is sufficiently 'wealthy'? Furthermore, does the payee have to procure the guarantee directly, or can it be procured via a litigation investment company? Bowling accepts that the guarantor 'would take an assignment' of the adjudicated sum. However, what if the contract between the payer and the payee contains a 'no assignment' clause prohibiting assignment of the adjudicated sum?

Thirdly, the interplay between such guarantee and champerty laws shall be considered. If the guarantor provides 'advocacy services, litigation services or claims management services' and is recompensed on a damages-based agreement receiving over 50% from the adjudicated sum, then such agreement is deemed unenforceable[343], and an adjudication enforcement proceeding may even fail as abuse of process[344]. If the payee suspects that a guarantee will be required to enforce any prospective adjudicator's decision, both the payee and guarantor benefit from assigning the claim before its adjudication. The payee enjoys the guarantor's experience and resources during adjudication, whilst the guarantor better understands the dispute that may ultimately need to defend in litigation/arbitration. Champerty laws most certainly apply to such agreement for providing advocacy services.

Fourthly, can the guarantor incorporate terms and conditions, or must the guarantee be unconditional? The courts have dismissed 'After the Event Insurances', which Bowling likened to his proposed guarantees[345], for having 'exclusions and avoidance clauses'[346]. An important term is the guarantee's duration. The payer can commence proceedings for repayment within six years, or any longer contractual limitation period[347]. Should the guarantee last for these six or more years, or a lesser period?

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[343] The Damages-Based Agreements Regulations 2013, paras.1(2)&4(3).

[344] *Meadowside* (n.324), paras.114&125.

[345] Bowling (n.315), p.184.

[346] *John Doyle*, para.108.

[347] *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38.

2.6.3 Freezing injunctions

In principle, the courts may issue a freezing injunction[348] against a have-not that received an adjudicated amount, pending conclusion of subsequent litigation/arbitration, to prevent dissipation of assets as to frustrate any repayment awarded by the future judgment. However, in practice, such freezing orders are as difficult to obtain as orders for stay of execution of the adjudicated amount. In *Gosvenor London Ltd v Aygun Aluminium UK Ltd*[349] Fraser J confirmed that parties seeking stay of execution and freezing injunctions must meet the same high test[350], namely establish:

> a real risk that any judgment would go unsatisfied by reason of the [have-not] organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid[351].

Insofar as being within the ordinary course of business, there are no restrictions on how a have-not may deal with the adjudicated amount and it is not obliged to prove its intentions[352]. The analogy between stay of execution and freezing injunctions was affirmed by the EWCA[353], which added that solid evidence is required proving unjustifiable dissipation of assets, not every risk of a future judgment becoming unsatisfied will suffice for granting freezing injunction[354].

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[348] Pursuant to CPR pt.25/r.25.1(1)(f).

[349] [2018] EWHC 227.

[350] *ibid*, para.40.1.

[351] *ibid*, para.39.

[352] *ibid*, para.40.4.

[353] *Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2018] EWCA 2695, paras.40-41.

[354] *ibid*, para.42.

2.6.4 Impact of such countermeasures on the legislation's effectiveness

Although the countermeasures of more readily upholding an application to stay the enforcement of an adjudicator's decision or imposing freezing injunctions for the adjudicated sum tackle the problem of adjudication's pseudo-temporary nature, they also undermine the legislation's purpose. The courts have considered such safeguards and dismissed them in favour of maintaining the legislation's force as an equalising reform. Furthermore, this thesis raised several concerns over Bowling's recommendation that the payee provides a third-party guarantee for the adjudicated amount, and, therefore, does not endorse it.

It is also relevant that BCISPA(NSW) originally gave the payer the option of providing a form of security for the adjudicated amount instead of paying it. This option was repealed shortly thereafter for undermining the legislation.[355]

The phenomenon of adjudication's pseudo-temporary nature is, therefore, inevitable if the legislation's purpose is to be protected. For the legislation to achieve its goal, that is, to dispel the advantages that 'haves' get from delaying dispute resolution, an adjudicator's decision must be treated as 'pay now, argue later', without introducing additional barriers in the enforcement of an adjudicator's decision.

Therefore, the risk of injustice caused by adjudication's pseudo-temporary nature can only be mitigated, not eliminated. This thesis will argue that this mitigation is better achieved by amending the legislation to the version that promotes the highest degree of procedural justice whilst preserving the legislation's speed. This speed preservation ensures that the legislation's advantages as an equalising reform are maintained. The importance of optimising procedural justice is explained below.

[355] BCISPA(NSW) (Historical version for 5 October 1999 to 2 March 2003), ss.23&24; LAH 12 November 2002 (Iemma); BCISPA(NSW)(Amendment)(2002), para.37.

2.7 Amending the legislation to the version that promotes the highest degree of procedural justice whilst preserving its speed

For any dispute resolution mechanism, whether adversarial (e.g. courts, arbitration and adjudication) or facilitative (e.g. mediation), its likelihood of producing an acceptable result is proportional to the disputants' perceived achievement of justice, often distinguished between 'substantive justice' and 'procedural justice'. Their simple definition is that:

> substantive justice is the justice of *outcome* while procedural justice is the justice of *process* which brings about this outcome.[356]

In common law, a doctrine central to the achievement of substantive justice is *stare decisis*[357], commonly known as *precedent*. It provides that rules established in previous cases are either binding[358] or persuasive[359] when deciding a future case with similar facts, 'and we are not at liberty to reject them… because we think that the rules are not as convenient and reasonable as we ourselves could have devised'[360]. Precedent ensures 'consistency, predictability, stability, certainty, fairness and efficiency in the law'[361].

Two further legal principles require consideration when evaluating substantive justice. First, that '[e]ach case must turn on its own facts'[362], which we shall call 'distinguishing'. Second, the burden of proof rule for establishing the truth of facts,

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[356] Wojciech Sadurski, 'Social Justice and Legal Justice' [1984] Law and Philosophy 329, p.346.

[357] From the Latin term 'stare decisis et non quieta movere', which is translated 'to stand by decisions and not disturb the undisturbed': Gabriel Adeleye and Kofi Acquah-Dadzie, *World Dictionary of Foreign Expressions: A Resource for Readers and Writers* (Bolchazy-Carducci, 1999), p.371.

[358] whereby lower courts are bound by rules set by higher courts.

[359] whereby higher courts are persuaded by rules set by lower courts or courts of different jurisdictions.

[360] *Mirehouse v Rennell* (1833) 1 Cl&F 527, p.546 (Parke J).

[361] Tushar Kanti Saha, *Textbook on Legal Methods, Legal Systems and Research* (Universal Law Publishing, 2001), p.107.

[362] *Haney & Ors R (on the application of) v The Secretary of State for Justice* [2014] UKSC 66, para.110 (Lord Mance).

which for civil cases lies on the balance of probabilities. A judge cannot sit on the fence regarding the truth of a fact. If an alleged fact is found more likely to be true than false, it is treated as true, whereas if found more likely to be false than true, it is treated as false.[363]

When 'precedent' is viewed in conjunction with 'distinguishing' and 'burden of proof', it becomes apparent that evaluating the substantive justice achieved by any dispute resolution method can be difficult and subjective. This is because a dispute often involves complex disputed issues of both fact and law, with the parties submitting cogent arguments, supported by witness statements, contemporaneous records, expert opinion reports and legal submissions. Therefore, to prevent deadlock, appellate courts, and other forums such as arbitration, often have an odd number of judges/arbitrators so that, when opinions differ, a decision is still reached based on the majority opinion.

Evaluating substantive justice in adjudication is even harder because the parties' submissions and the adjudicators' decisions are not published. Even at enforcement proceedings, the courts of both jurisdictions are ordinarily concerned with whether the adjudicator answered the right question, as opposed to whether the adjudicator answered the question correctly[364]; therefore, the parties' submissions and adjudicator's full decision are not published. In the UK, an adjudicator's reasoning may be reviewed in Part 8 proceedings, usually brought by the party challenging the adjudicator's decision, asking the court to determine a question that forms part of the adjudicator's decision which is unlikely to involve a substantial dispute of fact[365]. However, Part 8 proceedings are rare, and their nature does not represent the norm.

As explained, substantive justice is concerned with the outcome whilst procedural justice with the process that brings the outcome. Aspects of procedural justice include the economy, efficiency, expedition and equality of the process. The

[363] *B (Children)* [2008] UKHL 35, para.2 (Lord Hoffmann) and para.32 (Baroness Hale).

[364] *Bouygues* [1999] (n.320), para.22&23; *Probuild* (HCA), para.2.

[365] see ch.8/s.8.5.

Woolf Report and subsequent reform of the CPR introduce a new concept of civil justice equally committed to both substantive and procedural justice 'rather than, as was previously the case, an unalloyed commitment to the achievement of… substantive justice'[366]. This principle of proportionality is encapsulated in the very first rule of the CPR: the overriding objective.[367]

By contrast, Sadurski refuses to accept any dichotomy between procedural and substantive justice. Sadurski argues that procedural justice is either 'a derivation from and reducible to substantive justice'[368], or alternatively, 'not a category of justice… at all'[369], 'but rather of humanitarianism'[370]. Chapter One examined the principle of 'access to justice' endorsed by Lord Woolf in 1996. A decade earlier, Sadurski used the less appealing term 'humanitarianism', which he refused to associate with achievement of justice.

Authors from Sadurski's ideology are more likely to support the notion of an instrumental perspective on procedural justice, which argues that disputants' perception of substantive justice achieved, particularly in adversarial win or lose proceedings, is biased, in that it depends on the favourability of the outcome.[371] Instrumentalists, therefore, argue that procedural justice has a single instrumental value and purpose, namely the tribunal reaching the correct decision that upholds the parties' substantive rights and obligations.

By contrast, advocates of a normative perspective on procedural justice[372] argue that procedural justice serves important intrinsic values. Seminal empirical study published in 1975 suggests that disputants regard procedural fairness to be as

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366 John Sorabji, 'The Road to New Street Station: Fact, Fiction and the Overriding Objective' [2012] EBLR 77, p.78.

367 ibid, p.85; John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press, 2014), pp.102,146,147&157.

368 Sadurski (n.356), p.346.

369 ibid.

370 ibid, p.354.

371 Tom Tyler, *Why People Obey the Law* (Princeton University Press, 2006), p.7.

372 Tyler (n.371).

important as its outcome.[373] Subsequent studies reinforced the argument that disputants value their procedural experiences, even if they do not result in a favourable outcome. Such experiences include the opportunity of a party to present its arguments and evidence to the tribunal, the tribunal's consideration of those arguments and evidence[374], as well as the tribunal's neutrality, lack of bias and efforts to be fair[375]. The analogy between the disputants' positive perception of procedural justice and their perception of the substantive justice achieved as a result is strongly supported by literature, including empirical studies such as surveys, psychometric tests and experimentation.[376]

The legislation invades the parties' freedom of contract, in that new rights and obligations are statutorily imposed that cannot be contracted out. Its purpose is to dispel advantages gained by 'haves' through delaying dispute resolution, and overcome the consequential social problems examined in Chapter One. This chapter explained the potential injustice caused by adjudication's pseudo-temporary nature. Granted, these features can be associated with Sadurski's 'humanitarianism'. However, Sadurski and the proponents of the instrumentalist view on procedural justice, both fail to consider the real-life situations explained in Chapter One, in which 'haves' exploited the slow and expensive legal system to force their 'have-not' antagonists to abandon their claims. This cannot be said to represent an achievement of substantive justice.

They also fail to consider the disputants' own perception of substantive justice achieved through the outcome of their dispute resolution procedure. Whilst

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[373] John Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis* (L. Erlbaum Associates, 1975), cited in Neil Vidmar, 'The Origins and Consequences of Procedural Fairness' [1990] Law & Social Inquiry 877.

[374] Nancy A. Welsh, 'Making Deals in Court-Connected Mediation: what's justice got to do with it?' [2001] Washington University Law Quarterly 787, pp.820-821.

[375] Tyler (n.371), p.7.

[376] For a review of such literature see: Robert J. Maccoun, 'Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness' [2005] Annu. Rev. Law Soc. Sci.171; Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2010), pp.14-16; Denise Meyerson, Catriona Mackenzie and Therese MacDermott (eds), *Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives* (Routledge, 2021); HMIP, Procedural Justice (18 December 2020, Crown) <https://www.justiceinspectorates.gov.uk/hmiprobation/research/the-evidence-base-probation/models-and-principles/procedural-justice/> accessed 24 October 2022.

litigating every legal and factual issue and exhausting all appeal avenues may increase the likelihood that the outcome is substantively just[377], it requires significant sums of money and time. Chapter One presented evidence that even the wealthiest of litigants would have preferred a quicker and cheaper alternative to the traditional litigation[378].

Accordingly, the question is whether a rapid adversarial dispute resolution procedure called statutory adjudication can, on the one hand, dispel the advantages that 'haves' get from delaying dispute resolution, while on the other hand produce an outcome that is substantively just in the disputants' eyes. Based on the literature on the normative perspective of procedural justice, this question is answered in the affirmative, provided that all processes surrounding the legislation optimise the parties' procedural experiences without compromising the legislation's speed.

It is for this reason, therefore, that this thesis aims to recommend the legislation's version that balances the opposing forces of speed and procedural justice. The introduction of this thesis explained that the legislation's three pillars are statutory payment provisions, adjudication process and enforcement of an adjudicator's decision. These pillars have different procedures, thus different concepts of procedural justice and speed (the 'set parameters'). For statutory payment provisions (Chapters Three to Five), the set parameters represent the legislation's version that provides the highest degree of 'transparency in the exchange of information relating to payments'[379] whilst offering the payer reasonable opportunity to comply with its SPNO.

Regarding adjudication process (Chapters Six and Seven), it shall not merely resemble a temporary debt recovery mechanism for solving cash flow problems. Instead, without compromising its speed, the process must represent 'a mainstream dispute resolution mechanism… producing de facto final

[377] Though this is not always the case because a party with weaker case but better representation may well win, which is inconsistent with achievement of substantive justice.

[378] Gibb (n.135).

[379] BEIS (2020) (n.30), p. 2.

resolution'[380], ensuring that parties in an adjudication enjoy the normative experiences of procedural justice explained above. Finally, enforcement of an adjudicator's decision (Chapter Eight) must be available through a streamlined court process that can review the limited grounds available for resisting enforcement quickly.

2.8 The legislation's ambit

HGCRA's and BCISPA(NSW)'s ambit (i.e. the extent to which the legislation applies) is excluded from detailed analysis. This does not lose anything significant from the analysis of the legislation's substantive rules. It is nevertheless helpful to outline the legislation's applicability to the contracted works, contracts with residential occupiers and oral contracts to understand how the respective governments addressed these issues and pave the way for the analysis of the legislation's substantive rules.

2.8.1 Works covered by the legislation

The legislation is wide-ranging and substantially covers construction industry's spectrum.[381] This includes labour only contracts[382], excluding employment contracts within the meaning of Employment Rights Act 1996 (UK)[383] and Industrial Relations Act 1996 (NSW)[384].

Both HGCRA and BCISPA(NSW) exclude drilling or extraction of oil or natural gas[385], or minerals including construction of underground works for this

[380] *Bresco* (UKSC), para.13.

[381] For detailed lists and definitions see: HGCRA s.105; BCISPA(NSW) s.5.

[382] HGCRA, s.104(1); BCISPA(NSW), s.6(1)(b)(i).

[383] HGCRA, s.104(3);

[384] BCISPA(NSW), s.7(3)(a).

[385] HGCRA, s.105(2)(a); BCISPA(NSW), s.5(2)(a).

purpose[386]. HGCRA s.105(2)(c) imposes the following additional exclusions, whereas BCISPA(NSW) does not:

> assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is—
>
> (i) nuclear processing, power generation, or water or effluent treatment, or
>
> (ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;

Recent regulations broaden the water industry's exclusion to certain infrastructure projects designated by the Water Services Regulation Authority[387].

CUB recommended repealing s.105(2)(c)[388], since 'the excluded operations are just as likely to suffer from payment problems and disputes as other operations which are within [HGCRA]'[389]. However, the government refused progressing this to consultation because 'of differences between the process plant and construction industries'[390]. However, a study testing the hypothesis 'that there are no serious payment or dispute problems in the process industry' found that construction work in the process industry suffers from the same problems as the conventional construction industry suffered pre-legislation and recommends repealing s.105(2)(c).[391] Another reason for repealing s.105(2)(c) is the resultant costly litigation on whether works fall under s.105(2)(c)[392].

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[386] HGCRA, s.105(2)(b); BCISPA(NSW), s.5(2)(b).

[387] Construction Contracts (England) Exclusion Order 2022.

[388] CUB (n.45), para.2.4.3.

[389] ibid, para.2.4.1.

[390] Griffiths (n.47), p.2.

[391] Peter Phillips and Martin Green, *Adjudication for the Process Industry: Should s105 of the Housing Grants, Construction & Regeneration Act (1996) be revised?* (Bloomsbury Professional, 12 January 2016).

[392] Jonathan Cope, *Let's put section 105(2) of the Construction Act 1996 into Room 101!* (PLCB, 29 April 2014); Jonathan Cope, *TCC considers the section 105(2) exclusions (again)* (PLCB, 05 November 2019).

Employers counterargue that adjudication is unsuitable for disputes concerning complex chemical processing plants[393]. However, conventional construction adjudication often involves complex issues with expert report submissions on technical matters. Furthermore, if the decision to introduce HGCRA was left to employers, it is unlikely that HGCRA would have ever been introduced. The important question is whether 'have-not' contractors are disadvantaged in those projects. This was answered in the affirmative[394]; therefore, s.105(2)(c) should be repealed.

Furthermore, HGCRA s.105(2)(d) excludes contracts for the manufacture or delivery of goods but not for their installation. By contrast, BCISPA(NSW) s.6(1)(a) covers such 'supply only' contracts. Furthermore, BCISPA(NSW) s.5(e)(iv) includes prefabrication works. Like HGCRA s.105(2)(c) exclusions, calls have been made for repealing HGCRA s.105(2)(d)[395].

2.8.2 Residential occupiers

HGCRA s.106 excludes contracts with residential occupiers. BCISPA(NSW) originally also excluded them pursuant to s.7(2)(b). However, the Murray Report recommended abolishing this exclusion for its 'inherently incongruous' nature of prohibiting main contractors from resorting to the legislation against employers, whilst sub-contractors for the same projects can avail the legislation's benefits against main contractors[396]. NSW government implemented Murray's recommendation and repealed the exclusion on 01 March 2021[397].

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[393] Derek Goodyear comment in Cope (2014) (n.392).

[394] Phillips and Green (n.391).

[395] Jonathan Cope, *Does the supply of concrete include "installation" as well as "delivery" for the purposes of the Construction Act 1996?* (PLCB, 08 October 2019).

[396] Murray (n.55), p.117&126.

[397] BCISPA(NSW)(Regulation)(2020), sch.2.

CUB recommended removing HGCRA's exception because 'adjudication is a relatively cheap and quick form of dispute resolution which should be available to residential occupiers'[398]. However, the government refused progressing it to consultation for being an 'unwanted shift in balance away from the customer and towards the industry'[399].

Coulson J urged reconsidering, due to adjudication's success in the broader construction sector and the costs of enforcement proceedings concerning whether the contract is exempt[400]. Cope disagrees abolishing the exclusion because the adjudicator's fees can become disproportionate, particularly when the residential occupier and small builder 'are unrepresented and consider that their human rights have somehow been breached… don't understand what the issues are or what they are claiming and/or defending'[401]. These parties really want an expert who himself/herself investigates and determines the issues, instead of an adjudicator who decides the dispute based on whether the evidence presented by the parties have satisfied the burden of proof[402].

A paper[403] studying the interplay between this exclusion and consumer laws argues that consumers often agree to the legislation's provisions without understanding the implications because those provisions are embedded in standard forms of contract. However, it is difficult for consumers to persuade the courts that those terms are unfair and thus unenforceable. It recommends abolishing the exclusion, but only to the extent of introducing adjudication, not SPNO. Alternatively, it recommends narrowing the exclusion to contracts with value up to £15,000.[404]

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[398] CUB (n.45), para.2.2.1.

[399] Griffiths (n.47), p.2.

[400] *Westfields Construction Limited v Clive Lewis* [2013] EWHC 376, para.60.

[401] Jonathan Cope, *Abolish section 106? I'm not so sure M'Lud…* (PLCB, 12 March 2013).

[402] ibid.

[403] Philip Britton, *Adjudication and the 'Residential Occupier Exception': Time for a rethink?* (2015, SCL).

[404] ibid.

2.8.3 Oral contracts

BCISPA(NSW) always applied to 'any construction contract, whether written or oral, or partly written and partly oral'[405]. By contrast, HGCRA s.107 originally limited HGCRA's ambit to agreements in writing, which existed if 'made in writing (whether or not it is signed by the parties)'[406], or, 'made by exchange of communications in writing'[407], or, 'evidenced in writing'[408], that is, 'recorded by one of the parties, or by a third party, with the authority of the parties'[409], or, agreed 'otherwise than in writing by reference to terms which are in writing'[410]. Reference 'to anything being written or in writing include its being recorded by any means'[411].

In *RJT Consulting Engineers Ltd v DM Engineering Ltd*[412], the first instance judge regarded the numerous invoices and meeting minutes as enough documentary evidence proving that the oral agreement was evidenced in writing, and therefore within HGCRA's ambit[413]. However, the EWCA unanimously disagreed, holding that this documentation was merely 'evidence of the existence of the contract… not evidence of the terms of the oral agreement… certainly not evidence of the terms of the contract on which the respondents rely in the adjudication'[414]. Ward LJ, with whom Walker LJ agreed, said that 'what has to be evidenced in writing is, literally, the agreement, which means all of it, not part of it'[415]. Auld LJ offered a wider scope in that only the terms material to the 'issues giving rise to the

[405] BCISPA(NSW), s.7(1).

[406] HGCRA, s.107(2)(a).

[407] HGCRA, s.107(2)(b).

[408] HGCRA, s.107(2)(c).

[409] HGCRA, s.107(4).

[410] HGCRA, s.107(3).

[411] HGCRA, s.107(6).

[412] [2002] EWCA 270.

[413] *ibid*, paras.6&7.

[414] *ibid*, para.18 (Ward LJ).

[415] *ibid*, para.19.

reference should be clearly recorded in writing… [not] every term, however trivial or unrelated to those issues'[416].

CUB acknowledged that HGCRA s.107 combined with the decision in *RJT* could undermine the legislation and increase disputes over whether an agreement is 'in writing'. Furthermore, many companies, particularly SMEs, would not enjoy the legislation's benefits because their agreements are usually oral.[417] CUB did not reach a consensus recommendation, since its members' opinions ranged from increasing the legislation's ambit to include oral contracts, to further limiting its ambit to only allow contracts that are wholly in writing[418].

The first consultation[419] did not consider this issue because it accepted the CA's 'interpretation as being appropriate in the context of adjudication'[420]. However, the second consultation considered it and proposed repealing s.107 so that HGCRA applies to contracts 'agreed wholly in writing, only partly in writing, entirely orally or varied by oral agreement'[421]. 90% of the respondents supported this proposal[422].

HGCRA s.107 was ultimately repealed[423]. Therefore, both HGCRA and BCISPA(NSW) presently apply to oral contracts (as well as written or partly written contracts). This is preferred, because otherwise 'have' payers would be motivated to agree oral contracts with 'have-not' payees to escape the legislation.

2.9 Conclusion

[416] *ibid*, para.22.

[417] CUB (n.45), para.2.3.2

[418] ibid, para.2.3.3.

[419] DTI and WAG (2005) (n.48), p.17.

[420] ibid, p.88.

[421] DTI and WAG (2007) (n.50), p.19.

[422] BERR and WAG (n.51), p.10.

[423] LDEDCA, s.139.

Chapter Two argued that in tackling the injustice caused by the advantages that 'haves' get from delaying dispute resolution, the legislation creates a different kind of injustice due to adjudication's 'pseudo-temporary' nature. That is, an adjudicator's decision having a permanent effect, with its purportedly temporarily binding nature only existing in principle.

Injustice arises where this phenomenon is caused by the insolvency, or the risk of intervening insolvency, of (usually) the winning party in an adjudication before the conclusion of subsequent arbitration/litigation (excluding adjudication enforcement proceedings) and actual repayment of any sums ordered, thereby deterring the other party from pursuing such proceedings. Several cases were cited whereby the winner in an adjudication became insolvent shortly thereafter, thereby proving the research problem's plausibility.

This chapter then explored possible countermeasures, aiming to recommend a solution that considers both adjudication's pseudo-temporary nature and the legislation's purpose. Whilst the safeguards of more readily upholding an application to stay the enforcement of an adjudicator's decision or imposing freezing injunctions for the adjudicated sum may prevent this injustice, they also undermine the legislation. They have therefore been rejected in favour of amending the legislation to the version that promotes the highest degree of procedural justice whilst preserving its speed. This becomes the research question for the remainder of this thesis. The next chapter comparatively analyses the statutory right to interim payment introduced by HGCRA and BCISPA(NSW), which forms the foundation for all other rights and obligations pursuant to the legislation.

Chapter Three: The statutory right to interim payment, common valuation methods and prohibition of conditional payment provisions[424]

3.1 Introduction

Chapter One argued that HGCRA and BCISPA(NSW) tackle the injustice caused by the advantages that 'haves' get from delaying dispute resolution. However, as Chapter Two argued, HGCRA and BCISPA(NSW) create a different kind of injustice caused by adjudication's pseudo-temporary nature. Therefore, both jurisdictions introduced a legislation to tackle one kind of injustice, but in doing so, created a different kind of injustice. Chapters Three to Eight involve a comparative analysis of HGCRA and BCISPA(NSW), aiming to propose the legislation's version that better resolves this problem. That is, as explained in Chapter Two, the version which promotes the highest degree of procedural justice whilst preserving or even improving the legislation's speed.

Both HGCRA and BCISPA(NSW) introduce a right to interim payment, which forms the basis for other rights and obligations under the legislation to arise. That is, this right to payment creates statutory payment notification obligations (SPNO) compelling the payer to notify the payee in writing and by a certain deadline of the reasons for non-payment of any sum claimed by the payee, thereby enabling early identification of disputes and their prompt referral for adjudication. Therefore, this Chapter Three examines the statutory right to interim payment due to its importance in the legislation's operation.

It first explains HGCRA's and BCISPA(NSW)'s position regarding the right to interim payment, common valuation methods including the default valuation method in the absence of agreement, and prohibition of conditional payment

[424] This Chapter draws in part on: Harry Meliniotis, 'Do milestone payment regimes require further regulation? A comparative study of the UK and the Australian State of New South Wales (NSW)' (2020) 36[1] Const.L.J. 23.

provisions. It then analyses the interplay between interim payment valuation regimes and the prohibition of conditional payment provisions.

Chapter Three argues that HGCRA and BCISPA(NSW) have significant differences, stemming primarily from their differing approaches relating to the commencement of, and intervals between, interim payment cycles. These differences are analysed to explain their implications and to recommend the legislation's version that promotes the highest degree of procedural justice whilst preserving its speed. The criteria in determining this balance include that the commencement date of each interim payment cycle must be easily comprehended, while preventing payers from avoiding monthly interim payments through contractual provisions or circumstances that are outside the payee's responsibility.

3.2 The 'entire performance' rule and statutory entitlement to interim payments

Historically, courts supported the notion that, unless otherwise agreed, a party's entire performance of its obligations under the contract is a condition precedent to receiving any payment[425]. In *Glazebrook v Woodrow*[426], Lawrence J relevantly said that 'nothing short of performance of the whole can enable [the claimant] to sustain this action for the money'[427].

For construction projects, although principles of substantial performance, unfair enrichment and waiver of this condition precedent due to the employer's use of the defective works progressively gained favour[428], common law preserved this 'entire performance' rule. Therefore, a contractor was not entitled to interim payments for work carried out under a construction contract, unless the contract

[425] Hence in *Cutter v Powell* [1795] EWHC KB J13, 101 ER 573 the family of a deceased sailor did not recover any proportion of his wages for the part of the journey he survived.

[426] (1799) 101 E.R. 1436.

[427] *ibid*, p.1440.

[428] *Hoenig v Isaacs* [1952] EWCA 6.

provided otherwise.[429] The term 'interim payment' means partial payment to the contractor before the works are completed, normally followed up by further partial payment(s) as the works progress.

The legislation's first step towards tackling the advantages that 'haves' obtained by delaying dispute resolution was to introduce a statutory entitlement to interim payment. HGCRA s.109 uses the term 'stage payments' while BCISPA(NSW) s.8 uses 'progress payments'. As an equalising reform, this reduces the debt which a 'have-not' payee is owed during the construction stage, whilst enabling early identification of disputes so they can be resolved quicker.

HGCRA requires 'payment by instalments, stage payments or other periodic payments'[430], unless the works' duration is agreed to be less than 45 days[431]. BCISPA(NSW) has no such exception, while similarly permits parties to agree periodic or milestone payments[432]. In practice, the two common valuation methods are periodic and milestone[433]. They are therefore examined below, together with the default statutory position absent of agreement.

3.3 Common valuation methods of interim payments: periodic and milestone

For both periodic and milestone methods, the payee usually issues a valuation specifying the payment it considers to be owed, and the payer responds with a valuation specifying what it considers to be payable including reasons for any shortfall. Most popular is a periodic, normally monthly, valuation.[434] A pricing

[429] *Henry Boot Construction Ltd. v Alstom Combined Cycles Ltd.* [2005] EWCA 814, para.17 (Dyson LJ): '…but for the provisions for payment of interim certificates, [the Contractor] would have had no entitlement to be paid as the work progressed at all'. This case involved a contract entered into prior to HGCRA's introduction.

[430] HGCRA, s.109(1).

[431] HGCRA, s.109(1)(a)&(b).

[432] BCISPA(NSW), s.4(1), progress payment definition.

[433] David Benge, *Interim valuations and payment: RICS professional guidance* (RICS 2015).

[434] ibid, pp.3&5.

document, such as contract sum analysis, bill of quantities or schedule of rates, is used to break down the contract sum into the various elements of work. The competing valuations indicate for each element the percentage considered to represent the value of work carried out. The parties also include in their valuations any matters adjusting the original contract sum, such as, variations, loss and expense, set-off claims and liquidated damages.

The difference of the milestone valuation method is that the original contract sum is broken into 'a series of lump sums, each paid upon [the payee] achieving a 'milestone' – meaning a defined stage of progress'[435]. The Latham Report favoured the milestone valuation method over periodic for being easier to recognise whether a milestone activity is complete rather than carrying out monthly measurements and remeasurements of each activity[436]. Several modern standard forms of contract include for interim payments based on milestones as an option[437]. In fact, some incorporate a hybrid valuation method, whereby interim payment for works forming the original contract sum is valued based on milestone principles[438] while interim payment for adjustments to the original contract sum, such as variations and loss and expense, are valued based on periodic principles[439].

A disadvantage of milestones are disputes over whether the milestone was complete by the time of valuation. Under a periodic valuation, the payee would apply for 100% of an element of work considered complete, and the payer would reply with, say, 95% payment together with reasons for the lower percentage. This hardly causes a dispute since the payee will be paid the certified percentage, carry out the outstanding work and reapply for the full amount in the next valuation. However, under a milestone valuation, the payee is not entitled to any

[435] ICE, *Civil Engineering Procedure* (7th edition, ICE Publishing, 2016), p.162.

[436] Latham (1994) (n.42), pp.20,36&37.

[437] JCT, *Design and Build Contract 2016* (Thompson Reuters, 2016), cl.4.12; NEC, *NEC4: Engineering and Construction Contract* (Thomas Telford, 2017), Opt.A, cls.11.2(29) & 50.3.

[438] JCT DB 2016, cl.4.12.1.1.

[439] JCT DB 2016, cls.4.12.1.2 & 4.12.2.3.

payment in respect of that milestone until its completion[440]. A study investigating milestone valuations suggests they provide fertile ground for disputes over whether a milestone is indeed completed. From 58 respondents, 77.58% experienced such disputes either frequently or occasionally.[441]

Milestones also may be abused, since neither HGCRA nor BCISPA(NSW) limit the length of the works forming each milestone. Therefore, at contract formation, a payer with bargaining power can impose milestones that require lengthy works to complete, thereby delaying the payee's right to interim payment. This can undermine the legislation, since the right to payment forms the basis for other rights and obligations under the legislation. Therefore, the legislation of both jurisdictions can be improved by limiting the maximum duration of each milestone[442].

3.4 Default statutory position for valuing interim payments

HGCRA s.109(2) allows parties freedom 'to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due'. The Scheme applies in the absence of agreement[443], and introduces the concept of 'relevant period'[444]. If the relevant period is not specified or calculable pursuant to the contract, it is a period of 28 days[445]. For each relevant period, the payment is the aggregate of the amount equal to the value of work performed in accordance with the contract 'from the commencement of the contract to the end

[440] *Bennett (Construction) Limited v CIMC MBS Limited (formerly Verbus Systems Ltd)* [2019] EWCA 1515, paras.21&65; *Energetech v Sides Engineering & Anor* [2005] NSWSC 801, paras.6,7,19&24.

[441] Karl Blyth and Ammar Kaka, 'The industry's view of stage payments and the Latham recommendations' in W. Hughes (eds), *15th Annual ARCOM Conference* (ARCOM, Vol.2, 1999), p.639.

[442] see ch.3/s.3.6.3.

[443] HGCRA, s.109(3).

[444] Scheme, pt.II/para.2.

[445] Scheme, pt.II/para.12.

of the relevant period'[446] plus 'any other amount… which the contract specifies shall be payable'[447] less 'any sums which have been paid or are due for payment'[448].

Under BCISPA(NSW), the party undertaking to carry out work under the contract[449] is entitled to serve a payment claim 'on and from the last day of the named month in which the construction work was first carried out… and on and from the last day of each subsequent named month'[450], or, on and from any earlier date agreed in respect of any particular named month[451]. The amount of payment is calculated in accordance with the contract, or, in the absence of agreement, based on the value of construction work carried out[452].

Therefore, the default valuation method under both legislations is periodic. HGCRA provides for valuations in cycles of 28 days (relevant period), whereas under BCISPA(NSW) the valuation cycles have the last day of the month as fixed reference point.

HGCRA's 28-day cycle has two disadvantages. Firstly, the uncertainty of when the first 28-day cycle begins, and consequently ends. Apparently, it starts on the 'commencement of the contract'[453], which is a debatable term, unless specified in the contract. Is it, for example, the date the contract was signed, or the verbal agreement reached, or the date the contractor deployed resources for procuring or designing the works, or the date the contractor took possession of the site, or the date the contractor commenced physical works on site? Naturally, any uncertainty over when the first cycle ends, affects subsequent cycles too.

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[446] Scheme, pt.II/para.2(2)(a).

[447] Scheme, pt.II/para.2(2)(c).

[448] Scheme, pt.II/para.2(3).

[449] BCISPA(NSW), s.8.

[450] BCISPA(NSW), s.13(1A).

[451] BCISPA(NSW), s.13(1B).

[452] BCISPA(NSW), ss.9&10.

[453] Scheme, pt.II/paras.2(2)(a-c)&2(3).

The second disadvantage is the variable date each cycle ends. For example, assuming the contract commenced on 06/01/2020, the first relevant period ends 03/02/2020, the second 02/03/2020 the third 30/03/2020 and so forth. It is easier to have a monthly fixed date than doing such calculations. The next chapter explains that knowing the precise date each cycle ends can be crucial in determining the deadlines for complying with SPNO[454]. Missing this deadline by a single day renders the payer's notice invalid, thereby the payer becoming liable to pay the full sum notified by the payee.

BCISPA(NSW)'s monthly fixed-date approach achieves a higher degree of procedural justice since the parties more easily comprehend the commencement of each payment cycle. It is therefore preferred over HGCRA's 28-day cycle for preventing smash-and-grab adjudications[455].

3.5 Conditional payment provisions

Conditional payment provisions, such as pay-when-paid and pay-when-certified, are contractual clauses rendering payment contingent on the performance of someone other than the payee. The courts have upheld conditional payment provisions[456]; therefore, a statutory right to interim payment would be futile if permitted to be fettered by such clauses.

Both HGCRA and BCISPA(NSW) prohibit pay-when-paid, rendering ineffective any provisions that purport to make the payer's liability to pay the payee conditional upon the payer receiving payment from a third party[457]. However, HGCRA permits pay-when-paid provisions in the event of an upstream

[454] e.g. the payer's deadline to comply with its SPNO are calculated from the expiry of seven days following the 'relevant period', or the making of a claim by the payee, whichever occurs later: Scheme, pt.II/para.4.

[455] see ch.4/s.4.1.

[456] see ch.1/s.1.9.

[457] HGCRA, s.113(1); BCISPA(NSW), s.12(2)(a)&(b).

insolvency[458], whereas BCISPA(NSW) does not. This difference is analysed in Chapter Five. This section reviews provisions making payment conditional on the performance of another contract, or an obligation by the payer.

Originally, HGCRA and BCISPA(NSW) did not address provisions making payment conditional on the operation of another contract. For example, payment under a sub-contract being conditional on the issuing of a certificate by the employer under the main contract (pay-when-certified).

In *Alstom v Jarvis (No2)*[459], the sub-contract provided that '[t]he Contractor shall pay to the Subcontractor the amount due on the certificate within seven days of the [Employer's] certificate being issued'[460]. Humphrey LLoyd J found this pay-when-certified provision compliant with HGCRA. He endorsed the freedom which s.110(1) affords, namely, 'to agree how long the period is to be between the date on which a sum becomes due and the final date for payment', and construed that HGCRA permits the final date for payment to be 'set by reference to a future event... [which] could be the result of action by a third party, such as a certificate under a superior contract'[461].

BCISPA(NSW) was first to prohibit such clauses by introducing s.12(2)(c), which renders ineffective provisions that make 'liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract'[462]. In the UK opinions differed, as explained below.

PWG found 'pay-when-certified' to 'have the same effect as a "pay-when-paid" clause… [therefore] it would be inappropriate to allow a loophole to allow the practice to continue through a different mechanism.'[463] However, it also recognised that 'certification by a supervising officer of payments under the main

[458] HGCRA, s.113.

[459] [2004] EWHC 1285.

[460] *ibid*, para.4.

[461] *ibid*, para.22.

[462] BCISPA(NSW)(Amendment)(2002), para.21.

[463] PWG (n.46), para.2.2.1.

contract is a normal and effective method of confirming sums due'[464], particularly to nominated sub-contractors[465]. Some members considered it 'reasonable for the parties to agree to share the risk of a late certificate'[466]. Consequently, PWG failed to reach a consensus on whether pay-when-certified should be banned[467].

The first consultation favoured preserving pay-when-certified, stating they 'can have a helpful and proper role to play'[468]. Instead, it proposed making their use conditional upon the certificate identifying the relevant element of works and its due date and requiring that a copy of the certificate is passed to the sub-contractor[469]. However, the second consultation took a different view and proposed their complete prohibition[470].

Ultimately, HGCRA s.110(1A) was introduced[471], which states that the requirements of s.110(1)(a) that every contract shall 'provide an adequate mechanism for determining what payments become due under the contract, and when' are not satisfied where the:

> contract makes payment conditional on—
>
> (a) the performance of obligations under another contract, or
>
> (b) a decision by any person as to whether obligations under another contract have been performed.[472]

The government introduced s.110(1A) because:

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[464] ibid. para.2.2.2.

[465] ibid. para.2.2.5.

[466] ibid. para.2.2.6.

[467] ibid. para.2.2.8.

[468] DTI and WAG (2005) (n.48), para.5.8.

[469] ibid, para.5.5.

[470] DTI and WAG (2007) (n.50), p.38.

[471] LDEDCA, s.142.

[472] HGCRA, s.110(1A); However, pay-when-certified clauses are permitted in first tier PFI sub-contracts: Construction Contracts (England) Exclusion Order 2011.

> courts have held that an "adequate mechanism" can include a certificate issued by a third party (for example, an architect or quantity surveyor) under a superior contract… New subsection (1A) secures that it is not an adequate mechanism for these purposes to make the determination of what payments are due, or when, dependent upon the performance of obligations in a different contract (for example, in a superior contract) or upon someone's decision as to whether obligations have been performed in a different contract.[473]

Clearly, parliament introduced s.110(1A) in direct response to *Alstom*. If a contract contains such conditions, then the Scheme's relevant provisions apply[474]. The next section explains how courts applied the Scheme when contractual provisions were deemed inadequate pursuant to s.110(1A).

Neither HGCRA nor BCISPA(NSW) state what happens where payment is conditional upon the performance of an obligation that the payer has under its contract with the payee; however, this should be deemed a settled matter under common law. The EWCA cited and endorsed the cases of *Roberts v Bury Commissioners*[475] and *Waddan Hotel Limited v MAN Enterprise SAL (Offshore)*[476], which provide that 'no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself'[477].

In fact, relevant case law can be traced further back in history, providing that it is a 'universal principle of law, that a party shall never take advantage of his own wrong'[478]. NSW courts have upheld this notion by relying on English case law[479].

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[473] Explanatory Notes to LDEDCA, paras.319&320.

[474] HGCRA, s.110(3).

[475] [1870] LR5CP 310.

[476] [2015] BLR 478.

[477] *Bennett* (n.440), para.23.

[478] *Alghussein Establishment v Eton College* [1988] 1 W.L.R. 587, p.591 (Lord Jauncey), quoting *Rede v. Farr* (1817) 6 M.&S. 121, pp.124&125 (Lord Ellenborough).

[479] *Francis Gregory Hannigan v Inghams Enterprises Pty Limited* [2019] NSWSC 321, paras.96&97.

The next section analyses the interplay between conditional payment and the common valuation methods of periodic and milestone.

3.6 Interplay between periodic and milestone valuation methods, and the prohibition of conditional payment provisions

3.6.1 UK legislation and case law

HGCRA s.109(2) allows parties freedom ‘to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due’, while s.110(1) requires that:

> Every construction contract shall—
>
> (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
>
> (b) provide for a final date for payment in relation to any sum which becomes due.
>
> The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

Therefore, s.110(1) creates two distinct concepts, namely, the date which a sum becomes due, known as the ‘due date’, and the final date for payment. These concepts are examined in the next chapter. This section examines what constitutes an ‘adequate mechanism’ under s.110(1), particularly in relation to the length between payment intervals and the valuation method.

During HGCRA’s parliamentary debates, Lord Howie of Troon criticised the subjectivity of the term ‘adequate mechanism’, noting that:

> The Bill gives no description of either adequacy or mechanism… [and] lacks any objective standard that might be applied… the constituent

> elements of an adequate mechanism should be set out… [otherwise] avoidance of payment provisions will be a simple task for any unscrupulous contractor who seeks to delay payment.[480]

He proposed including several 'constituent elements of an adequate mechanism'[481], for example, that 'construction contracts shall specify the payment interval'[482]. However, his suggestions did not survive the debates.

PWG recommended defining what constitutes an 'adequate mechanism'[483]. However, none of its constituent elements included imposing maximum intervals between interim payments[484]. Similarly, 78% of the consultation's respondents recommended defining 'adequate mechanism'; however, none of the elements proposed to the respondents included limiting the interval between interim payments.[485] Ultimately, LDEDCA's amendments in relation to what constitutes an adequate mechanism did not limit the intervals between interim payments[486].

Two CA cases offer guidance on what constitutes an 'adequate mechanism' related to the length between payment intervals and the valuation method. These are *Balfour Beatty Regional Construction Ltd v Grove Developments Ltd*[487] and *Bennett*[488].

In *Balfour*, the parties agreed a schedule specifying 23 monthly interim payments for the planned duration of the works. However, the construction period exceeded these 23 months originally envisaged. The employer argued that the contractor had no right to interim payments beyond the agreed schedule and until completion of the project. By contrast, the contractor contested that after the

[480] HL Deb 28 March 1996, col.1923.

[481] ibid, col.1925.

[482] ibid.

[483] PWG (n.46), paras.1.5&2.1.4&2.1.9.

[484] ibid, para.2.1.4.

[485] DTI and WAG (2006) (n.49), p.37.

[486] LDEDCA, s.142.

[487] [2016] EWCA 990.

[488] (n.440).

schedule's expiry the contract lacked an adequate payment mechanism under s.110(1), therefore, the Scheme's 28-day payment cycle should apply until the project's completion.[489]

Stuart-Smith J agreed with the employer and endorsed a textbook passage that 'a contract prescribing one periodic payment, even of an insignificant amount, would it seems, meet the requirements [of s.109]'[490]. Stuart-Smith J interpreted s.109(2) as permitting parties:

> to agree stage payments… at highly irregular intervals and require highly variable amounts to be paid… to adopt *any* amount and *any* interval… to agree that payments would be withheld until very late on. There is also nothing… to prevent the parties from agreeing that the amount of a payment shall be nil.[491]

Accordingly, he found that the lack of providing 'interim payments covering all of the work'[492] did not contravene s.110(1). Consequently, the contractor was not entitled to further interim payments until the project's completion[493]. On appeal, the contractor argued that this decision 'creates a commercial nonsense'[494]. The contractor persuaded Vos LJ[495]; however, Jackson LJ and Longmore LJ had none of it[496]. The appeal was therefore dismissed on 2:1 majority[497].

Addressing the 'commercial nonsense' argument, Jackson LJ noted that:

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[489] *Grove Developments Ltd v Balfour Beatty Regional Construction Ltd* [2016] EWHC 168, paras.4,15&19.

[490] *ibid*, para.32, quoting Stephen Furst, Vivian Ramsey and Charlotte Ellis, *Keating on Construction Contracts* (9th edn, Sweet & Maxwell, 2011), col.18-057.

[491] *Grove*, para.30.

[492] *ibid*, para.33.

[493] *ibid*, paras.37&41.

[494] *Balfour*, para.38.

[495] *ibid*, para.83.

[496] *ibid*, paras.39,42,88-91.

[497] *ibid*, paras.67,87&92.

> this is a classic case of one party making a bad bargain. The court will not, indeed cannot, use the canons of construction to rescue one party from the consequences of what that party has clearly agreed.[498]

Nevertheless, he was skeptical of the textbook passage endorsed by Stuart-Smith J and emphasised that parties 'must draw up a system of interim payments in good faith. I doubt that a cynical device… prescribing one interim payment "of an insignificant amount" would suffice'.[499] This case illustrates the court's support of freedom of contract over perceived fairness. Although Lord Jackson's latter qualification attempts to prevent gross unfairness, it lacks an objective standard on what constitutes a cynical device.

Bennett concerns the interplay between milestone payment terms and HGCRA's requirements of having an adequate payment mechanism[500]. The contract required payment from the main contractor to the sub-contractor of certain percentages of the contract sum on 'sign-off' of each milestone by the end user / employer / main contractor[501]. The first instance judge found these milestones non-compliant with HGCRA and replaced them with paragraphs 2-5 of part II of the Scheme, while also replacing the milestone payment mechanism with periodic.[502] Accordingly, it became irrelevant whether the milestones were achieved, since payment would be calculated based on the value of work carried out[503].

However, the CA unanimously disagreed. The lead judgment was given by Coulson LJ who determined that the central issue was the interpretation of the term 'sign-off'[504]. He concluded it should be interpreted objectively, that is, whether the milestones were in a state capable of being signed-off, as opposed

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[498] *ibid*, para.39.

[499] *ibid*, paras.56&57.

[500] *Bennett*, para.2.

[501] *ibid*, para.4.

[502] *ibid*, para.11&46.

[503] *ibid*, paras.12&13.

[504] *ibid*, para.27.

to subjectively, which would require actual sign-off. Accordingly, the contract was deemed compliant with HGCRA.[505]

Although the appeal was already allowed on this basis, due to its wider importance, Coulson LJ went on to determine what the correct replacement payment mechanism should have been if the milestones were non-compliant[506]. He considered the authorities prescribing a piecemeal incorporation of the Scheme to the extent necessary to rectify any non-compliant payment provisions[507], and concluded that the replacement mechanism must do the least violence to the parties' agreement[508]. He found that where a milestone payment mechanism is non-compliant with HGCRA, then the Scheme pt.II/para.7 shall be incorporated, which provides that payment shall become due 7 days following completion of the work[509]. The consequences of this finding are analysed below[510].

3.6.2 NSW legislation and case law

Originally, BCISPA(NSW)'s entitlement to progress payment arose 'on and from each reference date'[511] determined in accordance with the contract, or, if no provisions were made, the last day of the named month in which the work was first carried out and the last day of each subsequent named month[512]. Murray's report identified two circumstances where this concept caused unfairness.

First, since reference dates could be determined in accordance with the contract, the payer could insist incorporating provisions requiring a payment claim to be

[505] *ibid*, paras.35-45.

[506] *ibid*, para.45.

[507] *ibid*, pars.50-56.

[508] *ibid*, para.66.

[509] *ibid*, paras.63-66.

[510] ch.3/s.3.6.3.

[511] BCISPA(NSW) historic version to 20 October 2019, s.8(1).

[512] ibid, s.8(2)(a).

made ‘on the last day of the subsequent month after the claimed work has been carried out (e.g. make a claim on 30 June for work completed during the month of May)’[513]. The legislation’s purpose was undermined because this postpones payment and identification of any dispute by one month.

The second unfairness was caused by the court’s ruling that following termination of contract there can be no further reference dates, and therefore no further right to progress payment under BCISPA(NSW)[514]. Payers abused this loophole by waiting ‘until the second the work is completed, and then terminate the contract before the [payee] can make its final claim’[515]. Consequently, the payer could deprive the payee of its statutory rights by terminating the contract, even if the termination’s cause was disputed.

By contrast, the EWCA in *Adam Architecture Ltd v Halsbury Homes Ltd*[516] had to determine whether HGCRA’s SPNO apply to interim payments only or to payments following completion/termination too, ruling that they apply to both[517]. Therefore, under HGCRA the payee can resort to its statutory rights even after termination.

BCISPA(NSW)’s amendments rectified this unfairness by abolishing the concept of ‘reference date’, redrafting s.8 to simply repeat BCISPA(NSW)’s key objective that the party undertaking to carry out work under the contract is entitled to progress payments.[518] Payment application intervals are now controlled by the added subsections 13(1A) & 13(1B)[519], which provide that a payment claim ‘may be served on and from the last day of the named month in which the construction work was first carried out… and on and from the last day of each subsequent

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[513] Murray (n.55), p.130.

[514] *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd* [2016] HCA 52, paras.2,80,81.

[515] Murray (n.55), p.129.

[516] [2017] EWCA 1735.

[517] *ibid*, paras.2&65.

[518] BCISPA(NSW)(Amendment)(2018), para.4.

[519] ibid, para.10.

named month'[520], or, on and from any earlier date agreed in respect of any particular named month[521].

BCISPA(NSW) s.13(5) provided that the 'claimant cannot serve more than one payment claim in respect of each reference date'. The amendments redraft this section to provide that, '[e]xcept as otherwise provided for in the construction contract, a claimant may only serve one payment claim in any particular named month'[522].

The draft Bill of BCISPA(NSW)'s amendments provided that the 'reference date' of a milestone is the day immediately following the event to which the milestone relates[523]. However, this did not survive the final Amendment Act and, as explained, the concept of reference date was abolished. The implication seems to be that, unless the contract provides otherwise, the payee can only make one payment claim per month, whereas, based on the draft Bill, he could make a payment claim whenever he is deemed to have completed a milestone. For example, if he is deemed to have completed two different milestones in a month, he could make two payment claims. From a procedural fairness perspective, the final version is better because the draft Bill would impose additional administrative burdens for the payer to process multiple payment claims per month.

The case of *Maxcon Constructions Pty Ltd v Vadasz*[524] examines the implications of s.12(2)(c), which renders ineffective any provision making payment contingent or dependent on the operation of another contract. Although *Maxcon* originated in the State of South Australia, s.12(2)(c) of BCISPA (South Australia) mirrors that of BCISPA(NSW). *Maxcon* is a High Court of Australia (HCA) case, the country's highest court, and extended the application of s.12(2)(c) to instances where payment is 'dependent on something unrelated to [the sub-contractor's]

[520] BCISPA(NSW), s.13(1A).

[521] BCISPA(NSW), s.13(1B).

[522] BCISPA(NSW)(Amendment)(2018), para.12.

[523] BCISPA(NSW) Amendment Bill 2018 (public consultation draft), para.(3)(5).

[524] [2018] HCA 5.

performance'[525]. All seven justices agreed on this point[526]. The following section analyses the implications of this judgment.

3.6.3 Comparative analysis of the two distinctive approaches to milestone payment regimes

HGCRA does not impose a maximum interval between interim payments. *Balfour's* implication is that if the parties agreed a set of periodic payments, but the project is not complete by the last periodic payment, the payment regime transforms from periodic to milestone, with the project's practical completion becoming the relevant milestone. By contrast, BCISPA(NSW) entitles the payee to issue monthly payment claims. Therefore, if the parties have agreed a set of (at least monthly) periodic payments, but the project is not completed by the last periodic payment, the payee is entitled to submit a payment claim on and from the last day of each subsequent named month.

In *Balfour*, the contractor argued that the 'delay may have been out of its control and in the control of [the employer]'[527]. The TCC nevertheless found that the contractor was not entitled to further interim payments if completion of the relevant milestone (the project's completion) was delayed 'for whatever reason'[528]. This finding is concerning because it includes delays caused by the employer, and therefore the contractor can be prevented from receiving payment for reasons beyond its responsibility.

The EWCA merely acknowledged that the project was subject to delay, the cause of which was in dispute[529]. It did not challenge the TCC's aforesaid finding of law that the contractor is not entitled to further interim payment even if the employer is responsible for the delay. The only argument advanced by the contractor was

[525] *ibid*, para.25.

[526] *ibid*, paras.25,31,32,40&41.

[527] *Grove*, para.37.

[528] *ibid*.

[529] *Balfour*, para.15.

that such a finding is against commercial common sense[530]. However, if the employer was responsible for the delay, such a finding is also contrary to the common law principle that no party can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself.

Balfour involved Part 8 proceedings brought by the employer, seeking a declaration that the contractor was not entitled to further interim payments past the agreed schedule, until practical completion was achieved[531]. The employer relied on the non-fulfilment of a condition, namely, completion of the relevant milestone (the project's completion).

A contention, which, if advanced by the contractor, could have clarified the court's position, is that because of the said common law principle, for the court to decide the matter, it must first determine whether the employer was responsible for the delay. Therefore, the contractor would argue, the dispute is inappropriate for Part 8 proceedings as involving a substantial dispute of fact[532]. Based on the judgments, no such argument was advanced by the contractor or considered by the court.

Regarding the statutory prohibition of making payment conditional on the performance of another contract, BCISPA(NSW) renders such provisions ineffective whereas HGCRA declares them inadequate and incorporates the Scheme. Regarding BCISPA(NSW), the decision in *Maxcon* supports the notion that milestone payment provisions are rendered ineffective if their completion is delayed for reasons unrelated to the payee's performance.

Regarding HGCRA, in determining that the issue in *Bennett* was one of interpretation of the term 'sign-off', Coulson LJ relied on *Alstom*, which he said had similarities with *Bennett*[533]. *Alstom* ruled that HGCRA permits calculating the

[530] *Grove*, para.23; *Balfour*, para.39.

[531] *Balfour*, para.23.

[532] CPR 8, para.8.8(1)(a).

[533] *Bennett*, paras.25,38&66.

final date for payment under a sub-contract by reference to an 'action by a third party, such as a certificate under a superior contract'[534]. However, *Alstom* occurred before the introduction of s.110(1A), which, as explained, precisely aims to tackle provisions rendering payment dependent upon the performance of obligations under another contract, including, but not limited to, the issuing of a certificate under a superior contract.

Section 110(1A) applies to contracts entered into after 01 October 2011[535]. The contract in *Bennett* was dated 01 June 2012[536], therefore s.110(1A) applied. No s.110(1A) argument was raised in the pleadings available[537], nor was its relevance addressed in the judgments[538]. If 'sign-off' of the milestones was an obligation of the employer under its contract with the main contractor, then the payment mechanism under the sub-contract should be found inadequate for reason of s.110(1A). HGCRA does not call for a subjective or objective interpretation of such obligation for s.110(1A) to apply.

Bennett's most concerning aspect is the CA's finding that Scheme pt.II/para.7, which provides that payment shall become due 7 days following completion of the work, shall apply where a milestone payment mechanism is inadequate. This is because a paradoxical loop is created between HGCRA s.110(1A) and Scheme pt.II/para.7 where the parties agreed payment by milestones and completion of a milestone depends on the performance of an obligation under another contract that is delayed.

For example, let us assume that a milestone agreed between a main contractor and its electrical sub-contractor is the completion of the first fix works for all sockets in an area, including the associated containment and wiring terminated at the back boxes. Completion of this milestone is conditional upon the

[534] *Alstom*, para.22.

[535] LDEDCA (Commencement No. 2) (England) Order 2011, art.2.

[536] *Bennett*, para.3.

[537] payee's particulars of claim for the first action to the TCC.

[538] of *CIMC MBS Limited v Bennett (Construction) Limited* [2018] EWHC 2440 and *Bennett* (EWCA).

performance of obligations under other contracts, for example, the employer's architect issuing setting out drawings indicating the sockets' precise locations, and the main contractor's dry lining sub-contractor completing the installation of all walls.

If either of these tasks is delayed, completion of the milestone is delayed, and consequently payment to the electrical sub-contractor is delayed due to no fault of its own. Based on *Bennett*, even if the electrical sub-contractor successfully argues that the payment mechanism is inadequate pursuant to HGCRA s.110(1A), then Scheme pt.II/para.7 applies, which provides that payment is due 7 days following completion of the work; however, completion of the work is conditional upon an obligation under another contract that is delayed, which again triggers HGCRA s.110(1A), thereby causing a loop. The sub-contractor may have completed a significant proportion of the milestone, and incurred associated costs, however, it is prevented from receiving interim payment due to no fault of its own.

The only getaway for the sub-contractor is successfully pleading one of the safeguards that the courts sought to provide, for example, that the payment regime is a 'cynical device'[539] or drawn in bad faith[540] or 'so deficient'[541]. However, these safeguards offer no objective standard which the parties or an adjudicator can apply. In *Balfour*, the delay to the relevant milestone was '2 or 3 years'[542], yet the court found the payment regime to be compliant with HGCRA.

To summarise, in NSW, *Maxcon* supports the notion that milestone payment provisions are rendered ineffective if their completion is delayed for reasons unrelated to the payee's performance. By contrast, in the UK, where the lack of completion of a milestone is outside the payee's responsibility, the payee is not ordinarily allowed any payment for that milestone. Therefore, the milestone

[539] *Balfour*, para.57.

[540] *ibid*.

[541] *Bennett*, para.67.

[542] *Balfour*, para.78.

payment regime conflicts with the common law principle that no party can take advantage of the non-fulfilment of a condition the performance of which has been hindered by itself. Furthermore, on most occasions, it also conflicts with the statutory prohibition of making payment conditional on the performance of another contract.

Both jurisdictions merit statutory intervention, albeit for different reasons. HGCRA's position conflicts with other laws and undermines the legislation's purpose, since the payee is not entitled to payment, and therefore cannot exercise its statutory rights, for reasons beyond its responsibility. By contrast, BCISPA(NSW)'s position undermines the concept of agreeing payment regimes based on milestones because, theoretically, even the slightest delay unrelated to the payee's performance shall render the milestone ineffective.

An option is to prohibit all milestone payments, other than retention release milestones[543]. However, this option may be objected to on the basis that it unreasonably interferes with freedom of contract.

An alternative option is to prohibit milestones (other than retentions) whose duration of works extends to more than, for example, 30 days, for reasons outside the payee's responsibility. On such occasion the payee shall, in respect of that milestone, be entitled to periodic payments at intervals not exceeding 30 days. For example, if a milestone's original duration is 20 days and is delayed by 5 days for reasons beyond the payee's responsibility, then the milestone payment regime shall remain intact. If the original duration of the milestone is 30 days or more, then any delay that is not the payee's responsibility shall render the milestone ineffective.

This option balances the freedom of contract to agree milestones, the common law principle that no party can take advantage of the non-fulfilment of a condition the performance of which has been hindered by itself and the statutory prohibition

[543] see ch.5/s.5.3.

of making payment conditional on the performance of another contract. It also prompts parties to agree shorter milestones.

3.7 Conclusion

This chapter explored the right to interim payment under HGCRA and BCISPA(NSW). Broad similarities include a right to interim payment, prohibition of conditional payment provisions such as pay-when-paid and pay-when-certified, and allowing parties freedom to agree whether interim payments will be valued based on periodic or milestone principles.

However, significant differences also exist. Firstly, in the absence of agreement as to when each interim payment cycle commences, HGCRA provides for valuations in cycles of 28 days, whereas BCISPA(NSW) has the last day of the month as fixed reference point. This thesis favoured BCISPA(NSW), because its monthly fixed-date approach achieves a higher degree of procedural justice since the commencement of each payment cycle is more easily comprehended by the parties. The default reference point shall be the last day of each month, with parties having freedom to agree an earlier date for any particular month, insofar as that date falls within that month.

Second difference is that BCISPA(NSW) requires monthly interim payments as a minimum, whereas HGCRA allows parties freedom to agree the interval between interim payments. This thesis favoured BCISPA(NSW) because it better promotes the legislation's purpose, since it prohibits payers from imposing long intervals between interim payments. It is not logical that HGCRA allows parties to agree intervals longer than 45 days, considering it requires contracts whose duration of work is over 45 days to provide for interim payment. Long payment intervals can undermine HGCRA's purpose because the right to interim payment forms the basis for other rights and obligations under the legislation to arise.

HGCRA's purpose is further undermined where parties agreed a schedule of interim payments up to the expected project completion date, but completion is subsequently delayed. On such an occasion, the payment regime is transformed from periodic to milestone, with the project's completion being the relevant milestone. Accordingly, the payee is not entitled to further interim payments until the project's completion. If HGCRA was to provide for monthly interim payments as a minimum, this potential injustice would be prevented.

This chapter also offered new insights into the interplay between milestone payments and the prohibition of conditional payment provisions. In the UK, where completion of a milestone is prevented for reasons outside the payee's responsibility, the milestone payment regime conflicts with the common law principle that no party can take advantage of the non-fulfilment of a condition the performance of which has been hindered by itself. Furthermore, it can conflict with the statutory prohibition of making payment conditional on the performance of another contract. By contrast, in NSW milestone payment provisions are rendered ineffective if their completion is delayed for reasons unrelated to the payee's performance.

Both HGCRA and BCISPA(NSW) require amending, albeit for different reasons, to balance the freedom of agreeing milestone payments and the prohibition of conditional payment provisions. The legislation should prohibit milestones (except retentions) whose duration of works extends to more than 30 days for reasons outside the payee's responsibility. This ensures that a 'have' payer retains the right to agree a payment regime based on milestones, whilst a 'have-not' payee is not disadvantaged if completion of a milestone is delayed for reasons outside its responsibility.

Chapter Four: Statutory payment notification obligations and consequences of failure to adhere[544]

4.1 Introduction

The previous chapter reviewed the statutory right to interim payments, explaining that it is this right to payment which then leads to other rights and obligations under the legislation. Importantly, HGCRA and BCISPA(NSW) impose statutory payment notification obligations (SPNO) to the parties in respect of each payment.

SPNO have become part and parcel of every piece of legislation introducing adjudication in a jurisdiction. Despite being governed by different rules, their commonality is that they establish the sum that must be paid and the date by which it must be paid. Provided the payee has complied with its SPNO, failure of the payer to adhere to its SPNO renders the payer liable to pay the full sum notified by the payee.[545] This compels the payer to notify the payee in writing, and by a certain deadline, of the reasons for paying any lesser amount than that claimed by the payee. This enables early identification of disputes and their prompt referral for adjudication.

Despite their critical function for the legislation's effective operation, SPNO cause the controversial smash-and-grab[546] adjudications. This colloquialism originated in the UK and means an adjudication where the decision depends on whether timeous and valid payment notifications were issued, as opposed to a decision

[544] This Chapter draws in part on: Harry Meliniotis, 'Statutory Payment Notification Obligations Pursuant to HGCRA and BCISPA(NSW): A Comparative Study from the Perspective of Preventing Smash-and-Grab Adjudications Whilst Improving the Legislation's Effectiveness' (Society of Construction Law, September 2021).

[545] HGCRA, ss.110A,110B&111; BCISPA(NSW), ss.15&17(2).

[546] The Cambridge Dictionary defines 'smash-and-grab' as 'a crime in which thieves break the window of a shop and steal things before quickly escaping': <https://dictionary.cambridge.org/dictionary/english/smash-and-grab-raid> accessed 31 October 2022.

that reflects the account's true value after considering the parties' substantive claims and defences[547]. The potential for injustice caused by adjudication's pseudo-temporary nature[548] is more severe in smash-and-grab adjudications because, assuming the payer has failed to comply with its SPNO, the payee is awarded the full amount claimed without the payer being able to rely on any contractual defence or set-off.

Chapter Two explained that this problem is better resolved through statutory intervention amending the legislation to the version that promotes the highest degree of procedural justice whilst improving the legislation's speed (the set parameters). Regarding SPNO, this is defined as the version which provides the highest degree of 'transparency in the exchange of information relating to payments'[549], offers the payer every reasonable opportunity to comply with its SPNO, and requires the payer to comply with its SPNO quickly.

This chapter first reviews SPNO's legislative history leading to their current provisions. It then comparatively analyses the several components forming SPNO, recommending the version better promoting the set parameters. These components include:

- BCISPA(NSW)'s 'parallel' versus HGCRA's 'mandatory' regime.
- The distinctive meaning of the term 'due date'.
- Date to which each payment shall be valued.
- Instigation of payment cycles.
- Timing of payee's application[550].
- Permitting only one application per cycle and requiring it to state that is made under the legislation.
- Payment terms.

[547] *Grove v S&T* (n.27), para.13; *J&B Hopkins Ltd v Trant Engineering Ltd* [2020] EWHC 1305, para.35;

[548] see ch.2/ss.2.4&2.5.

[549] BEIS (2020) (n.30), p.2.

[550] The terms 'application', 'application for payment' and 'payment claim' are all similar and mean a written notice from the payee to the payer specifying the sum that the payee claims to be due and the basis on which that sum is calculated.

- Payer's notification obligations and payee's duty to remind the payer to comply.
- Requirement for 'supporting statement' to accompany applications.

4.2 SPNO pursuant to HGCRA

4.2.1 The concepts of 'payment due date' and 'final date for payment'

HGCRA incorporates the two distinct concepts of 'payment due date' and 'final date for payment'[551]. Parties are free to agree 'the amounts of the payments and the intervals at which, or circumstances in which, they become due'[552], as well as 'how long the period is to be between the date on which a sum becomes due and the final date for payment'[553].

HGCRA requires every contract to provide a mechanism for determining when payments become due (payment due date)[554] and their final date for payment[555]. To the extent that the contract fails to comply, the Scheme's relevant provisions apply[556]. The Scheme introduces the concept of 'relevant period'[557], which, if is not specified or calculable by reference to the contract, is a period of 28 days[558]. An interim payment becomes due 7 days following the 'relevant period', or the making of a claim by the payee, whichever occurs later[559]. Where the parties 'fail to provide a final date for payment in relation to any sum which becomes due'[560]

[551] see ch.3/s.3.6.1.

[552] HGCRA, s.109(2).

[553] HGCRA, s.110(1).

[554] HGCRA, s.110(1)(a)

[555] HGCRA, s.110(1)(b)

[556] HGCRA, s.110(3).

[557] Scheme, pt.II/para.2.

[558] Scheme, pt.II/para.12.

[559] Scheme, pt.II/paras.3&4.

[560] Scheme, pt.II/para.8(1).

then the final date for payment 'shall be 17 days from the date that payment becomes due'[561].

4.2.2 SPNO pursuant to HGCRA as originally enacted

Deadlines for complying with SPNO are calculated according to the 'due date' and 'final date for payment'. HGCRA s.111(1) originally provided that the payer 'may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment', served either in accordance with s.110(2) 'not later than five days after the date on which a payment becomes due', or s.111(2) 'not later than 7 days before the final date for payment'[562] unless a different period was agreed. The interpretation of these sections generated conflicting jurisprudence 'for what can be termed "wide" and "narrow" constructions'[563].

In *SL Timber Systems Ltd v Carillon Construction Ltd*[564], the adjudicator found that the payer's failure to issue a timeous notice meant that the adjudicator was 'not required (or indeed entitled) to look at the substance of the [payee's application]'[565]. Accordingly, the adjudicator ordered payment of the sum applied for by the payee[566]. This is the wide construction.

However, Lord Macfadyen disagreed with the adjudicator, observing that s.110(2) 'makes no provision as to the consequence of failure to give the notice it contemplates'[567], whilst the phrase 'sum due under the contract' in s.111 cannot be interpreted to mean the 'sum claimed'[568]. Accordingly, the payer was not

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[561] Scheme, pt.II/para.8(2).

[562] Scheme pt.II/para.10 (as originally enacted).

[563] *Rupert Morgan Building Services (Llc) Ltd. v Jervis & Anor* [2003] EWCA 1563, para.5

[564] [2001] ScotCS 167.

[565] *ibid*, para.7.

[566] *ibid*.

[567] *ibid*, para.19.

[568] *ibid*, para.20.

obliged to issue withholding notice when the dispute concerned 'whether the sum claimed was due under the contract'[569], for example, whether the work claimed had in fact been carried out in accordance with the contract, or properly valued. Withholding notice was only required when advancing 'some separate ground for withholding the payment, such as… a counterclaim, that would constitute an attempt to "withhold... a sum due under the contract"'[570].

This became known as the 'narrow' construction of s.111, in that 'one cannot withhold what is not due'[571]. An exception was when a third-party certificate[572] had been issued under the contract, thereby becoming the sum due under the contract, and therefore payable unless a timeous withholding notice was issued.[573]

4.2.3 Calls for introducing stringent consequences for failing to adhere to SPNO

This narrow construction caused calls for amending HGCRA. PWG said that s.110(2) 'is a failing in the current legislation'[574] because it 'is frequently ignored and is not backed by any sanction that might apply when the notice isn't served… [an adjudicator is] likely to conclude that the notice should have been served, but little more.'[575] TeCSA recommended introducing a default mechanism enabling the payee to issue a payment application that 'would become payable if no withholding notice were served'[576]. As a safeguard, TeCSA proposed a statutory

[569] *ibid*.

[570] *ibid*.

[571] *KNS Industrial Services Ltd v Sindall Ltd* [2000] HT 00/164, para.17 (Humphrey LLoyd), quoted in *Rupert Morgan*, para.5.

[572] e.g. by the architect.

[573] *Clark Contracts v The Burrell Co.* [2002] SLT 103; reaffirmed in *Rupert Morgan*, paras.12-14.

[574] PWG (n.46), para.2.1.1.

[575] ibid.

[576] ibid, para.2.1.5.

obligation for the payee to issue a reminder notice to the payer 'to observe the process in the legislation before the date for payment'[577].

The first consultation noted the limitations of s.111, namely that notice was only required when making a set-off, not when revising the amount considered to be due under the contract, whilst also not requiring specifying the amount scheduled for payment. Consequently, payees often did not know what payment to expect even after receiving notice.[578] The prospect of entitling payees to issue payment applications was considered[579], which would be taken forward if it 'would not generate a burden on business or an increased number of disputes'[580]. 61% of the consultation's respondents said that payees shall be entitled to submit applications whenever they wish, 24% that contracts shall specify the payee's application dates, and 15% that payees shall have no statutory right to applications[581].

The second consultation considered whether s.110(2), which requires the payer to give notice specifying the amount of payment, creates unnecessary duplication of notices where the contract specifies a third-party (e.g. the contract administrator) for giving such notices[582]. 69% of respondents agreed that a third-party named in the contract should be allowed to serve such notices in lieu of the payer[583].

The second consultation also proposed introducing a statutory fallback provision to the effect that, when no payment notice is issued, the sum claimed by the payee would become the sum due under the contract[584]. The consultation said that 'this proposal was broadly welcomed'[585], although no percentages of

[577] ibid, para.2.1.6.

[578] DTI and WAG (2005) (n.48), p.31.

[579] ibid, pp.26-29.

[580] ibid, p.26.

[581] DTI and WAG (2006) (n.49), p.40.

[582] DTI and WAG (2007) (n.50), p.29.

[583] BERR and WAG (2008) (n.51), p.12.

[584] DTI and WAG (2007) (n.50), pp.36&37.

[585] BERR and WAG (2008) (n.51), p.13.

proponents and opponents are stated. However, the consultation clarifies that 'some were wholly opposed to it'[586], citing the following response as example:

> if it is intended to introduce a default position whereby a payer must, without appropriate notice, pay any sum that is invoiced by the payee, this would be manifestly unfair[587].

4.2.4 Amendments to HGCRA's SPNO

The Parliament ultimately introduced such a fall-back provision, by omitting s.110(2)[588], introducing new sections 110A and 110B[589], and redrafting s.111[590]. Paragraphs 9[591] and 10[592] of Scheme pt.II, which deal with payment notice and notice of intention to pay less respectively, were also redrafted. This section analyses these provisions.

If the contract is silent in relation to, or, does not comply with, certain requirements of HGCRA ss.109-111, then the Scheme's relevant provisions are implied into the contract[593]:

> to govern the legal relations of the parties to the extent that they have not already concluded binding contractual arrangements that can remain operative. They will not automatically or necessarily be imported in their entirety.[594]

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[586] ibid.

[587] ibid.

[588] LDEDCA, s.143(2)(a).

[589] LDEDCA, s.143(3).

[590] LDEDCA, s.144(1).

[591] Scheme(Amendment)(Regulations)(2011), para.4(3).

[592] ibid, para.4(4).

[593] HGCRA, ss.109(3),110(3),110A(5),111(7)(b).

[594] *Grove v Balfour* (n.489), para.29 (Stuart-Smith J).

That is, there is no ‘wholesale replacement: it occurs to the extent only that the Contract does not comply with [HGCRA]’[595]. The EWCA unanimously re-affirmed that regarding payment provisions ‘the Scheme applies, but only to the extent that such implication is necessary to achieve what is required by [HGCRA]’[596].

For every payment, the contract shall require the payer (or specified person e.g. the contract administrator)[597], or, the payee[598], to give a payment notice ‘not later than five days after the payment due date’[599]. To be compliant, this notice shall specify the sum considered ‘to be or to have been due at the payment due date’[600] and ‘the basis on which that sum is calculated’[601]. Hereinafter, this notice is referred to as ‘payment notice’. Therefore, HGCRA gives parties freedom to agree if the payment notice shall be given by the payee, or, the payer or a specified person. This is in direct response to the concern about duplication of notices raised in the consultations.

If the contract requires the payer or specified person to give the payment notice, but they fail to do so, then s.110B entitles the payee to issue a ‘payee's notice in default of payer's notice’ in accordance with s.110A(3) at any time after the date the payer’s notice was required to be given[602]. The final date for payment is postponed by the number of days lapsed between the date the payer’s notice was required and the date the payee issued its notice[603]. However, if the contract permits or requires the payee to issue a notice complying with the requirements

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[595] *Bouygues (UK) Ltd v Febrey Structures Ltd* [2016] EWHC 1333, para.36 (Jonathan Acton Davis QC).

[596] *Bennett* (n.440), para.54 (Coulson LJ).

[597] HGCRA, s.110A(1)(a).

[598] HGCRA, s.110A(1)(b).

[599] HGCRA, ss.110A(1)(a)&110A(1)(b).

[600] HGCRA, ss.110A(2)(a)(i)&110A(2)(b)(i)&110A(3)(a); [subsections refer to notice issued by the payer, specified person and payee respectively].

[601] HGCRA, ss.110A(2)(a)(ii)&110A(2)(b)(ii)&110A(3)(b); [subsections refer to notice issued by the payer, specified person and payee respectively].

[602] HGCRA, ss.110B(1)&110B(2).

[603] HGCRA, s.110B(3).

of s.110A(3) earlier than the payer's notice was required to be given, then the payee does not have to issue another notice under s.110B[604].

To the extent that a contract does not comply with s.110A(1), the Scheme's relevant provisions apply[605]. Where the parties fail, in relation to a payment required under the contract to provide for the issue of a payment notice under HGCRA s.110A(1)[606], then '[t]he payer must, not later than five days after the payment due date, give a notice to the payee'[607] specifying 'the sum that the payer considers to be due or to have been due at the payment due date and the basis on which that sum is calculated'[608].

The Scheme is silent on what the payee should do where the payer does not give such notice. As explained, by virtue of s.110B, the payee may give a payee's notice in default of payer's notice, and the final date for payment is postponed accordingly. However, the Scheme, by virtue of the payee's claim required under pt.II/para.4, 'permits or requires' the payee, before the date on which the payer's payment notice is required to be given, 'to notify the payer or a specified person of (i) the sum that the payee considers will become due on the payment due date in respect of the payment, and (ii) the basis on which that sum is calculated'. Therefore, if the payee's claim meets these requirements, it is regarded as a valid payment notice and the payee is not required to give a notice in default of payer's notice.

This process establishes the sum that becomes due under the contract, also referred to as the 'notified sum' under HGCRA s.111. Section 110(1) remained unamended and gives the parties freedom 'to agree how long the period is to be between the date on which a sum becomes due and the final date for payment'. Section 111 provides that 'the payer must pay the notified sum (to the extent not

[604] HGCRA, s.110B(4).

[605] HGCRA, s.110A(5).

[606] Scheme, pt.II/para.9(1).

[607] Scheme, pt.II/para.9(2).

[608] Scheme, pt.II/para.9(3).

already paid) on or before the final date for payment'[609], unless the payer or specified person gives 'to the payee a notice of the payer's intention to pay less than the notified sum'[610] specifying:

> (a) the sum that the payer considers to be due on the date the notice is served, and
> (b) the basis on which that sum is calculated.[611]

Hereinafter, this notice is referred to as 'pay-less notice'. A pay-less notice 'must be given not later than the prescribed period before the final date for payment'[612]. Parties have freedom to agree what this 'prescribed period' is, alternatively the Scheme applies[613], which provides that it 'must be given not later than seven days before the final date for payment'[614]. Also, it must be given after a payee's payment notice under s.110A(3), or, a payee's notice in default of payer's notice under s.110B[615].

Therefore, the amendments change the prohibitive mood of the original s.111, 'may not withhold payment… of a sum due under the contract', to the imperative mood, 'must pay the notified sum'. Subsequent case law confirmed the payer's obligation to pay a sum duly notified by the payee if the payer has failed to issue the required notice[616], creating the colloquialism smash-and-grab adjudication.

4.3 SPNO pursuant to BCISPA(NSW)

[609] HGCRA, s.111(1).
[610] HGCRA, s.111(3).
[611] HGCRA, s.111(4).
[612] HGCRA, s.111(5)(a).
[613] HGCRA, s.111(7).
[614] Scheme, pt.II/para.10.
[615] HGCRA, s.111(5)(b).
[616] see ch.4/s.4.1.

The party undertaking to carry out work under the contract[617] is entitled to serve a payment claim 'on and from the last day of the named month in which the construction work was first carried out… and on and from the last day of each subsequent named month'[618], or, on and from any earlier date agreed in respect of any particular named month[619]. BCISPA(NSW) s.13(2)(c) provides that a payment claim 'must state that it is made under [BCISPA(NSW)]'.

Only one payment claim can be made in any particular named month unless the contract provides otherwise[620]. However, this does not prevent the inclusion of 'an amount that has been the subject of a previous claim'[621] or of work that was carried out in previous months[622].

A payer intending to pay less than the amount indicated in the payment claim must issue a 'payment schedule' within 10 business days after the payment claim is received, or, the time required by the contract, whichever is earlier[623]. The payment schedule must identify the payment claim it relates to, the amount of payment the payer proposes to make, and indicate why it is less than the payee's claim[624].

Where the payer has failed to issue such a payment schedule and has failed to pay the full amount indicated in the payment claim by the final date for payment[625], or, has issued a payment schedule but has failed to pay the full amount indicated in the payment schedule by the final date for payment[626], the

[617] BCISPA(NSW), s.8.
[618] BCISPA(NSW), s.13(1A).
[619] BCISPA(NSW), s.13(1B).
[620] BCISPA(NSW), s.13(5).
[621] BCISPA(NSW), s.13(6)(b).
[622] BCISPA(NSW), s.13(6)(c).
[623] BCISPA(NSW), s.14(4)(b).
[624] BCISPA(NSW), ss.14(2)&(3).
[625] BCISPA(NSW), s.15(1).
[626] BCISPA(NSW), s.16(1).

payee may serve notice to the payer of the payee's intention to suspend its performance under the contract[627], a remedy analysed in Chapter Five.

Where the payer has failed to issue a payment schedule and has failed to pay the full amount indicated in the payment claim by the final date for payment, the payee is also entitled to either:

- Recover the unpaid amount as a debt in any court of competent jurisdiction[628]. In such proceedings the payer cannot bring any cross claims, or, raise any contractual defences[629]; or
- Within 20 business days following the final date for payment notify the payer of the payee's intention to apply for adjudication[630]. The payer then has a second opportunity to provide a payment schedule within 5 business days from receiving the payee's notice[631]. The payee must then apply for adjudication within 10 business days after the end of this 5-day period[632].

The payee can either adjudicate or litigate. If the payee applies for adjudication, it loses its entitlement to litigate[633]. The law seems less clear when the payee merely notifies an intention to apply for adjudication but does not apply. In *Cromer*, the payee's entitlement to litigate was preserved because the payer had not issued a payment schedule in response to the payee's notice of intention to apply for adjudication. However, the court offered no conclusive answer as to what the outcome would have been if the payer had issued a payment schedule.[634]

Where the payer has failed to serve a payment schedule at the first opportunity, one can be left contemplative adjudication's benefit over litigating, since the latter

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[627] BCISPA(NSW), ss.15(2)(b)&16(2)(b).

[628] BCISPA(NSW), s.15(2)(a)(i).

[629] BCISPA(NSW), s.15(4).

[630] BCISPA(NSW), s.17(2)(a).

[631] BCISPA(NSW), s.17(2)(b).

[632] BCISPA(NSW), s.17(3)(e).

[633] *Cromer Excavations Pty Ltd v Cruz Concreting Services Pty Ltd* [2011] NSWSC 51, paras.28-46.

[634] *ibid*, paras.45-46.

does not require affording the payer a second opportunity to submit a payment schedule. Also, the payer cannot bring in those court proceedings any cross-claim or raise any defence (other than whether SPNO were duly complied with). However, to adjudicate, the payee must first afford the payer a second opportunity to submit a payment schedule. Even judges seem bewildered by this matter[635].

An advantage is that an adjudication certificate can be filed as judgment debt[636], which is quicker than litigating. Furthermore, to commence proceedings for having an adjudication judgment debt set aside, the payer must 'pay into the court as security the unpaid portion of the adjudicated amount'[637]. By contrast, if the payee opts for litigation, the payer normally keeps its money during the proceedings and any subsequent appeals.

Where the payer issues a payment schedule but fails to pay the full amount indicated by the final date for payment, the payee, in addition to its right to suspend performance, may either:

- Commence proceedings to recover the unpaid amount in any court of competent jurisdiction[638], during which the payer cannot bring any cross claim or contractual defence[639].
- Apply for adjudication[640] within 20 business days after the final date for payment[641]. The payee does not have to notify the payer of its intention to apply or allow the payer an opportunity to revise the payment schedule.

Where the payer issued a payment schedule indicating a lower amount than claimed, the payee may apply for adjudication[642] within 10 business days after

[635] *Kell & Rigby Pty Ltd v Guardian International Properties Pty Ltd* [2007] NSWSC 554, para.11.
[636] BCISPA(NSW), ss.24&25.
[637] BCISPA(NSW), s.25(4)(b).
[638] BCISPA(NSW), s.16(2)(a)(i).
[639] BCISPA(NSW), s.16(4).
[640] BCISPA(NSW), s.16(2)(a)(ii).
[641] BCISPA(NSW), s.17(3)(d).
[642] BCISPA(NSW), s.17(1)(a)(i).

receipt of the payment schedule[643]. Chapter Six analyses these different circumstances in which the payee can apply for adjudication.

The term 'due date' means the final date for payment[644]; therefore, it has a different meaning from HGCRA. BCISPA(NSW) originally allowed the parties freedom to agree payment terms[645]. However, since 21 April 2014[646], BCISPA(NSW) provides that the final date for payment from a principal (employer) to a head contractor (main contractor) is 'the date occurring 15 business days after a payment claim is made'[647], or any earlier date agreed[648]. Payment further down the contracting chain i.e. from main contractor to sub-contractor, sub-contractor to sub-sub-contractor etc. was 30 business days[649] (or earlier if agreed[650]), but recent amendments reduce this to 20 business days[651]. BCISPA(NSW) allows parties in exempt residential construction contracts to agree payment terms[652]. If they fail to agree, it is 10 business days after a payment claim is made[653].

4.4 Comparative analysis of the two distinctive SPNO

4.4.1 BCISPA(NSW)'s 'parallel' and HGCRA's 'mandatory' regime

[643] BCISPA(NSW), s.17(3)(c).

[644] BCISPA(NSW), ss.4(1)&11.

[645] BCISPA(NSW) (Historic version to 20 April 2014), 11(1)(a).

[646] BCISPA(NSW)(Amendment)(2013), sch.1/para.3.

[647] BCISPA(NSW), s.11(1A)(a).

[648] BCISPA(NSW), s.11(1A)(b).

[649] BCISPA(NSW), s.11(1B)(a).

[650] BCISPA(NSW), s.11(1B)(b).

[651] BCISPA(NSW)(Amendment)(2018), para.7.

[652] BCISPA(NSW), s.11(1C)(a).

[653] BCISPA(NSW), s.11(1C)(b).

In All *Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd*[654], the NSWCA confirmed that:[655]

1. BCISPA(NSW) creates a parallel statutory payment regime that is separate from any contractual payment regime;
2. an adjudication determination under the statutory regime does not affect the parties' rights under the contract, or any proceedings arising under the contract;
3. the court or tribunal in proceedings brought under the contractual regime shall, where appropriate, allow for the restitution of moneys paid under the statutory regime[656].

By contrast, HGCRA provides a mandatory payment regime, in that the legislation sets the minimum requirements that every contract shall satisfy. If the contract is silent in relation to, or, does not comply with, the requirements of HGCRA ss.109-111, then the Scheme is implied into the contract to the necessary extent as to render it compliant[657].

Of course, like BCISPA(NSW), a court or tribunal shall, where appropriate, allow for the restitution of moneys paid pursuant to an adjudicator's decision. The difference is that, under HGCRA, since its payment regime is mandatory, a court or tribunal in proceedings brought under the contract shall follow the same payment provisions as an adjudicator. By contrast, since BCISPA(NSW)'s payment regime is separate from the contractual, a court or tribunal in proceedings brough under the contract may be bound by different provisions than an adjudicator, if the contractual regime differs from the statutory.

This can cause practical issues, and even undermine the legislation's purpose. Section 4.4.5 below explains one such impracticality, namely, where the contractual provisions require the payee to issue its payment claim 'before' the

[654] [2017] NSWCA 289.

[655] *ibid*, para.8.

[656] BCISPA(NSW), para.32(3).

[657] HGCRA, ss.109(3),110(3),110A(5),111(7)(b).

relevant valuation date, rather 'on and from' the relevant valuation date. A possibility therefore arises that a payment claim is valid under BCISPA(NSW), but invalid under the contract, or vice versa. BCISPA(NSW)'s purpose may be undermined if the contract provides for fast-track arbitration, thereby having two conflicting decisions, since the arbitrator is bound by different provisions than the adjudicator.

Therefore, HGCRA's mandatory regime is preferred over BCISPA(NSW)'s parallel one. The legislation should set the minimum mandatory payment provisions that every contract shall adhere to, with the legislation's provisions being implied into the contract to the extent required to render it compliant. This promotes procedural justice because the applicable payment provisions become clearer and consistent, irrespective of whether they concern a statutory adjudication or other contractual proceedings.

4.4.2 The term 'due date'

HGCRA introduces the two distinct concepts of payment 'due date' and 'final date for payment'. Due date is a reference point in HGCRA's payment cycles for calculating the deadline for issuing the payment notice[658]. Final date for payment has its ordinary meaning. By contrast, under BCISPA(NSW) 'due date' means the final date for payment[659].

A consultation reviewing HGCRA suggested that 'the term "due date" was misleading if interpreted as providing that the sum due under the contract becomes payable when it becomes due'[660]. The term 'assessment date' was proposed as replacement, and 65% of respondents agreed[661]. However, the

[658] 'not later than five days after the payment due date': HGCRA, ss.110A(1)(a)&(b).

[659] BCISPA(NSW), ss.4(1)&11.

[660] DTI and WAG (2006) (n.49), para.2.3.

[661] ibid, para.2.3&p.38.

subsequent amendments simply clarified that '"payment due date" means the date provided for by the contract as the date on which the payment is due'[662].

This thesis recommends replacing HGCRA's term 'due date' with 'valuation date'. The Cambridge Dictionary defines 'due date' as 'the date on which a sum of money is expected to be paid'[663]. Accordingly, HGCRA's terminology is inconsistent with the term's common meaning. Therefore, the recommended change improves procedural justice because it avoids misunderstandings in this regard. As recommended[664], 'valuation date' should be the last day of each month, with parties having freedom to agree an earlier date for any particular month, insofar as that date falls within that month.

4.4.3 Date to which each payment shall be valued

BCISPA(NSW) requires interim payments to be valued 'in accordance with the terms of the contract'[665]. Arguably, nothing prevents terms requiring interim payments to be the value of work carried out up to the date falling 60 days before the named month to which the payment relates. However, such terms would undermine BCISPA(NSW)'s purpose because the debt owed to the payee increases, whilst taking longer to identify disputes.

Similarly, HGCRA requires the payment notice to specify the sum considered to be due at the 'due date'[666] (this thesis recommended replacing 'due date' with 'valuation date'). However, HGCRA does not require the payment notice to be valued up to the due date i.e. the valuation to include for all work carried out up to the due date / valuation date. For example, the Scheme requires interim payments to be valued to the end of the 'relevant period' but become due seven

[662] HGCRA, s.110A(6).

[663] Cambridge Dictionary, *due date* (Cambridge University Press, 2022) <https://dictionary.cambridge.org/dictionary/english/due-date> accessed 27 December 2022.

[664] ch.3/s.3.4.

[665] BCISPA(NSW), s.10.

[666] HGCRA, s.110A.

days following the relevant period[667]. Payers can take advantage by requiring applications to be valued to a certain date, with the due date being considerably later. Consequently, the payer has a longer period to issue its payment notice, which is contrary to HGCRA's objective of transparency. Therefore, both legislations merit amending to require that each interim payment shall be valued up to its respective valuation date.

4.4.4 Instigation of payment cycles

Under BCISPA(NSW), payment cycles always commence via the payee issuing an application. By contrast, HGCRA allows parties freedom to agree who[668] shall instigate the cycle, by issuing its payment notice[669]. Therefore, the contract can provide that the cycle commences via the payer issuing a payment notice by a certain date, without the payee having to issue an application first. Importantly, if the contract provides for when the 'due date'[670] for a payment is, but does not make the issuance of an application by the payee a condition precedent to that due date, then the payer is obliged to issue a payment notice even if the payee does not issue an application[671]. On such occasion, if the payer fails to issue a payment notice, the payee may issue a 'payee's notice in default of payer's notice'[672].

HGCRA does not require this 'default notice' to state that it is such. In fact, its prescribed contents are similar to an application for payment.[673] However, where a document is found to be a default notice instead of an application, the payer usually has a shorter deadline to respond with a pay-less notice[674]. Therefore,

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667 Scheme, pt.II/paras.2&4.

668 namely, the payer (or specified person) or the payee.

669 HGCRA, ss.110A(1)(a)&(b).

670 this thesis recommended replacing 'due date' with 'valuation date'.

671 HGCRA, s.110A(5); Scheme, pt. II/para.9.

672 HGCRA s.110B.

673 HGCRA, s.110B(2); Scheme, pt.II/para.12 definition of 'claim by the payee'.

674 HGCRA, ss.110B(3), 111; Scheme, pt.II/para.10.

disputes can arise as to whether a document is an application for payment or a default notice.[675]

Such disputes can be avoided by abolishing HGCRA's option of instigating payment cycles via the payer issuing a payment notice, and instead always requiring the cycle to commence via the payee issuing an application. There are no practical advantages in preserving this option because it is highly unlikely that a payer would walk the site to value the payee's payment, without the payee having issued an application first.

Therefore, it is recommended to follow BCISPA(NSW)'s approach, whereby payment cycles always commence via an application by the payee. This improves procedural justice by setting a consistent approach for every payment cycle.

4.4.5 Timing of payee's application

The previous section recommended requiring payment cycles to commence via the payee issuing an application. This section investigates whether the application should be served 'on and from'[676] the last day of the month, or, whether a different term is more appropriate.

In *All Seasons Air*[677], Leeming and Payne JJA found that the term 'on and from' 'identifies the earliest date on which a payment claim may be served'[678]. Therefore, due to BCISPA(NSW)'s parallel payment regime, they concluded that a payment claim served before the relevant date is invalid under

[675] *CG Group Ltd v Breyer Group Plc* [2013] EWHC 2722.

[676] BCISPA(NSW), ss. 13(1A)&(1B).

[677] (n.654).

[678] *ibid*, para.17.

BCISPA(NSW)[679], even if the contract contains a clause deeming a premature claim as valid[680].

Although White JA agreed with the orders of Leeming and Payne JJA because his decision should be confined on the parties' submissions, he also proposed an alternative interpretation not argued by the parties, namely that the term 'on and from' be regarded as meaning 'on and with effect from'. Consequently, a payment claim would be deemed valid regardless of whether it is made before or after the relevant date.[681] Therefore, there is opportunity for this construction to be argued in future litigation.

Chapter One explained that construction projects involve several contracting tiers. Therefore, to prepare an accurate application, the main contractor may need to review its sub-contractors' applications, the sub-contractors need to review their sub-sub-contractors' applications and so forth. Accordingly, allowing parties to agree that an application shall be served before its valuation date has practical benefits.

That is, if the employer requires the main contractor to submit its application by the last day of the month, then it is practical for the main contractor to require its sub-contractors to submit their applications a few days earlier. Therefore, the legislation should permit parties to agree a deadline for submitting the application that is earlier than the valuation date. The contractors shall submit their applications by the agreed deadline and include in their valuation an estimate of the work planned to be carried out by the valuation date (in our scenario the last day of the month). However, the legislation should also provide for the earliest date that the application shall be submitted to prevent unreasonably early applications.

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[679] *ibid*, paras.32-36.

[680] *ibid*, paras.39-41.

[681] *ibid*, paras.48-52.

Therefore, the legislation should require the payee's application to be submitted not later than three business days after the relevant valuation date and not earlier than ten business days before the relevant valuation date, with parties having freedom to agree the deadline insofar as it falls within these limits and has at-least two business days' time slot. This improves procedural justice as it provides certainty as to when the application must be served, while also affording additional practical benefits as explained above, all without compromising on the legislation's speed.

4.4.6 Permitting only one application per payment cycle and requiring it to state that is made under the legislation

HGCRA does not limit the number of applications that can be made for any given 'due date'. Similarly, BCISPA(NSW) originally did not limit the number of applications that could be submitted for each reference date. However, the NSW government recognised the potential for abuse by issuing multiple applications[682]; therefore, BCISPA(NSW)'s first amendment limited payment applications to one per any given reference date[683]. Because the 2019 amendments abolish the concept of 'reference date', they also limit payment claims to one per month unless otherwise agreed[684]. BCISPA(NSW)'s approach is preferred, since it prohibits the payee from abusing the legislation via issuing multiple applications.

BCISPA(NSW) s.13(2)(c) originally provided that an application 'must state that it is made under [BCISPA(NSW)]'[685]. However, in 2014, s.13(2)(c) was amended to limit this requirement only to contracts connected with an exempt residential contract[686]. The 2019 amendments restored s.13(2)(c) back to its original

[682] LAH 12 November 2002.

[683] BCISPA(NSW)(Amendment)(2002), para.24.

[684] BCISPA(NSW)(Amendment)(2019), para.12.

[685] BCISPA(NSW) historical version to 20 April 2014.

[686] BCISPA(NSW)(Amendment)(2013), para.6(c).

version, requiring all applications to state that they are made under BCISPA(NSW)[687].

By contrast, HGCRA never required applications to state that they are made under HGCRA (or to state that the document in question is 'payment notice' or 'default payment notice'). This generated disputes as to whether a document issued by the payee was indeed an application for payment or a default payment notice[688]. Therefore, disputes can be reduced by requiring the payee to state on the face of the communication[689] that the document is an application for payment made under HGCRA. Furthermore, this ensures that the payer's attention is drawn to the document, thereby improving procedural justice.

4.4.7 Payment terms

Save for exempt residential contracts, BCISPA(NSW) prescribes maximum payment terms of:

- Employer to Main Contractor: 15 business days after a valid payment claim is made.
- All other payments in the contracting chain: 20 business days after a valid payment claim is made.

By contrast, HGCRA allows parties freedom to agree payment terms for all contracts. Latham favoured this freedom, noting in his review of HGCRA that:

> "Late payment" is not an abstract concept. It should be assessed against the time which has been mutually agreed in the contract, rather than some vague notion of what a desirable timescale is. If the parties have agreed to a 90 day payment cycle, a 90 day payment is not "late".[690]

[687] BCISPA(NSW)(Amendment)(2018), para.11.

[688] *Caledonian Modular Ltd v Mar City Developments Ltd* [2015] EWHC 1855.

[689] the cover letter or email.

[690] Latham (2004) (n.44), p.4.

PWG reported payment terms spanning up to 180 days[691]. PWG considered whether HGCRA should impose maximum payment terms, however, no consensus conclusion was reached. Some argued it would make little difference, because the problem's root was payment abuse by not paying by the agreed date, rather than the agreement of long payment terms per se.[692] However, this does not justify refusing to regulate payment terms because safeguards already exist for not paying by the agreed date, such as interest for late payment, adjudication, and suspending performance.

Instead of regulating payment terms, the UK government promoted a Model Fair Payment Charter in 2007, proposing 21-days payment terms from Employer to Main Contractor and 30-days from Main Contractor to Sub-Contractor, with no contract in the chain exceeding 30-days[693]. A formal Construction Supply Chain Payment Charter published in 2014 sets out eleven 'fair payment commitments', and nine major construction organisations agreed to comply.[694] The most significant commitment was to limit payment terms to no longer than 45-days by June 2015, reducing to 30-days by January 2018.[695]

An updated Charter was published in August 2016, with similar commitments[696]. However, it was subsequently held in abeyance because the government was undertaking a consultation into tackling late payment. It is not clear how a consultation into tackling late payment justified the abeyance of the fair payment

[691] PWG (n.46), para.2.6.1.

[692] ibid, para.2.6.4.

[693] Office for Government Commerce, *Guide to best 'Fair Payment' practices* (Crown, 2007), pp.5&6.

[694] BIS, *Government and industry agree new construction payment charter* (Crown, 22 April 2014) <https://www.gov.uk/government/news/government-and-industry-agree-new-construction-payment-charter> accessed 01 November 2022.

[695] Construction Leadership Council, *Construction Supply Chain Payment Charter* (April 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/306906/construction-supply-chain-payment-charter.pdf> accessed 02 November 2022.

[696] BEIS, *Construction supply chain payment charter* (Crown, 10 August 2016) <https://www.gov.uk/government/publications/construction-supply-chain-payment-charter> accessed 02 November 2022.

commitments. Consequently, there was an uproar from the supply chain, describing the Charter as a dismal failure.[697]

The government's consultation involved a questionnaire[698] that gathered 283 responses; the most a consultation on this matter ever received[699]. Micro businesses (up to 9 staff) represented 35.34% of respondents, small businesses (10-49 staff) 24.03%, medium business (50-250 staff) 8.48%, large businesses (over 250 staff) 5.30%, business representative organisations/trade bodies 12.01%, charities 1.77%, central/local government 1.41% with the remaining 11.66% being individuals or other. Therefore, the responses cover well the relevant community, particularly smaller businesses. The results were published in June 2019 and key findings include:

- 57% of respondents were typically offered over 30-days payment terms[700].
- 70% of SMEs respondents considered power imbalance as the key reason for long payment terms[701].
- 'Legislating maximum payment terms' was the response of 31% of those who answered the question: 'What measures may be effective in addressing lengthy payment terms?'[702]. This was an open question with no optional choices; therefore, a higher percentage may consider this an effective measure if presented as a choice.
- Impact of long payment terms included preventing investment and growth (45%); pay their own suppliers late (38%); struggle to pay staff on time (22%); resorting to invoice financing (9%), bank overdrafts (34%), loans (19%) and salary cuts (10%); insolvencies (5 respondents) and redundancies (2 respondents).[703]

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[697] Aaron Morby, *Construction payment charter is 'dismal failure'* (Construction Enquirer, 2018).

[698] BEIS, *Creating a responsible payment culture: a call for evidence in tackling late payment* (Crown, October 2018).

[699] ——, ——: Government response (Crown, 2019), p.5.

[700] ibid, p.9.

[701] ibid, p.11.

[702] ibid, p.12.

[703] ibid, pp.14-15.

Large companies must publish their payment practices[704]. Most contractors have average payment terms significantly above 30-days, with over 60-days being common[705]. Several articles report the worst payers, who are often major contractors.[706] Payment charters and other non-binding commitments are unlikely to improve the situation since there are no legally enforceable consequences for failure to adhere. Furthermore, most companies forming the construction industry are simply not interested to commit.

In NSW, a contributing factor for regulating payment terms was the demise of major contractors such as Hastie[707]. The Collins Report found that although payment terms between employers and main contractors were typically up to 30 days, payments further down the contracting chain ranged between 45, 60, 90 or even 120 days. Most money received by main contractors are for work carried out by sub-contractors, since, as Chapter One explained, the modern main contractor essentially manages the process, with the physical work being carried out by contractors further down the contracting chain. By relying on prolonged payment terms contractors used the 'sub-contractors' money' for discretionary expenditure, paying debts from previous jobs and financing other operational ventures or investments.[708]

In 2018, Carillion's liquidation, one of UK's biggest and most historic contractors, reignited parliamentary debates for regulating payment terms[709]. However, the government did not intend to regulate[710]. In addition to improving the aforesaid social problems, limiting payment terms has further advantages relating to

[704] Small Business, Enterprise and Employment Act 2015, s.3.

[705] *Check when large businesses pay their suppliers* (Crown) <https://www.gov.uk/check-when-businesses-pay-invoices> accessed 02 November 2022.

[706] Jess Clark, *Top public sector contractors named as notorious late payers* (August 2018), <https://www.newcivilengineer.com/latest/top-public-sector-contractors-named-as-notorious-late-payers-01-08-2018/> accessed 02 November 2022.

[707] Collins (n.54), pp.46&94.

[708] ibid, pp.58-60.

[709] Business, Energy and Industrial Strategy Committee, *Small businesses and Productivity* (Fifteenth Report of Session 2017–19, HC, 5 December 2018), pp.37-40.

[710] HL Deb 19 June 2019, vol.798, cols.813&814.

HGCRA's purpose. Since the payer's deadline to comply with its SPNO is linked to the final date for payment, limiting payment terms improves the transparency in the exchange of information relating to payments, while enabling earlier identification of disputes. Furthermore, this reduces the debt owed to the payee at any given time during the works. This latter advantage can also ameliorate the disastrous effects caused by the insolvencies of major contractors because a contractor that has become insolvent should be owing less money to its supply chain at the point of its insolvency.

However, limiting payment terms has two disadvantages. Firstly, many major contractors heavily rely on the current payment structure, even to the extent that limiting payment terms could jeopardise their survival. Secondly, with shorter payment terms, when a have-not realises that a job it signed up to will be unprofitable, it is easier to cut its losses and abandon the contract because it has a lesser debt at any given time due to the reduced payment terms. However, neither of these disadvantages should suffice in preventing legislative intervention. Regarding the former, there is no guarantee that organisations which rely on the current payment structure will survive if there is no change in the law. For the latter, it is in the payer's control to properly value interim payments or require other forms of security (e.g. performance bonds) to prevent the payee from abandoning an unprofitable contract.

As explained, BCISPA(NSW) limits payment terms to 15 business days for employer to main contractor, and 20 business days for all other payments in the contracting chain, both from the date the payee's application is issued. This thesis has two objections:

1. It is not clear why the main contractor gets a week's benefit compared to the other contractors in the chain. If the rationale is that the main contractor requires a week until payment from the employer is cleared and processed to the main contractor's supply chain, then, by the same token, every party in the chain should be given the same privilege i.e. 25 business days for payment from sub-contractor to sub-sub-contractor, 30 business days from sub-sub-subcontractor to sub-sub-sub-contractor and so forth.

2. It is fairer to calculate the final date for payment with reference to the valuation date instead of the date of the payee's application. For example, this enables the main contractor to control that the final date for payment of all his sub-contractors' applications fall on the same day.

Therefore, this thesis recommends imposing the same maximum payment terms for all payments, specifically 28 days (or 20 business days) from the relevant valuation date. This period, rather than the shorter one of 21 days, ensures that the notification obligations explained in the next section are better accommodated. This 28-day period should be the legislation's default and maximum payment terms with parties having freedom to agree reduced payment terms.

4.4.8 Payer's notification obligations and payee's duty to remind the payer to comply

Under HGCRA, the payer or specified person may issue a payment notice not later than five days after the payment due date[711], and a pay-less notice not later than seven days, or any other period agreed, before the final date for payment. Deadlines aside, the difference between 'payment notice' and 'pay-less notice' is that they must specify the sum considered to be due 'at the payment due date'[712] and 'on the date the notice is served' respectively. Opinions differ on whether pay-less notices must value the works up to the date the pay-less notice is issued[713] or the due date (valuation date)[714].

[711] Unless the contract requires the payee to issue the payment notice.

[712] this thesis recommended replacing 'due date' with 'valuation date'.

[713] Benge (n.433), p.5: 'A notice to pay less than the notified sum must value the work at the date the notice is served, rather than the payment due date'.

[714] Laura Phoenix, 'Pay less notices: clearing up confusion' (The Construction Index, 2012), <https://www.theconstructionindex.co.uk/news/view/pay-less-notices--clearing-up-confusion> accessed 25 December 2020: '…the pay less notice should… start by setting out the sum which the notice writer (the payer) considers was due at the payment due date even though the figure is determined at the date of service of the pay less notice… [and] can then go on to take account

This thesis argues that pay-less notices should value the works up to the date the pay-less notice is issued to motivate payers to issue a payment notice within the shorter deadline permitted, instead of a pay-less notice that has longer deadlines. Without this adverse consequence, the concept of payment notice, and by implication HGCRA's objective of transparency, are undermined.

However, a pay-less notice that does not value the works to the date the pay-less notice is issued should still be held as valid in 'smash-and-grab' adjudications. To put this into context, let us assume that:

- The payee issued an application valuing the executed works at £1m;
- The payer failed to issue a payment notice in the timeframe allowed, or, issued a payment notice valuing the executed works at £1m but failed to specify any set-off claim;
- The payer issued a pay-less notice valuing the executed works at £1m, but also applied a £50k set-off.

If the basis for valuing the works at £1m was that the payer agreed with the payee's valuation, then the payer's valuation is incorrect, because more work was carried out between the payee's valuation date and the date the pay-less notice was served. Nevertheless, the pay-less notice should still be valid; the only repercussion being if the payee adjudicates to establish the true value of the works at the time the pay-less notice was issued.

BCISPA(NSW) requires the 'payment schedule' to be issued within ten business days after the payment claim is received, or any earlier time stated in the contract[715]. BCISPA(NSW) has the following differences to HGCRA:

- BCISPA(NSW) does not incorporate the notion of 'pay-less notice'.
- Regarding HGCRA's 'payment notice', the deadline for issuing the 'payment schedule' is calculated with reference to the payee's application, not the due date (valuation date), and is ten business days, not five days.

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of set-offs arising after the most recent due date but before the deadline for issuing a pay less notice'.

[715] BCISPA(NSW), s.14(4)(b).

If the payer fails to issue a payment schedule and fails to pay the claimed sum by the final date for payment[716], BCISPA(NSW) entitles the payee to:

1. Suspend performance[717]; and/or
2. Litigate to recover the unpaid portion of the claimed amount, with the payer being unable to raise any defence other than whether the payment claim and/or payment schedule were duly served[718].

However, to refer this same payment dispute to adjudication, the payee must first afford the payer another opportunity to issue a payment schedule. Specifically, the payee shall, within 20 business days following the final date for payment, notify the payer of the payee's intention to apply for adjudication[719]. The payer can then provide a payment schedule within five business days from receiving the payee's notice[720].

This arrangement is peculiar, in that the payee must jeopardise two rights already acquired, namely suspension and court proceedings in which the payer has limited defences, for a chance at acquiring a third right, namely adjudication in which the payer has limited defences, and in doing so, the payee may lose these three rights altogether and even risk breaching its obligations. This may occur, for example, where the payee suspends performance under s.15(2)(b) and also issues notice of intention to commence adjudication under s.17(2)(a), but the payer then issues a payment schedule under s.17(2)(b) specifying £nil payment.

Murray favours BCISPA(NSW)'s present arrangement, rationalising that the court option requires the payee to persuade a judge that it issued a valid payment claim and has not received a valid payment schedule, whilst 'it is an entirely different matter for such critical issues to be considered by a non-judicial person like an adjudicator without the respondent having any opportunity to participate

[716] BCISPA(NSW), s.15(1).

[717] By following the relevant procedure, see BCISPA(NSW), ss.15(2)(b) & 27.

[718] BCISPA(NSW), ss.15(2)(a)(i)&15(4).

[719] BCISPA(NSW), s.17(2)(a).

[720] BCISPA(NSW), s.17(2)(b).

in the process'[721]. Such differentiations between litigation and adjudication processes undermine adjudication's procedural justice. Chapter Seven examines the adjudication process and argues that the respondent should have the opportunity to participate.

This thesis submits that the payee should be required to remind the payer to comply with SPNO. This both promotes procedural justice and prevents 'smash-and-grab' adjudications. However, this thesis disagrees with BCISPA(NSW)'s present arrangement whereby the payee must jeopardise certain rights already acquired to have chances in acquiring a different right.

This problem is resolved if the legislation:

- Requires the payer to issue its 'payment notice' / 'payment schedule' within five business days from the valuation date.
- If the payer fails to do so, the legislation requires the payee to issue its reminder at any time after the expiry of the abovementioned five business days, up to the date falling ten business days after the final date for payment. If the payee fails to comply, then the legislation to provide that the payer is relieved from its SPNO in respect of that particular payment cycle.
- The legislation to provide a standard wording for this reminder, for example: 'We remind you that you have not issued a payment notice for our application for payment, and that you shall pay the full sum notified in our application unless you issue a pay-less notice'.
- The final date for payment should be the date falling five business days from the payee's abovementioned reminder, or, 28 days / 20 business days[722] from the valuation date, whichever is later.
- Requires the payer to issue a pay-less notice not later than one day before the final date for payment.

[721] Murray (n.55), p.170.

[722] Or any earlier date the parties agreed.

4.4.9 Requirement for 'supporting statement' to accompany applications

Since 21 April 2014[723], BCISPA(NSW) requires a 'supporting statement' to accompany every application from main contractor to employer[724]. By contrast, HGCRA has no such requirement.

A supporting statement is a signed and dated declaration listing all the main contractor's sub-contractors, identifying both those that have been paid in full and those for 'which an amount is in dispute and has not been paid'[725]. Before becoming mandatory, such declarations were required by some standard forms of contract in NSW[726]. However, there were no consequences for false reporting and therefore the Collins Report proposed making this a criminal offense[727].

Accordingly, BCISPA(NSW) was amended in 2014 to provide that a main contractor's payment claim, which is not accompanied by a supporting statement, is punishable by a maximum penalty of 200 units[728], equating to $22,000[729]. The maximum penalty for knowingly submitting a false or misleading supporting statement was $22,000, or 3 months imprisonment, or both[730]. The 2019 amendments increased these maximum penalties for corporations to $110,000, whilst for individuals they remain $22,000 or 3 months imprisonment or both.[731] An offence committed by a corporation carries 'executive liability for a director or other person involved in [its] management'[732].

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[723] BCISPA(NSW)(Amendment)(2013), para.7.

[724] BCISPA(NSW), ss.13(7)&13(9);

[725] BCISPA(NSW)(Regulation)(2008), sch.1.

[726] New South Wales Government GC21 RTA General Conditions of Contract (ed.1, 2009), cl.62.6.2.

[727] Collins (n.54), pp.46&47&58.

[728] BCISPA(NSW), s.13(7).

[729] Each penalty unit is $110: Crimes (Sentencing Procedure) Act 1999, s.17. Hereinafter, penalties calculated using this formula.

[730] BCISPA(NSW), s.13(8).

[731] BCISPA(NSW)(Amendment)(2018), paras.13&14.

[732] ibid, para.15.

Government appointed officers may investigate compliance, having wide-ranging powers including requiring main contractors to provide all relevant documents. Maximum penalties for failure to comply, or knowingly providing false or misleading information, were originally $22,000 or 3 months imprisonment or both[733]. Amendments increased this to $55,000 but repealed imprisonment[734].

There were conflicting first instance decisions on whether a non-compliant supporting statement invalidates the payment application[735] or not[736]. However, the NSWCA clarified that a non-compliant supporting statement shall not invalidate the application[737].

Regarding sub-contractors not fully paid, the supporting statement need not specify the shortfall nor its reasoning. Therefore, an employer cannot distinguish reasonable from unreasonable shortfalls. Also, BCISPA(NSW) does not state what an employer is supposed to do when a main contractor discloses that certain sub-contractors have not been paid the full amount claimed. It seems that the supporting statement requirement aims to hold main contractors 'in terrorem', since if they do not pay sub-contractors in full, regardless of the reasons being good or otherwise, they will look bad in the employer's eyes or risk supporting a contractual defence for the employer in any dispute between them.

Furthermore, the Collins Report found that equivalent sub-contractors' declarations required by several standard forms of contract 'often contain false information'[738]. Therefore, it is unclear why BCISPA(NSW) only requires main contractors to submit supporting statements, and not all contractors down the contracting chain.

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[733] BCISPA(NSW), s.36(3).

[734] BCISPA(NSW)(Amendment)(2018), paras.34-37.

[735] *Greenwood Futures v DSD Builders* [2018] NSWSC 1407; *Kitchen Xchange v Formacon Building Services* [2014] NSWSC 1602; *The Trustees of the Roman Catholic Church for Diocese of Lismore v T F Woolam & Son* [2012] NSWSC 1559.

[736] *Central Projects Pty Ltd v Davidson* [2018] NSWSC 52.

[737] *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93, paras.72-75,88-89.

[738] Collins (n.54), p.47.

Considering the draconian consequences for failing to adhere to SPNO, the prescribed maximum payment terms and the right to adjudication, this thesis submits that supporting statements are an excessive requirement, with no practical benefit other than to hold main contractors *in terrorem*. HGCRA's position is therefore preferred, which does not require supporting statements.

4.5 Conclusion

SPNO under both legislations establish the sum that must be paid and its final date for payment. Provided the payee complied with its SPNO, failure of the payer to adhere to its SPNO renders the payer liable to pay the sum notified by the payee. This imperative feature of the legislation compels payers to comply with their SPNO, thereby enabling early identification of disputes. HGCRA originally had negligible consequences for failing to adhere to SPNO. This undermined the legislation since payers had no incentive to comply, which consequently prevented payees from knowing the reasons for non-payment.

Despite SPNO's critical function in the legislation's successful operation, SPNO create the controversial smash-and-grab adjudications. The potential injustice caused by adjudication's pseudo-temporary nature is more severe in smash-and-grab adjudications because, assuming the payer has failed to comply with its SPNO, the payee is awarded the full amount claimed without the payer being able to rely on any contractual defence or set-off.

This problem is better resolved through statutory intervention amending SPNO's components to the version providing the highest degree of procedural justice whilst improving the legislation's speed. This chapter recommended that the optimal SPNO shall:

- Be mandatory, in that to the extent that the contract is silent, or does not comply with the legislation's minimum requirements, the legislation's

relevant provisions shall be implied into the contract to the necessary extent as to render it compliant.

- Require monthly interim payments as a minimum.

- Provide a ‘valuation date’ for each payment cycle, based on which the deadlines for the payee’s ‘application for payment’ and the payer’s ‘payment notice’ / ‘payment schedule’ shall be calculated. The default ‘valuation date’ shall be the last day of each month, with parties having freedom to agree an earlier date for any particular month, insofar as that date falls within that month.

- Require each interim payment to be valued up to its respective valuation date.

- Require payment cycles to commence via the payee issuing an application not later than three business days after the relevant valuation date and not earlier than ten business days before the relevant valuation date, with parties having freedom to agree the deadline insofar as it falls within these limits and has at-least two business days’ time slot.

- Permit only one application per payment cycle and require it to state that is made under the legislation.

- Not require any supporting statement to accompany the application.

- Provide that the final date for payment shall be 28 days / 20 business days[739] from the valuation date.

- Require the payer (reference to ‘payer’ includes any ‘specified person’) to issue a payment notice within five business days from the valuation date.

[739] Or any earlier date the parties agreed.

- If the payer issues a payment notice, require the payer to pay the sum specified in that payment notice unless the payer issues a pay-less notice not later than one day before the final date for payment. Any such pay-less notice shall value the works up to the date the pay-less notice is issued.

- If the payer fails to issue a payment notice, require the payee to remind the payer of the payer's failure to issue payment notice and the payer's obligation to issue a pay-less notice. Such reminder shall be issued at any time after the expiry of the abovementioned five business days, up to the date falling ten business days after the originally expected final date for payment. If the payee fails to comply, then the payer is relieved from its payment notification obligations in respect of that particular payment cycle.

- Provide that the revised final date for payment shall be the date falling five business days from the payee's abovementioned reminder, or, 28 days / 20 business days[740] from the valuation date, whichever is later.

- Require the payer to pay the sum specified in the payee's application, unless the payer issues a pay-less notice not later than one day before this revised final date for payment. Any such pay-less notice shall value the works up to the date the pay-less notice is issued.

[740] Or any earlier date the parties agreed.

Chapter Five: Remedies for non-payment or under-certification, retentions and pay-when-paid in the event of an upstream insolvency

5.1 Introduction

The previous chapter analysed the statutory payment notification obligations (SPNO) under HGCRA and BCISPA(NSW). SPNO may lead to timely full payment of the payee's application, which concludes the parties' interim rights and obligations for that payment cycle. Alternatively, SPNO may lead to non-payment of a sum due, under-certification, or a combination of the two.

Non-payment of a sum due occurs when the payer fails to comply with its SPNO (or notifies the full sum applied for by the payee) and fails to pay the payee's application in full by the final date for payment. Under-certification occurs when the payer duly notifies and pays a sum lower than the payee's application. A combination of under-certification and non-payment of a sum due occurs when the payer duly notifies a sum lower than the payee's application, but fails to pay it in full by the final date for payment. This chapter reviews the payee's remedies including adjudication, requiring the principal contractor to retain money from the payer to cover the payee's claim, suspending performance, and charging interest. This chapter also analyses the matters of retention and pay-when-paid in the event of an upstream insolvency.

5.2 Remedies for non-payment and/or under-certification

5.2.1 Adjudication

A significant remedy in the event of non-payment and/or under-certification is adjudication. The two distinctive adjudication regimes under HGCRA and BCISPA(NSW) are analysed in the next two chapters.

5.2.2 Suspension of performance

HGCRA and BCISPA(NSW) entitle the payee to suspend its performance under the contract on three occasions, namely, where the payer has failed to:

1. comply with its SPNO in respect of a sum duly notified by the payee, but not paid in full by the final date for payment[741]; or
2. pay in full by the final date for payment a sum duly notified by itself as due to the payee[742]; or
3. pay in full a sum determined by an adjudicator within seven days[743] or five business days, for HGCRA and BCISPA(NSW) respectively, from the date the adjudicator's decision is issued[744].

The payee must notify the payer of its intention to suspend performance. Before suspending performance, HGCRA s.112(2) requires at least seven days' notice whilst BCISPA(NSW) s.27(1) requires two business days.

HGCRA originally provided that the suspension right ceases once full payment is made[745], and only excused delay for 'any period during which performance was suspended' pursuant to HGCRA[746]. HGCRA did not expressly entitle the payee to recover loss and expense incurred in suspending performance.

PWG recommended supplementing the right to suspend performance with an entitlement to recover costs incurred from the suspension and subsequent remobilisation, as well as allowing reasonable time to remobilise[747]. The

[741] HGCRA, ss.111&112(1); BCISPA(NSW), ss.15(2)(b).

[742] HGCRA, ss.111&112(1); BCISPA(NSW), ss.16(2)(b).

[743] or the final date for payment of the notified sum under the contract if later.

[744] HGCRA, ss.111(1),111(9)&112(1); BCISPA(NSW), ss.23(1)(a)&24(1)(b).

[745] HGCRA, s.112(3).

[746] HGCRA, s.112(4).

[747] PWG (n.46), para.2.7.5.

consultation endorsed these recommendations[748], and 92% of the respondents agreed[749]. The second consultation again endorsed this recommendation and proposed clarifying 'that a party need not suspend all of his obligations to the party in default when exercising the statutory right'[750].

LDEDCA amended HGCRA to meet these recommendations by:

1. clarifying that the payee can suspend 'any or all of' its obligations[751].
2. entitling the payee to recover 'a reasonable amount in respect of costs and expenses reasonably incurred'[752].
3. excusing the payee for delay caused 'in consequence' of the suspension, in addition to the original excuse for the period of suspension[753].

BCISPA(NSW) originally provided that the right to suspend performance ceases to exist once payment is made[754]. BCISPA(NSW) was amended in 2003 to provide that the right 'exists until the end of the period of 3 business days immediately following the date on which the claimant receives payment'[755]. The amendments also introduced s.27(2A) providing that:

> If the [payee], in exercising the right to suspend… incurs any loss or expenses as a result of the removal by the [payer] from the contract of any part of the work… the [payer] is liable to pay the [payee] the amount of any such loss or expenses.

[748] DTI and WAG (2005) (n.48), paras.6.1-6.6.

[749] DTI and WAG (2006) (n.49), p.46.

[750] DTI and WAG (2007) (n.50), p.41.

[751] LDEDCA, s.145(2); HGCRA, s.112(1).

[752] LDEDCA, s.145(3); HGCRA, s.112(3A).

[753] LDEDCA, s.145(4); HGCRA, s.112(4).

[754] BCISPA(NSW) Historical version to 2 March 2003, s.27(2).

[755] BCISPA(NSW)(Amendment)(2002), para.41(2); BCISPA(NSW), s.27(2).

Munaaim argues that this entitles the payee to recover loss and expense incurred because of the suspension, although no case is cited in support[756]. Bailey notes that the wording is odd, in that '[i]f the [payee] suspends the work, the [payer] is not removing anything – the payee is simply stopping work until it is paid what is due'[757]. BCISPA (Singapore) s.26(3) has the same wording, and the High Court of Singapore stressed the requirement for:

> a *causal connection* between the "loss or expenses" claimed and the removal of contractual works by the [payer]. If the claimed "loss or expenses" does not flow from such removal, then it would simply be irrecoverable under [BCISPA(NSW) s.27(2A)].[758]

Accordingly, BCISPA(NSW) may not entitle the payee to recover costs incurred from the suspension, such as, non-productive time of labour and management staff until they are assigned to other projects, suspension claims from the payee's sub-contractors, loss of overheads and profit due to reduced turnover during the period of suspension and remobilisation costs. Furthermore, the payer may incorporate into the contract provisions disallowing such costs. Therefore, HGCRA's version is preferred for expressly entitling recovery of loss and expense incurred due to the suspension because otherwise this statutory remedy can be undermined.

Additionally, BCISPA(NSW)'s suspension right ceases three business days following payment, whereas HGCRA excuses delay caused consequent to the suspension. BCISPA(NSW)'s three business days is not always enough for remobilising and resuming with the programme of works as left at the time of suspension, while HGCRA's vagueness increases the risk of future disputes. HGCRA's version is, however, preferred as it is fairer to ascertain the excusable delay on a case-by-case basis. Any disputes as to entitlement will turn on the

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[756] Munaaim, M.E.C. *Security of Payment Regimes in the United Kingdom, New South Wales (Australia), New Zealand and Singapore: a comparative analysis*, pp.445&451. <https://www.irbnet.de/daten/iconda/CIB19017.pdf> accessed 04 November 2022.

[757] Julian Bailey, *Construction Law* (Routledge, 2011), p.640.

[758] *I-Lab Engineering Pte Ltd v Shriro (Singapore) Pte Ltd* [2018] SGHCR 15.

facts, for example the period of suspension, the works' nature and value, and the contractor's reaction following payment.

5.2.3 Requiring the principal contractor to retain money from the payer to cover the payee's claim

Since 2011[759], BCISPA(NSW) entitles a payee that has made an adjudication application to request the party by whom money become payable to the payer in the project (referred to as the 'principal contractor'), to retain enough money from the payer to cover the payee's claim[760]. By contrast, HGCRA has no equivalent provisions.

The party receiving such retaining request must, within 10 business days, inform the payee if it is not the principal contractor, or cannot otherwise satisfy the request because, for example, it has already paid the payer all money owed. Failure to do so attracts a maximum penalty of $5,500 or $1,100 for corporations and individuals respectively.[761]

The principal contractor shall retain the money until whichever of the following happens first:

1. The payer pays the payee the amount claimed[762].

2. The adjudication application is withdrawn, or the adjudicator fails to determine the adjudication within the prescribed timeframes[763], and the payee fails to reapply for adjudication within the allowed timeframes[764]. If

[759] BCISPA(NSW)(Amendment)(2010).

[760] BCISPA(NSW), ss.26A(1)-(4).

[761] BCISPA(NSW), s.26A(5).

[762] BCISPA(NSW), s.26B(3)(b).

[763] BCISPA(NSW), s.21.

[764] BCISPA(NSW), s.26; BCISPA(NSW)(Amendment)(2018), para.22; BCISPA(NSW), ss.26B(3)(a)&(a1).

the adjudication application is withdrawn, the payee must notify the principal contractor within 5 business days[765]. Failure to comply attracts a maximum penalty of $5,500 or $1,100 for corporations and individuals respectively.[766]

3. 20 business days have lapsed after a copy of the adjudicator's determination is served on the principal contractor[767]. The payee must serve the determination to the principal contractor within 5 business days after the determination is served to the payee. The maximum penalty for failing to comply is $5,500 and $1,100 for corporations and individuals respectively.[768]

4. The payee serves a notice of claim to the principal contractor under the CDA(NSW) s.6.[769] This involves the payee filing the adjudicator's determination as a judgment for a debt and requesting the court to issue a corresponding debt certificate[770]. The payee then serves the debt certificate together with a notice in an approved form to the principal contractor[771]. The principal contractor shall then pay the payee the amount retained from the payer[772]. However, the principal contractor may defend the payee's claim by raising any defences the principal contractor would have had against the payer up to the service of the debt certificate and approved notice[773].

Considering points 3 and 4 above, the payee has 20 business days, after a copy of the adjudicator's determination is served on the principal contractor, to obtain the debt certificate from the court and serve it to the principal contractor.

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[765] BCISPA(NSW), s.26D(3).

[766] BCISPA(NSW)(Amendment)(2018), para.24; BCISPA(NSW), s.26D(3).

[767] BCISPA(NSW), s.26B(3)(d).

[768] BCISPA(NSW)(Amendment)(2018), para.23; BCISPA(NSW), s.26B(5).

[769] BCISPA(NSW), s.26B(3)(c).

[770] CDA(NSW), s.7(1A).

[771] ibid, s.6.

[772] ibid, s.8.

[773] CDA(NSW), s.11(4); *Modcol v National Buildplan Group* [2013] NSWSC 380, para.9.

These rights and obligations created by BCISPA(NSW)'s have the following disadvantages:

- They deprive the payer of its money even if the payee's claim has no merit.

- They impose obligations on third parties, namely the principal contractor or even an unrelated party who simply happened to receive a retaining request, with penalties for failing to adhere.

- The principal contractor may have to deal with complex issues, for example, whether the adjudicator determined the adjudication within the prescribed timeframes.

- There is a risk of intervening insolvency of the principal contractor.

These disadvantages must be weighed against the purported advantage, which is security of the payee's money in the event of an intervening insolvency of the payer. It was characteristically said during parliamentary debates that '[n]othing in the process will prevent a principal [contractor] from making a direct payment to the [payee]'[774].

However, in *Modcol*[775] the payer became insolvent prior to the payee obtaining a debt certificate from the court. Section 440D of the Corporations Act 2001, which concerns stay of proceedings, provides that proceedings against a company in administration cannot begin or continue except with leave of the court. Accordingly, the payee sought the court's permission to continue with proceedings pursuing a debt certificate. If successful, the payee could then serve the debt certificate to the principal contractor and require payment out of moneys held under the contract between the principal contractor and the payer.[776]

[774] LCH 24 November 2010 (Fred Nile).

[775] (n.773).

[776] *ibid*, para.32.

However, McDougall J refused to grant leave and ordered that the proceedings be stayed. He found the Contractors Debt Act, which as explained is BCISPA(NSW)'s machinery for obtaining a debt certificate, to be inconsistent with Part 5.3A of the Corporations Act, which deals with the administration of companies. The payee argued that BCISPA(NSW)'s policy justifies the court exercising its discretion to permit the payee to continue with the proceedings. However, McDougall J disagreed, and reasoned that 'giving a significant advantage to one unsecured creditor over others'[777] would be inconsistent with the winding-up provisions of the Corporations Act.[778]

Therefore, the entire aim of this provision is undermined in the context of insolvency, because in the event of an intervening insolvency of the payer, the principal contractor can raise defenses refusing to pay the payee. Because of this, and the aforesaid disadvantages, including third-party obligations that can include complex issues, the payer's deprivation of money owed to it, and the risk of the principal contractor's intervening insolvency, this thesis favours HGCRA's position, which does not entitle the payee to require the principal contractor to retain money from the payer.

5.2.4 Interest for late payment

HGCRA is silent on the matter of interest for late payment. This is regulated by the Late Payment of Commercial Debts (Interest) Act 1998 (LPCDIA), which sets a statutory interest rate of 8% above the Bank of England base rate[779], unless the contract provides for another 'substantial remedy'[780]. Despite not specifying a minimum rate, LPCDIA s.9 states that in determining whether a contractual rate is substantial remedy, regard shall be had to the parties' bargaining power.

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[777] *ibid*, para.42.

[778] *ibid*, paras.22,41,43&54.

[779] LPCDIA, s.6; The Late Payment of Commercial Debts (Rate of Interest) (No. 3) Order 2002, para.4.

[780] LPCDIA, s.8.

In *Yuanda (UK) Co Ltd v WW Gear Construction Ltd*[781], Edwards-Stuart J found that 0.5% over base was not a substantial remedy, and so replaced it with the 8% over base statutory rate[782]. Although Edwards-Stuart J did not specify a minimum rate, he suggested that '3-4% would provide a substantial remedy… particularly if… specifically discussed and agreed'[783].

By contrast, BCISPA(NSW) s.11(2) requires payment of interest for late payment at 6% above the Reserve Bank of Australia cash rate[784] or any higher rate specified in the contract. BCISPA(NSW)'s version is preferred because it specifies a minimum mandatory interest rate, whereas HGCRA provides the subjective notion of 'substantial remedy'. Setting the minimum interest rate at 6% over base with parties having freedom to agree a greater rate improves procedural justice as it provides clarity for the parties and an objective standard for adjudicators to apply.

BCISPA(NSW) s.22(1)(c) requires adjudicators to determine 'the rate of interest payable'. By contrast, HGCRA is silent on the matter, although Scheme pt.I/para.20(c) provides that adjudicators may award interest 'having regard to any term of the contract'. Although the Scheme does not confer a freestanding power on the adjudicator to award interest, an adjudicator may decide questions as to interest if they form part of the dispute properly referred, or if the parties agree should be within the adjudicator's scope, or if the adjudicator considers them necessarily connected with the dispute.[785]

Under-certification occurs when the payer complies with its SPNO, and pays the notified sum on time, 'but on the matter being referred to adjudication the adjudicator decides that more than the sum specified in the notice should be

[781] [2010] EWHC 720.

[782] *ibid*, para.92&96(2).

[783] *ibid*, para.91.

[784] Pursuant to CPA(NSW) s.101(5) and UCPR(NSW) r.36.7.

[785] *Carillion* (n.316), para.91.

paid'[786]. On such occasions, HGCRA and BCISPA(NSW) require payment of the additional amount within seven days[787] and five business days[788] respectively from the adjudicator's decision. This supports the notion that neither HGCRA nor BCISPA(NSW) provide for payment of interest in the event of under-certification, insofar as the adjudicated amount is paid within the required deadline.

However, in *Partner Projects Limited v Corinthian Nominees Limited*[789] the court held that this must be viewed against the adjudicator's power to open up and revise any certificate. Consequently, the adjudicator could substitute the sums certified by the architect with those sums the adjudicator considered were due. Accordingly, the adjudicator had jurisdiction to award interest on those sums from the date that the original architect's certificate should have been paid.[790]

Unfairness arises if the payee delays commencing the adjudication. In *Partner Projects*, the adjudicator's decision was issued 1,352 days after the architect's certificate, and the interest awarded was £203,420.48.[791] While LPCDIA s.5 'Remission of statutory interest', and cases like *Claymore Services Ltd v Nautilus Properties Ltd*[792], which provides that the court may disallow interest if a claimant has delayed unreasonably to commence proceedings[793], seek to prevent this unfairness, they relate to statutory interest and unlikely to apply to contractual interest rates. Furthermore, adjudicators require an objective standard to apply.

It is therefore recommended that the legislation should limit the maximum interest an adjudicator can award to 90 days. This allows for a reasonable period to negotiate the dispute and for the adjudication's duration should negotiations fail. It therefore balances between having a reasonable interest amount and

[786] HGCRA, s.111(8).

[787] or the date which apart from the notice would have been the final date for payment, whichever is later: HGCRA, s.111(9).

[788] or any later date determined by the adjudicator: BCISPA(NSW), s.23.

[789] [2011] EWHC 2989.

[790] *ibid*, paras.30&31.

[791] *ibid*, para.26.95.

[792] [2007] EWHC 805.

[793] *ibid*, para.55.

preventing unreasonably high interest amounts should the payee delays commencement of adjudication.

5.3 Retentions

Retention is the best-known example of milestone payments[794], whereby the payer retains an amount, typically 3-5% from certified payments[795], for an agreed period. Parties are free to agree retention amounts and release terms. Half retention is normally released upon practical completion and the remainder upon the end of the defects' liability period, which is usually 12 months following practical completion, although periods of 2 or 3 years are common, with highs of 4 years even reported[796].

Retentions mitigate the risk that construction projects are not completed either at all or to the required standard and incentivise contractors to correct defects during the specified period.[797] Whilst retentions originate in the Victorian era[798], modern construction projects still suffer from defects and employers often struggle to achieve satisfactory rectification.[799] Even opponents of retentions appreciate their necessity, and therefore recommend placing retentions into trust accounts instead of prohibiting them[800].

BCISPA(NSW) requires a main contractor whose contract sum with the employer is over $20m to place all retentions held from sub-contractors into a trust account.

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[794] *Bennett* (n.440), para.21.

[795] BEIS, Retentions in the Construction Industry (BEIS Paper 17, October 2017, Crown), p.47.

[796] ibid, pp.27,72,73.

[797] ibid, p.16.

[798] TIC/HC, *The use of retentions in the UK construction industry* (Parliamentary copyright, 2002) <https://publications.parliament.uk/pa/cm200203/cmselect/cmtrdind/127/12702.htm> accessed 04 November 2022, para.1.

[799] Wendy Wilson, *New-build housing: Construction defects–issues and solutions* (Commons Library Research Briefing, 17 January 2022), p.4&9.

[800] Rudi Klein, *Payment in the construction industry–where are we now?* (SCL, 2019), pp.18-23.

The Regulation imposes management and reporting obligations on main contractors, breach of which can lead to fines up to $110,000.[801]

Although the Latham Report recommended introducing retention bonds or placing the money in secured trust funds to protect them from a payer's insolvency, HGCRA does not regulate retentions[802]. In the 1990s, members of several trade associations formed collective agreements to refuse contracts with retentions. However, the Office of Fair Trading argued these breached the Competition Act 1998. Consequently, these agreements were withdrawn.[803] In 2002, Parliament considered whether retentions should be abolished, concluding that they should be preserved.[804]

Carillion's collapse in 2018 reignited the debates. A Private Members' Bill under the Ten Minute Rule was proposed, which would render retention clauses ineffective unless deposited in a retention deposit scheme. The Bill's first reading occurred on 09 January 2018; however, it failed to complete its passage through Parliament before the end of the session, therefore, did not progress further.[805] Another Bill aiming to abolish retentions was proposed in 2021, but similarly did not progress past its first reading[806].

The 2014 and 2016 Charters[807] included a 'fair payment commitment' that main contractors would not impose more onerous retention terms than were included

[801] BCISPA(NSW), s.12A; BCISPA(NSW)(Regulation)(2020); superseding BCISPA(NSW)(Regulation)(2008).

[802] Latham (1994) (n.42), pp.93,99.

[803] R. Brook and W. Lord, 'A Study of Collective Agreements to Abolish Retention in the UK' in Peter Barrett and others (ed), *18th CIB World Building Congress* (CIB, May 2010), pp.299-310 <http://site.cibworld.nl/dl/publications/w113_pub345.pdf> accessed 04 November 2022.

[804] TIC/HC (n.798).

[805] Parliament, Construction (Retention Deposit Schemes) Bill 2017-19 (Parliamentary Copyright) <https://bills.parliament.uk/bills/2197/news> accessed 04 November 2022.

[806] HL, Construction (Retentions Abolition) Bill 2021-22 <https://bills.parliament.uk/bills/3056> accessed 04 November 2022.

[807] see ch.4/s.4.4.7.

in their contract with the employer, with retentions being eliminated by 2025.[808] However, the Charters are held in abeyance[809].

A government consultation published in February 2020 presents the views of the 55 respondents.[810] Opponents of retentions mainly argue that retentions shall be:

1. abolished via legislative intervention; or
2. replaced by retention bonds or by placing the retention money into secured trust funds (known as project bank accounts or retention deposit schemes).

Retention bonds can, however, be costly and difficult to acquire, particularly by smaller contractors due to financial institutions being reluctant to offer them. Similarly, secured trust funds can be costly and administratively burdensome.[811] Furthermore, they restrain cashflow because cash is held in trust funds rather than freely used in the market. The consultation mentions, but not explains, this matter[812].

Let us assume that a large main contractor working on a 3% profit margin[813] receives monthly payments from its several contracts of £100m, subject to 5% retention. This means monthly cash income of £95m. Assuming £22m goes towards its overheads, project teams, consultants and other ancillary project costs that are not subject to retention, and £75m goes towards sub-contractors and is subject to 5% retention. These transactions mean the contractor has a positive cash flow of £1.75m, is owed £5m retention, and owes £3.75m retention. However, if this £3.75m retention owed to sub-contractors must be placed in a

[808] BIS (2014) (n.694), p.2; BEIS (2016) (n.696), p.2.

[809] see s.4.4.7.

[810] BEIS, *Retention payments in the construction industry: A consultation on the practice of cash retention under construction contracts - Summary of responses* (2020, Crown), pp.3,4.

[811] ibid, pp.18-20.

[812] ibid, p.10.

[813] In 2017, UK's top ten contractors average profit margin was 1.09%, which in 2018 fell to 0.38%, with future target being 2.5%-3%: Hamish Champ and Dave Rogers, *Top 10 contractors under the cosh as margins slip to less than 0.5%* (27 July 2018, Building).

secured trust fund, then the main contractor's working cash flow becomes a negative £2m.

Furthermore, a risk exists that the financial institution holding the funds becomes insolvent, thereby large amounts being lost through no fault of either the main contractor or its supply chain. For example, Australia's Financial Claims Scheme protects up to $250,000 held with an authorised deposit-taking institution per account-holder[814]. Arguably, insolvency risk of the financial institution is lower than that of the contractor's, but it must still be considered.

The contractor will likely cover its negative cashflow through additional loans from the very same institutions holding these funds. Therefore, an insolvency of the main contractor, which is the risk that trust funds are designed to manage, may cause a chain reaction and collapse of the financial institution holding those funds due to the contractor's non-performing loans.

As explained, BCISPA(NSW) obliges main contractors whose contract with the employer is over $20m to place retention money withheld from sub-contractors into trust accounts. Although this may protect the sub-contractor from the main contractor's insolvency, it does not protect the main contractor from the employer's insolvency or the sub-sub-contractor from the sub-contractor's insolvency. This thesis recommends that, if retention accounts are to become mandatory, they should apply throughout the supply chain and irrespective of the contract value.

This thesis ultimately favours HGCRA's position, which allows the parties freedom to agree any retention amounts and release terms, and argues that retentions should not be regulated further (and certainly not abolished). This is because retention is a long standing practice, which to this day has practical benefits. Furthermore, retention alternatives such as bonds and trust funds have several disadvantages, including the cost and difficulty in obtaining the bonds,

[814] Australian Prudential Regulation Authority, *Financial Claims Scheme* <https://www.apra.gov.au/financial-claims-scheme-0> accessed 23 December 2022.

administrative burden, reduced cash flow, and insolvency risk of the financial institution. However, if secured trust funds nevertheless become mandatory, they should apply across the entire supply chain and irrespective of contract value.

5.4 Defence of pay-when-paid in the event of an upstream insolvency

Both HGCRA and BCISPA(NSW) prohibit pay-when-paid provisions[815]. However, HGCRA permits pay-when-paid in the event of an upstream insolvency[816], whereas BCISPA(NSW) does not. Specifically, HGCRA states that a provision making payment:

> conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.[817]

PWG considered repealing this exception. The competing arguments were that while insolvency risk should be managed by parties in direct contract, assigning the entire risk to the contractor in direct contract with the insolvent party can cause a domino effect[818]. The latter is because that contractor can also become insolvent thereby affecting not only sub-contractors down that contracting chain, but also parties involved with that contractor in other projects. PWG did not reach consensus[819]. 67% of the consultation's respondents saw no benefit for 'the industry to retain the ability to invoke "pay-when-paid" clauses in cases of "upstream" insolvency'[820]. Nevertheless, the government preserved this exception because it had been the subject of considerable compromise when

[815] see ch.3/s.3.5.

[816] HGCRA, s.113.

[817] HGCRA, s.113(1).

[818] PWG (n.46), paras.2.4.1.-2.4.5.

[819] ibid, para.2.4.6.

[820] DTI and WAG (2006) (n.49), p.49.

HGCRA was passed in 1996, and the consultation's arguments did not constitute sufficient new evidence to undermine that compromise[821].

From a procedural fairness perspective, an argument not submitted in prior consultations is that this exception can result into a windfall for the payer where the payee has a valid claim against the payer, but the payer's claim to its own payer in respect of the same matter is invalid, and an intervening insolvency of the payer's payer occurs. For example, the sub-contractor claiming a variation against the main contractor that is valid under their contract, but under the contract between the main contractor and the employer is considered 'design development'[822] and therefore not valid contractual variation.

Another example is where the sub-contractor and the main contractor claim loss and expense from the main contractor and the employer respectively. In turn, the main contractor and the employer defend the respective claim made against them and refuse payment. The employer then becomes insolvent before the disputes are resolved and the associated sums paid. At this stage, proper review of the employer's defence is likely to be impossible, therefore, the contractor can withhold payment from the sub-contractor irrespective of the merits of the employer's defence. The windfall occurs because if the employer was solvent and both disputes were tried finding the employer's defence valid whilst the main contractor's defence invalid, the main contractor would have had to pay the sub-contractor albeit failing in his claim against the employer.

For this paradoxical windfall possibility, BCISPA(NSW)'s approach is preferred, which prohibits pay-when-paid even in the event of an upstream insolvency. The increased risk to the party in direct contract with the insolvent party can be mitigated through a surety bond or insurance. Both PWG and the consultation noted that repealing this exception would reduce the cost of such insurances

[821] ibid, p.25.

[822] a change in the design that is the risk of the payee rather the payer under their contract.

because presently they need to cover the risk of insolvency anywhere upstream, not merely of the party in direct contract[823].

5.5 Conclusion

Both legislations entitle the payee to suspend performance for non-payment of a sum due by the final date for payment. However, HGCRA's version is preferred for compensating costs and delay caused by the suspension, whereas BCISPA(NSW) is silent on costs whilst allowing three business days for continuing the works following payment.

BCISPA(NSW) entitles a payee applying for adjudication to require the payer's payer to retain enough money from the payer to cover the payee's claim. However, in the event of the payer's intervening insolvency, the payer's payer can refuse to pay the payee, which in turn defeats this provision's purpose. Additional disadvantages include introducing obligations to third parties who are or are perceived to be the payer's payer, the payer's deprivation of cashflow, and the risk of the payer's payer's intervening insolvency. Therefore, HGCRA is preferred, which provides no such entitlement.

BCISPA(NSW) mandates minimum interest for late payment of 6% over base, whereas HGCRA allows parties freedom to agree a 'substantial remedy' with statutory rate of 8% over base applying where parties fail to agree. BCISPA(NSW)'s version was preferred for prescribing a minimum rate as opposed to HGCRA's subjective notion of 'substantial remedy'. However, the legislation should limit the maximum interest an adjudicator can award to 90 days to prevent high interest amounts caused by the payee's delay to commence adjudication.

Although both legislations permit retentions, BCISPA(NSW) requires contractors whose contract with the employer is over $20 million to place retentions withheld

[823] PWG (n.46), paras.2.4.3&2.4.4; DTI and WAG (2006) (n.49), p.22.

from sub-contractors into secured trust accounts, whereas HGCRA has no such requirement. HGCRA was preferred because placing retention money into trust accounts has disadvantages including administrative burden, costs, cashflow restrictions and insolvency risk of the financial institution holding the funds.

HGCRA permits pay-when-paid provisions in the event of an upstream insolvency, whereas BCISPA(NSW) does not. This thesis favoured BCISPA(NSW), and recommended abolishing HGCRA's exemption because it can result in a windfall for the payer.

Chapter Six: Statutory right to commence adjudication, nature of disputes that can be referred and timing in which they can be referred

6.1 Introduction

The introduction of this thesis explained that the legislation's successful operation rests on three pillars: payment provisions, adjudication process and enforcement of an adjudicator's decision. Chapters Three and Four analysed payment provisions, respectively the right to interim payment and payment notification obligations. Chapter Five analysed the remedies for non-payment or under-certification. Chapters Six and Seven review the adjudication process. Chapter Six investigates the statutory right to commence adjudication, the nature of disputes that can be referred and the timing in which they can be referred, whilst Chapter Seven focuses on adjudication procedures, from commencing adjudication until the adjudicator's decision is issued.

Chapter Six first compares BCISPA(NSW)'s asymmetric and HGCRA's equal right to adjudication, in conjunction with BCISPA(NSW)'s unilateral choice of adjudicator nominating authority (ANA) by the claimant and HGCRA's freedom to agree nominating body or adjudicator. It then reviews the nature of disputes that can be referred to adjudication, contrasting BCISPA(NSW)'s narrower scope of 'payment dispute' and HGCRA's wider ambit of 'a dispute arising under the contract'. It then examines whether an adjudicator's jurisdiction shall extent to issues of negligence, fraud and misrepresentation. Finally, the timing in which a dispute can be referred to adjudication is reviewed.

All these components are analysed from the perspective of promoting procedural justice whilst preserving the legislation's speed. This approach better resolves the problem of adjudication's pseudo-temporary nature whilst preserving the legislation's benefits as an equalising reform[824].

[824] see ch.2/ss.2.4-2.7.

6.2 BCISPA(NSW)'s asymmetric versus HGCRA's equal right to adjudication

BCISPA(NSW) only permits the party undertaking to carry out work under the contract to refer a payment dispute for adjudication[825]. Following a valid payment claim, three payment dispute scenarios exist:

1. Payer provides valid payment schedule indicating lesser amount than the payee's claim[826].
2. Payer provides valid payment schedule but fails to pay the indicated amount in full by the final date for payment[827].
3. Payer fails to provide valid payment schedule and fails to pay the amount claimed by the payee in full[828].

By contrast, under HGCRA:

> A party to a construction contract has the right to refer a dispute arising under the contract for adjudication… For this purpose "dispute" includes any difference.[829]

Therefore, HGCRA entitles either party to refer a dispute for adjudication. The only purported limitation is that the dispute must arise 'under' the contract[830]. This section analyses BCISPA(NSW)'s asymmetric and HGCRA's equal right to adjudication.

Historically, asymmetric rights to dispute resolution primarily related to arbitration clauses, which may entitle one party to choose between arbitration and litigation, whereas the other can only arbitrate or only litigate. English courts found such

[825] BCISPA(NSW), ss.8&13(1).
[826] BCISPA(NSW), s.17(1)(a)(i).
[827] BCISPA(NSW), s.17(1)(a)(ii).
[828] BCISPA(NSW), s.17(1)(b).
[829] HGCRA, s.108(1).
[830] see ch.6/s.6.4.

clauses to be valid[831]. The High Court of Australia, citing English case law, also confirmed their validity[832]. This thesis does not argue that BCISPA(NSW)'s asymmetric nature is invalid. Naturally, BCISPA(NSW) is legislation, not agreement, and therefore any question of invalidity is entirely different. Regardless, no authority suggests that BCISPA(NSW)'s asymmetric nature is invalid. Instead, this thesis investigates whether BCISPA(NSW)'s asymmetric nature compromises procedural justice.

Murray's Report considered whether BCISPA(NSW) should permit either party to commence adjudication, which some respondents submitted would provide 'a fairer dispute resolution process'[833]. Although Murray acknowledged the accuracy of this viewpoint 'in a dispassionate and theoretical sense'[834], he nevertheless argued that an equal right to adjudication depends on whether the legislation's purpose is to determine a payment claim:

> on a 'pay-now-argue-later' basis; or… provide an alternative dispute resolution mechanism that enables either party to refer any contractual dispute for evaluation on an interim basis (including claims such as the amount of damage that a contractor must pay to the other party)…[835]

Murray favoured the former, arguing that the latter renders adjudication less rapid and more expensive, thereby unaffordable for smaller payees[836]. However, Murray's reasoning in fact supports the phenomenon of adjudication's pseudo-temporary nature argued in this thesis. That is, if a 'have-not' payee is unable to afford adjudication, it certainly cannot afford arbitration or court proceedings. Consequently, the payer 'have' will never get the opportunity to argue its case and recover any overpayments, because the payee 'have-not' will opt for

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[831] *Pittalis v Sherefettin* [1986] 2 All ER 227; *Law Debenture Trust Corporation Plc v Elektrim Finance BV & Ors* [2005] EWHC 1412.

[832] *PMT Partners Pty Ltd (In Liq) v Australian National Parks & Wildlife Service* [1995] HCA 36.

[833] Murray (n.55), p.90.

[834] ibid.

[835] ibid.

[836] ibid.

insolvency rather than participating in subsequent arbitration/litigation. Therefore, adjudication is the only realistic recourse available to both 'haves' and 'have-nots'. This is consistent with Coulson LJ's description of adjudication being 'the only game in town'[837].

Murray overlooked the fact that the party receiving work under the contract may also be a contractor. As Lord Diplock noted, cashflow 'is also the lifeblood of the contractor whose own cash flow has been reduced by the expense to which he has been put by the sub-contractor's breaches of contract'[838]. Furthermore, employers should not be disadvantaged for not being contractors, since cash flow 'is the lifeblood of the village grocer too'[839]. Therefore, as a matter of fairness, all parties in the contract should be entitled to commence adjudication.

Murray also cites the 'pay now, argue later' notion to support his recommendation of preserving BCISPA(NSW)'s asymmetric nature. However, this phrase must be used with caution. There is a belief that because of this notion, adjudicators give claimants the benefit of the doubt[840]. For adjudication to achieve high procedural justice in the parties' eyes, this belief must be dispelled.

The 'pay now, argue later' notion is correct, insofar as it is confined to how an adjudicator's decision should be treated by the parties, and as a governing principle for courts during enforcement proceedings. It should not influence, and should not be perceived as influencing, the adjudicator's decision-making process. The adjudicator should eliminate from his/her decision-making process the notion of 'pay now, argue later'. In the scales of justice, the adjudicator should weigh and be perceived as weighing the facts and the law alone. There should be no place in either scale for the fact that the process is called adjudication nor that the decision is temporarily binding.

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[837] *John Doyle Construction Ltd v Erith Contractors Ltd* [2021] EWCA 1452, para.29.

[838] *Gilbert-Ash* (n.109), p.718.

[839] *ibid*.

[840] Andrew Wallace, *Discussion Paper – Payment dispute resolution in the Queensland building and construction industry: Final Report* (2013), p.132.

This proposition can better be explained by contrasting the interim nature of an adjudicator's decision with interim decisions in arbitration. The latter are interim measures within a single process, whereas the former is interim in name but is a decision on the merits and a final one for the adjudicator, and, as this thesis argues, very likely so for the parties themselves.

The standard of proof applied by arbitrators in deciding whether to grant an interim measure is that of a '*prima facie* establishment of case on the merits'[841], which is defined as a 'reasonably arguable case'[842]. By contrast, adjudicators must decide the dispute on the balance of probabilities, which is a higher standard[843]. Notwithstanding, of course, that 'given the summary, informal, investigative and speedy nature of adjudication, that standard must be applied in a different and less structured setting than when applied by an arbitrator'[844].

However, arbitrators must also consider any likely harm caused to the opposing party if the interim measure is granted including the applicant's financial position and the possibility it may abandon the arbitration should the measure is granted.[845] Therefore, even if the applicant proves its case is reasonably arguable, the relief sought may still be refused due to its financial position. By contrast, an adjudicator's decision should not depend on a party's financial position. In summary, adjudicators should eliminate from their decision-making process both the notion of 'pay now, argue later' and the theory of adjudication's pseudo-temporary nature advanced in this thesis.

6.3 BCISPA(NSW)'s unilateral choice of ANA by the claimant versus HGCRA's freedom to agree adjudicator or nominating body

[841] CIArb, *International Arbitration Practice Guideline: Applications for Interim Measures* (29 November 2016), p.5.

[842] ibid, p.7.

[843] see s.2.7.

[844] *Joinery Plus Ltd (In Administration) v Laing Ltd* [2003] EWHC 3513, para.65 (Thornton J).

[845] CIArb (n.841), p.8.

In ascertaining whether BCISPA(NSW)'s asymmetric right to adjudication compromises procedural justice, regard shall also be given to BCISPA(NSW)'s requirement that an adjudication application must be made to an ANA chosen by the claimant[846]. Therefore, even if the contract specifies an ANA, or, names a person to act as adjudicator, it is not binding[847].

By contrast, HGCRA does not prescribe who appoints the adjudicator, but requires the contract to provide a timetable for securing his/her appointment[848], in the absence of which the Scheme applies[849], prescribing the following process:

1. Any person specified in the contract to act as adjudicator, or
2. If no person is named, or, the person named is unwilling or unable to act, then the adjudicator is selected by any adjudicator nominating body (ANB) specified in the contract.
3. If no ANB is specified, then the referring party shall request an ANB to select an adjudicator.[850]

ANB is 'a body (not being a natural person and not being a party to the dispute) which holds itself out publicly as a body which will select an adjudicator when requested'[851]. Normally, if the contract fails to comply with even one requirement of HGCRA s.108, the entire contractual regime is ousted and Scheme/pt.I applies 'lock, stock and barrel' [852]. However, case law suggests that if a contract fails to name an adjudicator or a valid ANB, but the contractual adjudication procedure is otherwise compliant with HGCRA s.108, there shall not be a wholesale replacement of the contractual provisions with the Scheme, but instead, the adjudicator will be appointed by a responsible institution offering this service e.g. RICS, ICE, RIBA, TECBAR or TeCSA[853].

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[846] BCISPA(NSW), s.17(3)(b).

[847] Bailey (n.757), p.1539.

[848] HGCRA, s.108(2)(b).

[849] HGCRA, s.108(5).

[850] Scheme. para.2(1).

[851] Scheme, para.2(3).

[852] *Yuanda* (n.781), para.61.

[853] *J Murphy & Sons Ltd v W Maher and Sons Ltd* [2016] EWHC 1148, para.27.

BCSISPA(NSW) s.4(1) defines an ANA as 'a person authorised by the Minister… to nominate persons to determine adjudication applications'. As of November 2022, seven ANAs were listed on the government website[854]. In contrast to UK's ANBs that are mainly chartered institutions or professional bodies, NSW's ANAs are generally for-profit companies in competition with each other for securing the most referrals. They incorporate marketing techniques for attracting claimants, for example, not charging a nominating fee but receiving a commission from the adjudicator's fees, reportedly around 40%.[855] Government statistics suggest 30% on average[856], whilst in *Alucity Architectural v Australian Solutions Centre*[857], this was around 39%, namely $10,105.00 for the adjudicator and $6,450.00 for the ANA[858].

This financial incentive of ANAs, combined with BCISPA(NSW)'s asymmetric right to adjudication and the claimant's unilateral choice of ANA, can undermine procedural justice in the disputants' eyes. Indeed, they often cause scepticism and even bring BCISPA(NSW) into disrepute. For example:

- The majority of 23 experts interviewed for Skaik's PhD thesis supported the notion that adjudicators and ANAs 'are commercially driven to produce an outcome that is 'claimant friendly' rather than an outcome that is efficient and fair'[859].

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[854] NSWFT, *Authorised nominating authorities* <https://www.fairtrading.nsw.gov.au/trades-and-businesses/construction-and-trade-essentials/security-of-payment/authorised-nominating-authorities> accessed 04 November 2022.

[855] Alan Moss, *Review of Building and Construction Industry Security of Payments Act 2009 (SA)* (March 2015) <https://www.sasbc.sa.gov.au/pdfs/MossReview.pdf> accessed 04 November 2022.

[856] NSWFT (2020) (n.253), p.9.

[857] [2016] NSWSC 608.

[858] *ibid*, para.39.

[859] Samer Skaik, *Introducing Review Mechanisms into Statutory Construction Adjudication* (PhD thesis, Deakin University, 2017), pp.19&190. The number or percentage of experts supporting this view is not clarified; it is merely referred to as 'the majority'.

- A construction lawyer with over 100 adjudications said that '[s]ome ANAs are very claimant friendly… [claimants] tend to go to the most friendly ANA'[860].
- Pro-claimant bias is another characterisation used[861].
- The Collins Report confirmed that such criticisms are 'commonly made by highly experienced neutrals with no axe to grind'[862].
- The Wallace Report[863] reviewed the appropriateness of the adjudicator nomination process in Queensland, which at the time was similar to BCISPA(NSW). From 128 written submissions 28% favoured the existing system, 39% regarded it as requiring change, whilst 32% did not respond to the question. Those in favour of changing the nomination process stated that:
    - ANAs 'only ever represent one particular sector of the industry – Claimants'[864].
    - '…adjudicators are anxious to award large sums… to attract more business… on the basis that claimants will pick an ANA that appoints generous adjudicators'[865].
    - '…opening up a system for determining private rights… to a system of appointment of adjudicators based on commercial competition… is unfair and open to corruption and abuse'[866].
    - Wallace concluded that there is 'a risk that the existing process of the appointment of adjudicators is open to corruption and abuse'[867].

[860] M.E.C. Munaaim, *Statutory Adjudication in New South Wales: Operational Problems and Potential Improvements* (COBRA Conference, RICS, 2011), p.44.

[861] Moss (n.855), p.9.

[862] Collins (n.54), p.72.

[863] Wallace (n.840), pp.128-166.

[864] ibid, p.131.

[865] ibid, p.132.

[866] ibid, p.132.

[867] ibid, p.159.

Retired judge Alan Moss reviewed the performance of BCISPA (South Australia), which is similar to BCISPA(NSW). Although Moss found no evidence of actual bias[868], he concluded that:

> It is difficult to see how a "for profit" organisation which is seeking to attract business from sub-contractors wishing to get a favourable result, can be seen to be truly impartial.[869]

ANAs have also been criticised for advising claimants about the adjudication process and preparation of submissions[870]. Australia's leading ANA, Adjudicate Today, is open about the services it provides, which include an up-to-date website[871] with articles and flowcharts explaining adjudication and associated deadlines. Their staff also provide information and assistance, including checking for errors that would invalidate an adjudication application, for example, it being out of time or containing multiple payment claims, or the work being outside BCISPA(NSW)'s ambit.[872] These are jurisdictional matters that the payer may raise in the adjudication, therefore, an adjudicator may be called to find against something that the ANA who nominated him/her already reviewed and approved.

Section 6.6 below explores BCISPA(NSW)'s strict deadlines for commencing adjudication, which Murray described as 'complex and highly prescriptive'[873]. It is for this reason that Murray supported the present status of ANAs due to their 'free, but valuable, advisory service'[874]. However, as explained, ANAs are being remunerated through commission from the adjudicators' fees. This thesis will argue that BCISPA(NSW)'s strict deadlines should be lifted for preventing parties from negotiating settlement, whilst also representing a burden for have-nots;

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[868] Moss (n.855), para.22.

[869] ibid, para.31.

[870] Queensland Major Contractors Association, *Reform of the Building and Construction Industry Payments Act 2004* (2010), p.5; Wallace (n.840), pp.134,144-151.

[871] https://www.adjudicate.com.au/.

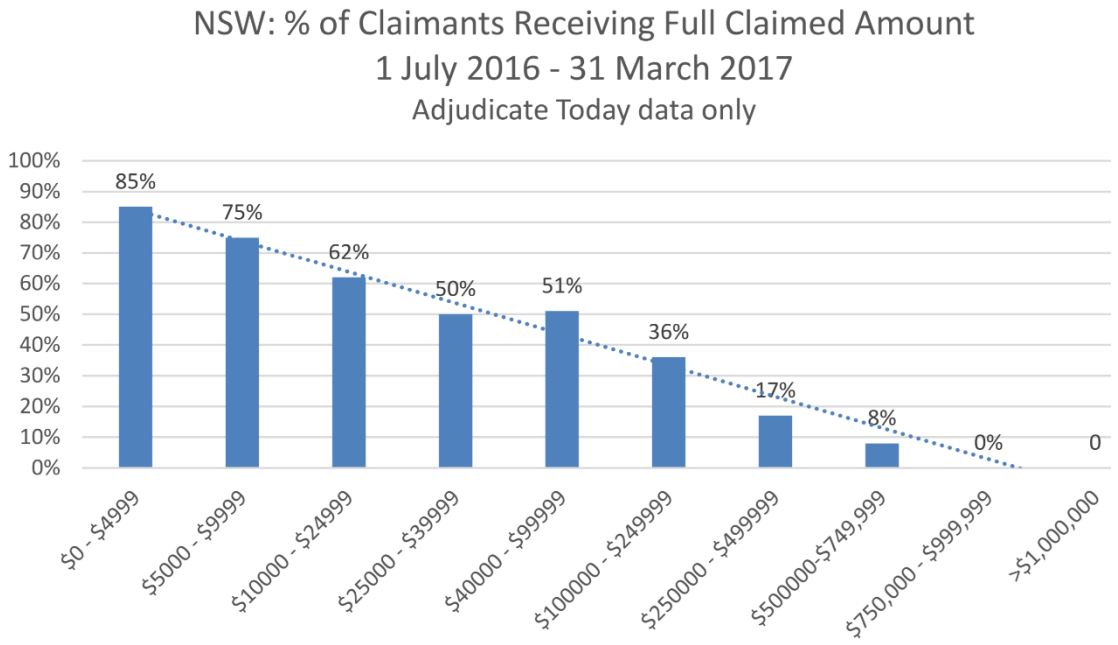
[872] Bob Gaussen, *Adjudicate Today Response to Review of Security of Payments Laws: Issues Paper* (15 May 2017), pp.43-45.

[873] Murray (n.55), p.181.

[874] ibid.

thereby countering Murray's justification for preserving ANAs in their current capacity.

The owner of Adjudicate Today responded to the bias criticisms by referring to statistics related to the outcome of adjudications, in which the adjudicator was nominated by Adjudicate Today. For NSW, the following chart was provided:[875]



The chart shows that for all 'claimed amount' bands, there were at least some adjudications where the claimant was not awarded the full amount claimed. Furthermore, the table demonstrates that the bigger the claimed amount, the larger is generally the probability that the claimant will not be awarded the full amount claimed. Murray referred to similar statistics to disprove the existence of bias[876].

A limitation of this data is that even where the adjudicator awards, for example, 95% of the claimed amount, it would still be classed as the claimant not receiving the full amount. However, Gaussen also said that for all adjudicator

[875] Chart copied from: Gaussen (n.872), p.37.

[876] Murray (n.55), p.180.

determinations released in that period, the total claimed amount was $97,483,324 and the total adjudicated amount was $42,261,531, which is 43%[877]. Similar figures are reported in the annual government statistics. For the year ending 30 June 2019, considering adjudications where a determination was issued, the total claimed amount was $197,450,068 and the total adjudicated amount was $80,622,261, which is 41%.[878]

Because of these statistics, Gaussen argues that:

> it is inconceivable for any responsible person to mount a case that adjudicator appointments by ANAs are directed towards claimant-friendly adjudicators or that the statistics support a case for bias, either apprehend or actual, in the appointment process by ANAs.[879]

As explained below, this thesis argues that these statistics neither prove nor disprove the existence of bias. There are significant limitations in using statistics related to the outcome of adjudications to measure the behaviour of adjudicators. The results are open to several possible explanations, for example, inflation of the amounts claimed and variations in the strength of the parties' arguments; therefore, they cannot be said to prove absence of bias. Furthermore, data on the final outcome of the adjudication does not consider 'aspects of tribunal decisions—such as legal interpretations or procedural decisions—that might reflect bias, regardless of the final outcome'[880].

Proper evaluation of bias requires analysis of the content and reasoning of adjudicators' decisions rather than purely their outcome. This may be achieved via qualitative doctrinal analysis of the decision, or its empirical 'content

[877] Gaussen (n.872), p.37.

[878] NSWFT (2020) (n.253), p.4.

[879] Gaussen (n.872), p.37.

[880] Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' [2012] Osgoode Hall LJ 211, p.223.

analysis'[881]. However, such approaches are impossible since adjudication decisions are not published. It is inappropriate to only analyse decisions reviewed by the courts at enforcement proceedings, hence to some extent published, because they do not represent the norm.

A dispute resolution procedure that generated academic literature in systemic bias is investment treaty arbitration (ITA). The central commonality between ITA and adjudication under BCISPA(NSW) is their asymmetric structure, whereby the investors can instigate arbitration against the state, and the party undertaking to carry out work can instigate adjudication against the party receiving it, but not vice versa. The following quotation is about ITA, but equally applies to adjudication under BCISPA(NSW), hence the references in square brackets have been added:

> The theoretical rationale for systemic bias in investment treaty arbitration [adjudication]… derives from assumptions about arbitrator [adjudicator] incentives based on the system's structure.[882] The asymmetrical claims structure and absence of institutional markers of judicial independence create apparent incentives for arbitrators [adjudicators] to favour the class of parties… able to invoke the use of the system.[883] Also, arbitrators [adjudicators] may be influenced by a need to appease actors who have power or influence over specific appointment decisions [ANAs] or over the wider position of the relevant arbitration [adjudication] industry.[884]

Van Harten investigated systemic bias in the resolution of jurisdictional issues in ITA using content analysis of 140 arbitration awards. Although he acknowledges

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[881] Mark Hall and Ronald Wright, 'Systematic Content Analysis of Judicial Opinions' [2008] Cal.L.Rev. 63 cited in Van Harten (n.880), p.214.

[882] See: Yves Dezalay and Bryant Garth, *Dealing in Virtue* (Chicago: University of Chicago Press, 1996), pp.8-9,36,45,50,70,93,124,194.

[883] Christopher Drahozal, 'Judicial Incentives and the Appeals Process' [1998] SMU.L.Rev 469, pp.500,503; Nudrat Majeed, 'Investor-State Disputes and International Law: From the Far Side' [2004] 98 Am.Soc'y.Int'l.L.Proc 30, p.31.

[884] Van Harten (n.880), p.213.

that ‘there is not, and probably never will be, conclusive empirical evidence of the presence or absence of systemic bias in [ITA]’[885], he found tentative evidence of systemic bias in ITA.[886] By contrast, Franck reviewed 102 ITA awards from 82 cases and supports the opposite notion, namely, that ITA’s procedural integrity is strong and its outcome is unaffected by the state’s or the arbitrator’s development status.[887] Van Harten critiqued Franck’s study, arguing that her findings are ‘exaggerated or unsupported by the results of the study’[888].

This thesis does not seek to argue that adjudications under BCISPA(NSW) are tainted by actual bias. Furthermore, ANAs like Adjudicate Today undoubtedly provide a valuable service considering BCISPA(NSW)’s strict deadlines. Moreover, the NSW government introduced an extensive code of practice for ANAs to safeguard their fairness and professionalism and prevent conflicts of interest[889].

However, this thesis aims to propose the legislation’s version that achieves the highest degree of procedural justice whilst preserving its speed. Considering the discussion in this and the previous section, this is better promoted through an equal right to adjudication as opposed to an asymmetric one because, due to adjudication’s pseudo-temporary nature, adjudication is the only realistic dispute resolution process and, therefore, should be available to both parties.

Furthermore, having an equal right to adjudication combined with a freedom to agree the ANA instead of the claimant unilaterally selecting it reduces any perceptions of systemic bias. Additionally, the ANA being a professional body with its function in the adjudication being confined to nominating an adjudicator, as opposed to a for-profit company undertaking administrative and advisory

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[885] ibid, p.215.

[886] ibid, pp.211,216,239,252.

[887] Susan D. Franck, ‘Development and Outcomes of Investment Treaty Arbitration’ [2009] Harv.Int.Law.J. 435, pp.454,464&487.

[888] Gus Van Harten, *Fairness and Independence in Investment Arbitration: A Critique of Susan Franck' s "Development and Outcomes of Investment Treaty Arbitration"* (2010) <https://core.ac.uk/download/pdf/232633836.pdf> accessed 05 November 2022.

[889] BCISPA(NSW)–Authorised Nominating Authorities (Code of Practice) Order 2020.

functions in the adjudication, further prevents any perceptions of systemic bias. HGCRA's equal right to adjudication and freedom to agree the ANA have led to parties almost exclusively selecting professional bodies[890].

6.4 Nature of disputes that can be referred

As explained, BCISPA(NSW) only permits payment disputes to be referred for adjudication whereas HGCRA permits any dispute arising under the contract. An interim or final account payment dispute may be formed of several disputed issues involving claims by either party for variations, extensions of time, loss and expense for prolongation and disruption, liquidated damages, contra charges and/or defective work. Widening the scope of referrable disputes means that not all adjudications must seek monetary redress, but may involve a claim for extension of time, or seeking declaration that a party breached the contract, thereby leaving monetary implications for another day. Consequently, a single disputed issue may be referred instead of the bigger and more complicated overall payment dispute, thereby confining the adjudication's scope, and simplifying its process. Resolving that single disputed issue by adjudication can assist the parties to negotiate an agreement for the overall dispute.

Therefore, HGCRA's wider scope is preferred over BCISPA(NSW)'s narrower scope in this respect. HGCRA's purported limitation is that the dispute must arise 'under' the contract. This term together with similar terms such as 'in relation to' or 'in connection with' the contract caused considerable litigation, particularly regarding the ambit of arbitration agreements.

In *Premium Nafta Products v Fili Shipping Company*[891] (commonly known as *Fiona Trust*) Lord Hoffman, with whom their Lordship agreed, cited several 20th century cases differentiating between these terms but refused to analyse 'the

[890] Milligan and Jackson (n.252), p.8: shows registered adjudicators per ANB which is almost exclusively professional bodies.

[891] [2007] UKHL 40.

effects of the various linguistic nuances'[892]. Instead, he said it was time to draw a line under those authorities and start afresh, finding that an arbitration clause should be construed as covering any dispute arising out of the parties' relationship, 'unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction'[893]. Therefore, he concluded that an arbitration clause covering 'any dispute arising under this [contract]':

> contains nothing to exclude disputes about the validity of the contract, whether on the grounds that it was procured by fraud, bribery, misrepresentation or anything else.[894]

Fiona Trust was concerned with arbitration agreements; therefore, its relevance to HGCRA's statutory construction remained to be seen. This eventually generated conflicting jurisprudence.

In *Hillcrest Homes Ltd v Beresford and Curbishley Ltd*[895], Raynor J suggested that '*Fiona Trust* is inapplicable to adjudication clauses, which are present or implied by reason of statutory intervention'[896]. He noted the different wording of the adjudication and arbitration clauses of the contract in that case, the former stating 'any dispute or difference [arising] under this Contract', whilst the latter stating 'any dispute or difference… of any kind whatsoever arising out of or in connection with this contract'.[897] For this difference, he concluded that the adjudicator had no jurisdiction to determine a claim for negligent misrepresentation, because it only arose under the Misrepresentation Act 1967, not under the contract.[898]

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[892] *ibid*, para.12.

[893] *ibid*, para.13.

[894] *ibid*, para.15.

[895] [2014] EWHC 280.

[896] *ibid*, para.50.

[897] *ibid*, para.51.

[898] *ibid*, para.47&52.

The problem with this reasoning is its reliance upon the intention of the contract draftsmen in drafting the respective adjudication and arbitration clauses of the contract in that case, to ascertain Parliament's intention when drafting HGCRA. Importantly, although contract draftsmen may expand access to adjudication, they cannot limit it since failure to meet HGCRA's minimum requirements renders the Scheme's adjudication provisions applicable[899].

By contrast, in *Murphy*[900] Akenhead J found *Fiona Trust* to be of 'particular resonance'[901]. *Murphy* concerned whether a dispute about the existence of a final account settlement agreement arose 'under', or, 'in connection with', the original contract[902]. Drawing an analogy to *Fiona Trust*, he refused to draw a distinction between these terms, and made several remarks about HGCRA's ambit including that:

- Parliament must have envisaged adjudication serving some socio-economic or commercial purpose.
- It is most doubtful that Parliament intended that only some disputes could be submitted to adjudication, whereas others could not. Clear language is required before finding such intention.
- Proper construction of HGCRA should give effect, as far as Parliament's language permits, to adjudication's policy and commercial purpose.
- Distinctions between 'under', 'out of' and 'in connection with' the contract reflect no credit upon English commercial or statute law.
- Parliament must have intended that any dispute arising out of the parties' relationship (or purported relationship) should be decided by the same tribunal; hence are within the adjudicator's jurisdiction.[903]

Accordingly, Akenhead J concluded that the dispute was within the adjudicator's jurisdiction, whilst permitting an appeal to be raised on this point due to the

[899] HGCRA, s.108(5).

[900] (n.853).

[901] *Murphy*, para.31.

[902] *ibid*, paras.1&25.

[903] *ibid*, paras.31&32.

conflicting decisions in this important area of construction law[904]. Although it was not appealed, the UKSC[905] discussed the conflicting jurisprudence of *Murphy* and *Hillcrest* and, obiter, was not persuaded that adjudication's:

> statutory compulsion… points at all towards giving the phrase "a dispute arising under the contract" a narrow meaning, by comparison with a similar phrase in a contract freely negotiated. The fact that, after due consideration of the Latham Report, Parliament considered that construction adjudication was such a good thing that all parties to such contracts should have the right to go to adjudication points if anything in the opposite direction.[906]

Phua's prize-winning paper argues that Fiona Trust should not apply to adjudication, yet HGCRA's ambit should be construed broadly via a purposive interpretation[907]. The remainder of this section supports such a purposive interpretation with reference to Hansard not included in Phua's paper.

Neither *Hillcrest*, *Murphy* nor *Bresco* cited any Hansard. An examination of parliamentary debates about a proposed amendment prohibiting adjudicators from determining a dispute involving professional negligence reveals Parliament's true intention of HGCRA's term 'dispute arising under the contract'. Key extracts from these debates are set out below with the author adding in square brackets the reference to fraud or misrepresentation. Although this reference is hypothetical, it fits well within the debate, and the likelihood is that Parliament would have treated these scenarios consistently.

Lord Howie of Troon supported an amendment narrowing the adjudicator's jurisdiction arguing that:

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[904] *ibid*, para.37.

[905] *Bresco* (UKSC) (n.169).

[906] *ibid*, para.41.

[907] Myron Phua, *The proper case for the inapplicability of Fiona Trust to statutory adjudication after Bresco* (September 2021, SCL).

> professional negligence or breach of professional duty [or fraud or misrepresentation]… is quite different from the kind of dispute about contractual procedures which we seem to be discussing... However, the Bill uses the words "any dispute" and it might be construed that such a clause would provide or imply that a dispute or difference about professional negligence [or fraud or misrepresentation] should go to adjudication… I do not think it can be under the adjudication procedure laid down in this Bill because, by the very nature of things, an investigation into professional negligence or breach of professional duty [or fraud or misrepresentation] is complicated and time-consuming and could not be done within the timescale indicated in the Bill.[908]

In response, Viscount Ullswater said that:

> If there is a concern about the jurisdiction of the adjudicator, I would prefer all disputes to be subject to adjudication procedure rather than have endless debates about whether a dispute is within the jurisdiction of the adjudicator or not.[909]

Similarly, Lord Lucas was concerned that:

> this amendment could actually increase the number of allegations of professional negligence [or fraud or misrepresentation]… [because] any party who wished to avoid the process of adjudication could simply throw in some such claim to scupper it.[910]

This amendment prohibiting adjudicators from considering professional negligence disputes was ultimately withdrawn. Therefore, the matter of narrowing the adjudicator's jurisdiction was considered by the Parliament and expressly rejected. This supports the notion that Parliament intended adjudicators to have

[908] HL Deb 28 March 1996, vol.570, col.1886.

[909] ibid, col.1886&1887.

[910] ibid, col.1887.

wide jurisdiction covering all disputes including those involving fraud or misrepresentation.

The permissibility of relying on Hansard for interpreting legislation has been a controversial matter. Historically, the courts forbade reference to parliamentary debates for practical reasons, as the associated investigations were deemed time consuming and expensive[911]. However, in 1992 the House of Lords relaxed this rule and permitted reliance on Hansard to facilitate the interpretation of ambiguous legislation[912]. Case law later clarified that the material relied upon should consist of a clear ministerial statement with such other parliamentary material as might be necessary to understand the statement[913]. These conditions are met in our case as Lord Lucas was representing the ministry.

For the reasons provided by Viscount Ullswater and Lord Lucas, this thesis favours a wide scope in the adjudicator's jurisdiction. The SC confirmed, obiter, that adjudicators have jurisdiction to deal with any defence advanced by the responding party, including fraud[914]. However, the *Hillcrest* and *Murphy* conflicting jurisprudence, the lack of a higher court judgment confirming, ratio decidendi, that adjudicators have jurisdiction to decide claims of fraud, and the futile debate on the applicability of *Fiona Trust* to adjudication further muddying the waters[915], all render the adjudicator's jurisdiction under HGCRA somewhat uncertain. In *SG South Limited v Kings Head Cirencester LLP & Corn Hall Arcade*[916] this uncertainty led the adjudicator to find an 'issue of alleged fraud to be beyond [his] jurisdiction and a matter for the police and the courts'[917]. Therefore, an amendment to HGCRA s.108(1) expressly widening the adjudicator's jurisdiction to cover all disputes including fraud is recommended.

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911 *Beswick v Beswick* [1967] UKHL 2, p.3.

912 *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3.

913 R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Limited [2000] UKHL 61; R (Heathrow Hub Ltd) v Secretary of State for Transport [2020] EWCA 213, para.158.

914 *Bresco* (UKSC), para.44.

915 *ibid*, para.41; Phua, p.15.

916 [2009] EWHC 2645.

917 *ibid*, para.11.

6.5 Considering issues of fraud and dealing with reluctance to submit evidence due to POCA

The previous section recommended that adjudicators should have jurisdiction to consider issues of fraud. UK courts confirmed that the responding party is entitled to raise fraud as a defence in adjudication, and that such defence cannot be raised at enforcement stage if not raised during adjudication but could and should have been raised then.[918] This supports the notion that adjudicators must decide issues of fraud when raised. Failing to do so may render the decision unenforceable for breaching the rules of natural justice due to adopting an erroneously restrictive view of his/her own jurisdiction[919] also known in Scotland as failure to exhaust jurisdiction[920].

This obligation may increase fraud allegations coupled with reluctance to submit evidence citing the Proceeds of Crime Act 2002 (POCA). In *SG South*, the responding party alleged that the referring party had committed fraud, whilst also saying that it:

> could not circulate documents about the fraud by reason… [of POCA] but they might afford access to the Adjudicator to read the file if he so required.

Indeed, POCA s.342 provides that if a person knows or suspects that an officer is acting or proposing to act in connection with an investigation[921], then any disclosure likely to prejudice the investigation[922] is punishable with up to five years imprisonment or a fine or both[923]. Interjection of criminal law into civil

[918] *PBS Energo A.S. v Bester Generacion UK Ltd* [2020] EWCA 404, para.23.

[919] *Pilon Limited v Breyer Group Plc* [2010] EWHC 837, para.17.

[920] *DC Community Partnerships Ltd V Renfrewshire Council* [2017] CSOH 143, para.1.

[921] See POCA, s.341 for various types of investigations.

[922] POCA, s.342(1).

[923] POCA, s.342(7).

proceedings is often complex. Here, the party arguing fraud as a defence also resorts to a statute prohibiting disclosure likely to prejudice a criminal investigation, to justify not providing evidence to support its own allegations. The court in *SG South* offered no guidance for adjudicators. In fact, no guidance could be found at all, whether from case law or professional organisations, on how adjudicators should deal with such uncomfortable situations.

Regarding parties citing POCA for not disclosing evidence, the mere reference to POCA is arguably a 'tip off' to the other party about a known or suspected investigation. Depending on the nature of the evidence, it may be better to simply disclose the evidence and avoid reference to POCA altogether.

Furthermore, sections 342(3)(c) and 342(4) of POCA provide immunity to a professional legal adviser making a disclosure that is likely to prejudice an investigation, insofar as such disclosure is made to any person in connection with legal proceedings or contemplated legal proceedings. It is not clear why only legal advisors have this immunity, whilst parties representing themselves have not. No justification could be found for this disparity.

In *Bowman v Fels*[924] the EWCA confirmed that, considering sections 342(3)(c) and 342(4), 'it may be that [POCA] would create no problem in the context of legal proceedings'[925]. However, POCA and the courts have not clarified whether the term 'legal proceedings' covers arbitration and adjudication. Since adjudication is mandated by statute, and courts require parties to raise fraud allegations during adjudication, this thesis argues that adjudications should be deemed 'legal proceedings' under POCA.

Therefore, the best guidance for an adjudicator is to:

[924] [2005] EWCA 226.

[925] *ibid*, para.104.

- Refuse to consider any evidence that a party had no opportunity to review and comment upon, because this can breach the rules of natural justice rendering the decision unenforceable[926].
- Rather than expressly directing disclosure of the evidence, inform the parties that he/she is obliged to reach a decision on the issue of fraud based on the evidence submitted.
- Consequently, decide the issue of fraud based on the evidence before him/her.

This promotes procedural justice as the accuser is given the opportunity to be heard while the accused can review the evidence against it and respond.

6.6 Timing for referring a dispute to adjudication

Since BCISPA(NSW) only permits adjudication of payment claims, serving a valid payment claim is a condition precedent to the right for adjudication. BCISPA(NSW) limits the period for submitting a payment claim to '12 months after the construction work to which the claim relates was last carried out'[927], unless a longer period is agreed[928]. However, this must be viewed in conjunction with the limitations that:

1. 'A payment claim may be served on and from the last day of the named month in which the construction work was first carried out… and on and from the last day of each subsequent named month'[929]; and
2. Only one payment claim may be served in any particular named month[930]; and
3. The finding in *Grid Projects NSW Pty Ltd v Proyalbi Organic Set Plaster Pty Ltd*[931] that the term 'the last day of each subsequent named month'

[926] *Rsl (South West) Ltd. v Stansell Ltd.* [2003] EWHC 1390, paras.31-33.

[927] BCISPA(NSW), s.13(4)(b).

[928] BCISPA(NSW), s.13(4)(a).

[929] BCISPA(NSW), s.13(1A).

[930] BCISPA(NSW), s.13(5).

[931] [2012] NSWSC 1571.

means ‘the last day of each subsequent month in which work was undertaken’[932].

The above support the notion that only one valid payment claim can be submitted after work was last undertaken.

Section 6.2 above explained BCISPA(NSW)’s three payment dispute scenarios following a valid payment claim. These in return generate five possible adjudication scenarios, each having strict deadlines:

1. The payer provides a valid payment schedule indicating a lesser amount than the payee’s claim[933]. The payee must issue its adjudication application within 10 business days from receiving the payment schedule[934].
2. The payer provides a valid payment schedule but fails to pay the indicated amount in full by the final date for payment[935]. The payee must issue its adjudication application within 20 business days after the final date for payment[936].
3. The payer fails to provide a valid payment schedule and fails to pay the amount claimed by the payee in full by the final date for payment[937]. The payee must, within 20 business days following the final date for payment, give notice to the payer of the payee’s intention to apply for adjudication. The payer then has a second opportunity to issue a payment schedule within 5 business days from such notice[938]. This may result in three different adjudication scenarios:
   3.1. The payer fails again to provide a valid payment schedule (and fails to pay the amount claimed by the payee) within these 5 business days. The payee can commence adjudication within 10 business days after the expiry of the aforesaid 5 business days[939].

[932] *ibid*, para.23 (Stevenson J).

[933] BCISPA(NSW), s.17(1)(a)(i).

[934] BCISPA(NSW), s.17(3)(c).

[935] BCISPA(NSW), s.17(1)(a)(ii).

[936] BCISPA(NSW), s.17(3)(d).

[937] BCISPA(NSW), s.17(1)(b).

[938] BCISPA(NSW), s.17(2).

[939] BCISPA(NSW), s.17(3)(e).

3.2. The payer provides a payment schedule within these 5 business days indicating a lesser amount than the payee's claim. The payee can commence adjudication within 10 business days after the expiry of the aforesaid 5 business days[940].

3.3. The payer provides a payment schedule within these 5 business days, but fails to pay the indicated amount in full. The payee can commence adjudication within 10 business days after the expiry of the 5 business days under s.17(2)[941].

In contrast to BCISPA(NSW)'s five specific adjudication scenarios that have differing deadlines for referring, HGCRA requires every contract to provide in writing that any party to the contract can 'give notice at any time of his intention to refer a dispute to adjudication'[942]. Failure to comply renders the Scheme applicable[943], which contains equivalent provisions[944]. Therefore, HGCRA does not have BCISPA(NSW)'s strict deadlines for commencing adjudication. For reasons explained below, HGCRA's approach is preferred.

BCISPA(NSW)'s deadlines have inherent disadvantages. Having to apply for adjudication within two weeks from receiving a payment schedule prevents parties from negotiating a resolution, since it is likely to take over two weeks to reach settlement. Furthermore, these deadlines represent a higher burden for smaller inexperienced contractors, who are less conversant with BCISPA(NSW). These are the same contractors the legislation sought to support in the first instance.

Moreover, BCISPA(NSW)'s 'strict and confusing'[945] deadlines for commencing adjudication were the main justification posed for preserving the advisory

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[940] ibid.

[941] ibid.

[942] HGCRA s.108(2)(a).

[943] HGCRA, s.108(5).

[944] Scheme, pt.I/para.1.

[945] Adjudicate Today, *Response to Proposed Changes to BCISPA Consultation Paper* (June 2016), p.12 quoted in Jeremy Coggins and Stephen Donohoe, 'Strength from Diversity: A Refined

capacity of ANAs. Abolishing these strict deadlines eliminates this justification, thus aligning with the recommendation of this thesis that ANAs should merely appoint the adjudicator, not advice the parties on jurisdictional or other matters.

Despite HGCRA's apparent right to adjudicate at any time, there are certain limitations:

1. Earliest and latest point that a dispute may be referred.
2. Contract stating that a decision or certificate pertaining to the dispute is final and conclusive.
3. Party commencing adjudication must have discharged any existing payment obligations under HGCRA s.111.

These are analysed hereunder for their significance in the legislation's operation.

6.6.1 Earliest and latest point a dispute may be referred

The earliest point for referring a dispute to adjudication is upon its 'crystallisation', a term denoting that a dispute exists[946]. Notifying a claim does not immediately give rise to a crystallised dispute. Provided the claim is not 'so nebulous and ill-defined that the respondent cannot sensibly respond to it'[947], a dispute crystallises when the claim is not admitted. This may occur by the respondent's express rejection, or through its conduct or silence.[948]

In *Beck Interiors Ltd v UK Flooring Contractors Ltd*[949], Akenhead J suggested that five days of silence, without specifying whether calendar or working, should suffice for inferring that the claim is disputed, whereas one working day would

Proposal for Unifying Australian Security of Payment Laws in Light of the Murray Review' [2018] Const.L.J. 19, p.35.

[946] *MW High Tech Projects UK Ltd v Balfour Beatty Kilpatrick Ltd* [2020] EWHC 1413, paras.27&36.

[947] *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA 291, para.29.

[948] *ibid*.

[949] [2012] EWHC 1808.

not[950]. Therefore, five working days would likely pass this test, unless the contract specifies a response period[951].

The referred dispute may not have crystallised if materially different from the notified claim, for example, referring to adjudication a £217,000 dispute when the notified claim was for £67,000[952]. However, a marginal difference between the notified claim and the dispute referred, or, introducing expert evidence or more detailed substantiation of the claim during the adjudication, do not mean that the referred dispute was not crystallised[953].

Regarding the latest point for referring a dispute to adjudication, the case of *Connex South Eastern Limited v MJ Building Services Group plc*[954] offers helpful insights. Connex argued that the term 'at any time' should not be read literally, arguing that permitting referral after the expiry of the applicable limitation period would breach the Limitation Act 1980. Connex observed that HGCRA does not define 'at any time', and relied on Hansard to argue that Parliament's intention was that adjudication may be commenced at any time, including after completion (or cessation) of the works:

> in the context of a procedure which was (a) quick, (b) cheap and (c) a temporary decision… if, as a result of the passage time, it is no longer possible to have a quick, cheap and temporary adjudication, then it is an abuse of process to permit…[955]

The CA rejected Connex's arguments and gave the term 'at any time' its literal interpretation, meaning that there is no time limit for commencing adjudication. However, in an adjudication commenced after the limitation period's expiration,

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[950] *ibid*, paras,25-27.

[951] *MW*, para.58.

[952] *Dickie & Moore Ltd v McLeish and others* [2020] CSIH 38, para.6.

[953] *MW*, para.59.

[954] [2005] EWCA 193.

[955] *ibid*, paras.36&37.

the adjudicator should decide in favour of the respondent if the limitation defence is taken.[956]

HGCRA is preferred because it does not prescribe any deadlines for commencing adjudication, while preserving a party's right to rely on the applicable limitation defence. Furthermore, as explained in the next section, for parties wishing to safeguard against late adjudications, HGCRA permits agreeing that a decision or certificate is final and conclusive unless adjudication is commenced within an agreed period.

6.6.2 Contract stating that a decision or certificate pertaining to the dispute is final and conclusive

The right to refer a dispute for adjudication at any time must be considered in conjunction with Scheme pt.I/para.20(a), which empowers the adjudicator to:

> open up, revise and review any decision taken or any certificate given by any person referred to in the contract **unless the contract states that the decision or certificate is final and conclusive** [Emphasis Added]

The contract may render a decision/certificate conclusive evidence for certain rights and obligations of the parties, unless proceedings commence challenging it within a given deadline. Failure to commence proceedings within the agreed deadline 'leads to serious consequences analogous to the consequences of limitation provisions'[957]. Whilst such clauses encourage prompt resolution of disputes, unfairness arises when the contract does not allow a reasonable time to bring those proceedings or does not allow that opportunity at all.

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[956] *ibid*, paras.38&39.

[957] *Bennett v FMK Construction Limited* [2005] EWHC 1268, para.18 (Havery J).

The latter occurred in *ISG Construction Ltd v English Architectural Glazing Ltd*[958], where the contract provided that the payer's bona fide estimate of loss incurred due to a breach by the payee is binding and conclusive pending final determination at final account stage. The judge said, obiter, that provided the estimate was bona fide, it was not open for the adjudicator to decide whether the estimate was right or wrong[959].

The freedom to agree 'conclusivity' clauses must be balanced against preventing abuse through terms rendering unilateral decisions conclusive without giving parties a reasonable opportunity to challenge. Therefore, Scheme pt.I/para.20 should be subject to the contract permitting either party to commence adjudication challenging the decision/certificate within at least 28 days from its issuance. If the contract provides for less than 28 days, or is silent on the matter, then any conclusivity provisions should become ineffective.

6.6.3 Requirement to have discharged payment obligations

In *S&T (UK) Ltd v Grove Developments Ltd*[960] the CA ruled a restriction to the right of commencing adjudication 'at any time', namely, when the payer has failed to comply with its payment notification obligations in response to a sum duly notified by the payee, thereby becoming liable to pay such sum under HGCRA s.111.[961] The CA considered conflicting case law, ranging from findings that the payer has no right to commence 'true value' adjudication if it had failed to comply with its payment notification obligations, to findings suggesting that the payer can commence a 'true value' adjudication at any time and use its outcome to counter a 'smash-and-grab' adjudication[962].

[958] [2019] EWHC 3482.

[959] *ibid*, para.40.

[960] [2018] EWCA 2448.

[961] *ibid*, para.107.

[962] *ibid*, paras.70-102.

Chapter Four explained that 'smash-and-grab' is an adjudication where the decision depends on whether timeous and valid payment notifications were issued, as opposed to a decision reflecting the account's 'true value' after considering the parties' substantive claims and defences. The CA ruled that the payer's right to commence a true value adjudication is not lost. However, the payer must first pay the sum ordered in a 'smash-and-grab' adjudication before commencing a 'true value' adjudication because:

> As a matter of statutory construction… the adjudication provisions are subordinate to the payment provisions… [HGCRA] cannot sensibly be construed as permitting the adjudication regime to trump the prompt payment regime… [therefore, HGCRA] must be construed as prohibiting the employer from embarking upon an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation.[963]

Although in *S&T* the UKSC granted permission to appeal[964], the parties settled prior to the case being heard. Therefore, it is open for the UKSC in future litigation to uphold or reverse the CA's ruling. The objective of this thesis is not to opine whether the CA's construction of HGCRA is correct, but rather to analyse its effect considering the recent case of *Davenport*[965] and propose the legislation's version that promotes procedural justice.

In *Davenport*, Stuart-Smith J juxtaposed the CA's decisions in *Harding v Paice*[966] and *S&T*. Stuart-Smith J said that *Harding* contains:

> no clear and unequivocal statement… that discharging the immediate obligation is a prerequisite to (a) starting and/or (b) relying upon a later true value adjudication decision… [therefore] it is *not* an essential

[963] *ibid*, para.107 (Jackson LJ).

[964] *S&T (UK) Ltd v Grove Developments Ltd* (SC, 22 May 2019).

[965] *M Davenport Builders Ltd v Greer & Anor* [2019] EWHC 318.

[966] [2015] EWCA 1231.

> prerequisite to relying upon a later true value adjudication decision that the earlier immediate obligation should be discharged *before launching* the later true value adjudication.[967]

By contrast, Stuart-Smith J said that *S&T* is:

> clear and unequivocal in stating that the employer must make payment in accordance with… [HGCRA s.111] before it can *commence* a 'true value' adjudication.[968]

Stuart-Smith J concluded that the implication of *Harding* and *S&T* is that:

> the Court will [not] always restrain the commencement or progress of a true value adjudication commenced before the employer has discharged his immediate obligation… It is not necessary for me to decide whether or in what circumstances the Court may restrain the subsequent true value adjudication...[969]

This syllogism relies on something not clearly said in an earlier case, to undermine something clearly said in a subsequent case. *Davenport* causes procedural justice concerns because:

- The 'smash-and-grab' and 'true value' adjudications may be running concurrently.
- Irrespective of the outcome in the 'smash-and-grab' adjudication, the adjudicator in the 'true value' adjudication seems to have jurisdiction to determine the dispute referred to him/her and therefore should press on.
- The payee has to apply to the courts for an injunction to restrain the 'true value' adjudication (it is unclear in which circumstances the court shall entertain such application).

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[967] *Davenport*, para.19.

[968] *Davenport*, para.37.

[969] *Davenport*, para.37.

- Therefore, the payee potentially has three different proceedings running concurrently, namely the ‘smash-and-grab’ adjudication (or enforcement proceedings thereof), the ‘true value’ adjudication, and the injunction application; all at a time of reduced cashflow due to the non-payment.

Furthermore, the payee is unsure how much time and money to invest in the ‘true value’ adjudication, and what line of argument to adopt. Nissen suggests the payee argues that ‘the employer’s claim for a declaration as to the true value (with payment consequent thereon) must fail because the employer has not first complied with his statutory obligation to pay the notified sum’[970]. However, its prospect of success is uncertain considering *Davenport.* Furthermore, if the employer pays halfway through the adjudication, for example, once the decision in the ‘smash-and-grab’ adjudication is issued, or the injunction hearing is about to take place, the payee may lose its opportunity to properly present its case in the true value adjudication.

Therefore, the legislation requires statutory or judicial intervention to confirm one of the following alternatives:

- Alternative One: The adjudication provisions are independent, not subordinate, to the payment provisions, effectively reversing *S&T* on this point. Consequently, the payer can commence ‘true value’ adjudication at any time and rely on its outcome to challenge a ‘smash-and-grab’ adjudication; or
- Alternative Two: The adjudicator in a ‘true value’ adjudication shall not have jurisdiction if the payer has issued its notice of adjudication prior to discharging its payment obligations under s.111. This upholds and enshrines *S&T*.

However, as will be explained, both alternatives have undesirable consequences.

[970] SCL and TECBAR, *Who should have won S&T V Grove in the Supreme Court? Delegate pack* (Mock Supreme Court Hearing, 21 January 2020).

Chapter Four argued that an imperative feature of the legislation is its payment notification mechanism whereby, provided the payee has complied with its notification obligations, failure of the payer to adhere to its notification obligations renders the payer liable to pay the sum notified by the payee. Alternative One attacks this feature at its very core, albeit offering procedural clarity.

Alternative Two can undermine procedural justice, as explained in the following three hypothetical scenarios:

1. A payer realises it failed to comply with its payment notification obligations, and therefore commences 'true value' adjudication prior to the payee commencing 'smash-and-grab' adjudication. The 'true value' adjudicator would lack jurisdiction insofar as the payee raised and maintained the jurisdictional challenge.
2. The above scenario presumed the payer's default; therefore, the answer was easy. In reality the parties will likely vigorously argue the validity of the payer's and/or the payee's payment notification. Therefore, in 'true value' adjudication that runs parallel with 'smash-and-grab' adjudication, the 'true value' adjudicator must decide whether to press on, resign, or make a non-binding decision on his/her jurisdiction thereby answering the same question as the 'smash-and-grab' adjudicator[971].
3. Payer starts 'true value' adjudication few months after practical completion of the works to establish the final account. The payee's lawyers then find out that the payer had failed to comply with its payment notification obligations in respect of the payee's final account application for payment. The payee raises a jurisdictional challenge to the 'true value' adjudicator and commences 'smash-and-grab' adjudication. The logical answer to this third scenario is that the 'true value' adjudicator should resign for lack of jurisdiction. However, this would be an abuse of the legislation if the payee has done it as a direct response to the 'true value' adjudication rather than cash-flow concerns stemming from the prompt resolution of disputes.

[971] For a review see: Jonathan Cope, *Implications of the Court of Appeal's decision in S&T v Grove Developments* (PLCB, 07 November 2018).

The legislation's optimal version must, therefore, balance the preservation of the repercussions for failing to comply with payment notification obligations, with the prevention of procedural difficulties and abuse. This is achieved by setting a deadline for commencing 'smash-and-grab' adjudication, in order for the adjudicator in 'true value' adjudication to lack jurisdiction. A reasonable deadline is 30 days (or any longer agreed between the parties) from the final date for payment of the sum claimed in the 'smash-and-grab' adjudication.

Where a 'smash-and-grab' adjudication has commenced within the deadline, an adjudicator in 'true value' adjudication shall have no jurisdiction until the 'smash-and-grab' adjudication is concluded and the payer complied with any payment ordered by the 'smash-and-grab' adjudicator. Provided a jurisdictional challenge is raised, the 'true value' adjudicator will have to decide whether the 'smash-and-grab' adjudication has commenced within the deadline, and if so, whether the payee has a real prospect of success in the 'smash-and-grab' adjudication. This simplifies the process and prevents, to certain extent, the undesirable scenario of the 'true value' adjudicator answering the same question as the 'smash-and-grab' adjudicator.

Where a 'smash-and-grab' adjudication is commenced after the deadline, then both the 'smash-and-grab' adjudicator and the 'true value' adjudicator shall have jurisdiction to decide the dispute referred to them. The purpose here is not prevent the 'smash-and-grab', but rather to allow both the 'smash-and-grab' and the 'true value' adjudications to proceed at the same time. Although the 'smash-and-grab' adjudication may be undermined if the payer relies in the outcome of the 'true value' adjudication in any enforcement proceedings, the payee would have no one to blame but itself for referring the 'smash-and-grab' adjudication late.

This compromise strikes a balance between ensuring that compliance with SPNO maintains its force and preventing the abuse of commencing a smash-and-grab adjudication late. Furthermore, it improves procedural justice by providing clarity and consistency to the rules governing whether an adjudicator lacks jurisdiction if the payer has failed to comply with its immediate payment obligations.

A cynical scenario arises if the payer, instead of the payee, commences ‘smash-and-grab’ adjudication, then withdraws before decision is issued, to prevent the payee from commencing the adjudication within the 30-day timeframe. This abuse is addressed by providing that the deadline recommences in such scenario, thereby the payee having 30-days to commence a smash-and-grab adjudication following the resignation of the former adjudicator.

6.7 Conclusion

This chapter reviewed the statutory right to commence adjudication, the nature of disputes that can be referred and the timing in which they can be referred, recommending the legislation’s version that promotes the highest degree of procedural justice whilst preserving its speed. HGCRA’s equal right to adjudication was preferred over BCISPA(NSW)’s asymmetric for achieving higher degree of procedural justice. Opponents’ argument that an equal right to adjudication would render the process unaffordable for ‘have-nots’, actually weighs in favour of permitting all parties to commence adjudication because it is the only realistic recourse for both ‘haves’ and ‘have-nots’.

HGCRA’s version of allowing parties to agree the ANA in their contract was also preferred, as opposed to BCISPA(NSW)’s unilateral choice by the claimant. Furthermore, the role of ANAs should be confined to nominating the adjudicator, not advising the parties nor administering the process.

Regarding the nature of disputes that can be referred, HGCRA’s wider scope of ‘any dispute’ was preferred over BCISPA(NSW)’s narrower ‘payment dispute’. The former permits simplification of the adjudication process by referring a single disputed issue instead of an overall payment dispute consisting of several disputed issues. Furthermore, the adjudicator must have jurisdiction to determine issues of fraud, negligence and misrepresentation.

HGCRA's freedom to commence adjudication 'at any time' was preferred over BCISPA(NSW)'s strict deadlines because the latter hinders parties from negotiating settlement, whilst also representing a burden for 'have-nots'. Furthermore, eliminating BCISPA(NSW)'s deadlines assists in achieving the recommendation of this thesis that ANAs should not offer jurisdictional advice to the parties.

However, this thesis favoured certain limitations to the right of commencing adjudication at any time:

- The earliest point for referring a dispute to adjudication is upon its 'crystallisation' as defined in section 6.6.1.
- Adjudication must be subject to the limitation defence.
- To encourage prompt resolution of disputes, the contract may provide that a decision/certificate is conclusive insofar as it permits commencement of adjudication within at least 28 days from the issuance of such decision/certificate.
- If the payer has failed to comply with its payment notification obligations in response to a sum duly notified by the payee, and a 'smash-and-grab' adjudication has commenced within 30 days (or other longer deadline agreed) from the final date for payment of such sum, then an adjudicator in a 'true value' adjudication shall have no jurisdiction until the 'smash-and-grab' adjudication is concluded and the payer has made any payments ordered.

Chapter Seven: Adjudication process from notifying intention to refer until the issuance of the decision

7.1 Introduction

Chapter Six undertook a comparative analysis between HGCRA's and BCISPA(NSW)'s right to commence adjudication, the nature of disputes that can be referred and the timing in which they can be referred. Chapter Seven focuses on the procedures from when a party decides to commence adjudication until the adjudicator's decision is issued.

Chapter Seven first reviews the adjudication process under BCISPA(NSW) and HGCRA, followed by contrasting the procedures for appointing an adjudicator. It then compares the submissions exchanged during adjudication and the adjudicator's conduct to avoid jurisdictional challenges or arguments that he/she breached the rules of natural justice. Chapter Seven finally examines the allocation of adjudication's costs, the right to withdraw from adjudication and whether an adjudicator can exercise a lien over his/her decision.

These components forming the adjudication process are comparatively analysed with the aim of identifying the legislation's version that promotes the highest degree of procedural justice whilst preserving its speed[972]. That is the version which, without compromising on speed, promotes both parties' normative experiences of procedural justice including the opportunity to be heard and considered by an unbiased adjudicator, whilst having balanced procedural rights and obligations during the adjudication.

7.2 Overview of the adjudication process under BCISPA(NSW) and HGCRA

[972] Ch.2/s.2.7.

The following two sub-sections outline the adjudication process under each legislation. This sets the scene for the subsequent comparative analysis of each component forming the adjudication process, which aims at recommending the version that balances the opposing forces of speed and procedural justice.

7.2.1 BCISPA(NSW)'s adjudication process

Chapter Six[973] explained BCISPA(NSW)'s five adjudication scenarios and their deadlines for issuing adjudication applications. For all scenarios, the application to an adjudication nomination authority (ANA) must be in writing, accompanied by any applicable fee, identify the payment claim and any payment schedule, and contain any relevant submissions the payee chooses to include[974]. A copy must be served to the payer[975]. Upon receipt, the ANA must refer it to an adjudicator as soon as practicable[976]. The adjudicator accepts the appointment by issuing a notice of acceptance to both parties[977].

BCISPA(NSW) prescribes two procedures and timeframes depending on the scenario:

1. Where the payer failed to provide a payment schedule in the two opportunities afforded, it has no right to lodge an adjudication response[978]. The adjudicator must issue his/her determination within 10 business days after the adjudicator's notice of acceptance[979] unless both parties agree to extend[980].
2. For all other scenarios, the payer can issue a response within 5 business days after receiving the adjudication application, or, 2 business days after

[973] Ch.6/s.6.6.

[974] BCISPA(NSW), s.17(3).

[975] BCISPA(NSW), s.17(5).

[976] BCISPA(NSW), s.17(6).

[977] BCISPA(NSW), s.19.

[978] BCISPA(NSW), s.20(2A).

[979] BCISPA(NSW), s.21(3)(a)(ii).

[980] BCISPA(NSW), s.21(3)(b).

receiving the adjudicator's notice of acceptance, whichever is later[981]. However, the payer cannot include any reasons for withholding payment unless they were included in the payment schedule[982]. The response must be in writing, identify the adjudication application to which it relates, and contain such submissions relevant to the response as the respondent chooses to include[983]. The adjudicator shall not consider a late response[984] and must issue his/her determination within 10 business days after the payer's response, or, if no response is issued, within 10 business days after the end of the period within which the payer could issue a response[985] unless both parties agree to extend[986].

The adjudicator has the power to:

- request further submissions from either party provided he/she gives the other an opportunity to comment on those submissions[987].
- set deadlines for such submissions and comments[988].
- call a conference with the parties[989], which shall be conducted informally and without legal representation[990].
- inspect any matter to which the claim relates[991].

The adjudicator's power to determine the adjudication is not affected if any or both parties fail to comply with directions[992]. The adjudicator and the ANA are not liable for anything done or omitted to be done in good faith[993].

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[981] BCISPA(NSW), s.20(1).

[982] BCISPA(NSW), s.20(2B).

[983] BCISPA(NSW), s.20(2).

[984] BCISPA(NSW), s.21(2).

[985] BCISPA(NSW), s.21(3)(a)(i).

[986] BCISPA(NSW), s.21(3)(b).

[987] BCISPA(NSW), s.21(4)(a).

[988] BCISPA(NSW), s.21(4)(b).

[989] BCISPA(NSW), s.21(4)(c).

[990] BCISPA(NSW), s.21(4A).

[991] BCISPA(NSW), s.21(4)(d).

[992] BCISPA(NSW), s.21(5).

[993] BCISPA(NSW), s.30.

The adjudicator's determination shall be in writing, served to both parties, and, unless otherwise agreed, be reasoned[994]. The determination includes any amount to be paid by the payer to the payee, the date such amount became or becomes payable, and any interest payable[995]. In reaching his/her determination, the adjudicator shall consider only BCISPA(NSW)'s provisions, the contract, the payment claim including all supporting submissions duly made, any payment schedule including all supporting submissions duly made and the results of any inspection[996].

The adjudicator may, on his/her own initiative or a party's request, correct any accidental errors in his/her decision[997]. If an adjudicator determines the value of an element of claim, then an adjudicator in any subsequent adjudication involving that same element is bound by that valuation unless satisfied that its value has changed since the previous adjudication[998].

7.2.2 HGCRA's adjudication process

HGCRA requires every contract to include written provisions that:

- enable a party to give notice at any time of its intention to refer a dispute to adjudication (notice of adjudication).
- Provide a timetable for securing the adjudicator's appointment and referral of the dispute to him/her within 7 days of such notice.
- require the adjudicator to reach a decision within 28 days of referral or any longer period agreed by the parties after the dispute has been referred.
- allow the adjudicator to extend this 28-day period by up to 14 days, with the referring party's consent.

[994] BCISPA(NSW), s.22(3).

[995] BCISPA(NSW), s.22(1).

[996] BCISPA(NSW), s.22(2).

[997] BCISPA(NSW), s.22(5).

[998] BCISPA(NSW), s.22(4).

- oblige the adjudicator to act impartially.
- enable the adjudicator to take the initiative in ascertaining the facts and the law.[999]
- state that the adjudicator's decision is binding until the dispute is determined by legal proceedings, arbitration (if agreed) or agreement. The parties may agree that the adjudicator's decision is final.[1000]
- permit the adjudicator to correct clerical or typographical errors in his/her decision arising by accident or omission.[1001]
- state that the adjudicator (including his/her employees or agents) is not liable for any act or omission in the discharge or purported discharge of his/her functions as adjudicator unless the act or omission is in bad faith.[1002]

Insofar as the contract complies with these requirements, the parties are free to agree procedural particulars. However, failure to comply with a single requirement means wholesale incorporation of the Scheme[1003], which sets more detailed provisions and grants the adjudicator additional powers. The Scheme is frequently incorporated, whether by agreement or implication. Therefore, its procedure is explained hereunder.

The referring party gives notice of adjudication to the responding party briefly explaining the project, the parties (including addresses for service of correspondence), their contract, the dispute's nature and where and when it has arisen, and the redress sought[1004]. The referring party then applies (including submitting a copy of the notice of adjudication[1005]) to the adjudicator or nominating body (ANB) agreed, or, if no agreement exists, to an appropriate

[999] HGCRA, s.108(2).

[1000] HGCRA, s.108(3).

[1001] HGCRA, s.108(3A).

[1002] HGCRA, s.108(4).

[1003] HGCRA, s.108(5).

[1004] Scheme, pt.I/para.1.

[1005] Scheme, pt.I/para.3.

ANB[1006]. The ANB must communicate the adjudicator's selection within five days from the application[1007]. The appointed adjudicator shall indicate his/her willingness to act within two days[1008].

The referring party must issue the referral notice to the adjudicator and the responding party within seven days from the notice of adjudication, setting out its detailed case and 'accompanied by copies of, or relevant extracts from, the construction contract and such other documents as the referring party intends to rely upon'[1009]. Upon receipt, the adjudicator must inform the parties of the date that the referral was received.[1010]

The adjudicator must reach his/her decision not later than 28 days from receiving the referral[1011], extendable by up to 14 days with the referring party's consent[1012]. Further extensions require both parties' consent[1013]. Failure to reach his/her decision within these deadlines renders any decision subsequently reached a nullity[1014], and any party can issue a fresh notice of adjudication[1015].

The adjudicator shall reach his/her decision within these deadlines and deliver a copy to the parties as soon as possible thereafter.[1016] Despite this distinction between 'reaching' the decision and 'delivering' it to the parties, the adjudicator is advised to deliver the decision before the deadline. In *Lee v Chartered Properties (Building) Ltd*[1017] the decision was unenforceable[1018] because the 74

[1006] Scheme, pt.I/para.2.

[1007] Scheme, pt.I/para.5(1).

[1008] Scheme, pt.I/para.5(3).

[1009] Scheme, pt.I/para.7(2)

[1010] Scheme, pt.I/paras.7(1)&7(3).

[1011] Scheme, pt.I/para.19(1)(a).

[1012] Scheme, pt.I/para.19(1)(b).

[1013] Scheme, pt.I/para.19(1)(c).

[1014] *Cubitt Building & Interiors Ltd v Fleetglade Ltd* [2006] EWHC 3413, para.76(c).

[1015] Scheme, pt.I/para.19(2)(a).

[1016] Scheme, pt.I/para.19(3).

[1017] [2010] EWHC 1540.

[1018] 'unenforceable' means that the court refuses to enforce the decision or otherwise quashes it, either in whole or in part. Chapter Eight explores the enforcement process.

hours lapsed between reaching the decision and delivering it to the parties was not deemed 'as soon as possible'[1019]. In *Cubitt*[1020], Coulson J said that the adjudicator shall issue the decision electronically by the deadline, and only in exceptional circumstances[1021] the court may afford leeway of 'a few hours at most… at the latest by the middle of the day after the final deadline'[1022].

The adjudicator shall consider all relevant submissions of the parties and make available to them any information to be considered in reaching his/her decision[1023]. The adjudicator shall avoid incurring unnecessary expense[1024]. The adjudicator can take the initiative in ascertaining the facts and the law and decide the procedure to be followed[1025]. The adjudicator has the power to:

- request documents reasonably required, including written statements supporting or supplementing submissions[1026].
- meet and question any of the parties and their representatives[1027].
- subject to obtaining any necessary consents, carry out tests, experiments, site visits and inspections, whether accompanied by the parties or not[1028].
- appoint experts or legal advisers after notifying the parties[1029].
- set the timetable, including deadlines or limits as to the length of written documents or oral representations[1030].
- issue other directions for conducting the adjudication[1031].

[1019] *Lee*, paras.32,33&35.

[1020] (n.1014).

[1021] *Cubitt*, para.92.

[1022] *ibid*, para.89.

[1023] Scheme, pt.I/para.17.

[1024] Scheme, pt.I/para.12(b).

[1025] Scheme, pt.I/para.13.

[1026] Scheme, pt.I/para.13(a).

[1027] Scheme, pt.I/para.13(c).

[1028] Scheme, pt.I/para.13(d)&13(e).

[1029] Scheme, pt.I/para.13(f).

[1030] Scheme, pt.I/para.13(g).

[1031] Scheme, pt.I/para.13(h).

Parties shall comply with the adjudicator's directions[1032]. If a party unreasonably fails to comply, the adjudicator may continue the adjudication and draw such justifiable interferences[1033]. The adjudicator considers the information before him/her, attaching such weigh as he/she thinks fit to any evidence submitted outside any deadline directed[1034]. Unless agreed otherwise, the parties may engage such advisers or representatives (whether legally qualified or not) as they consider appropriate[1035]. However, when the adjudicator is considering oral evidence or representations, a party may not be represented by more than one person, unless the adjudicator directs otherwise[1036].

The adjudicator shall decide the matters in dispute, including reasons for his/her decision if requested by a party[1037]. He/She may consider other matters that the parties agree should be within the adjudication's scope, or contractual matters necessarily connected with the dispute. Without limitation, the adjudicator may decide that a party is liable to make a payment and the final date for payment.[1038] Within five days from delivering his/her decision, the adjudicator may, on his/her own initiative or a party's request, correct any clerical or typographical errors[1039].

7.3 HGCRA's and BCISPA(NSW)'s differing approach for commencing adjudication

To commence adjudication, HGCRA (and the Scheme) require two different notices, namely the simpler 'notice of adjudication' followed by the more detailed 'referral' notice[1040]. The ANB uses the notice of adjudication and application form to appoint a suitable adjudicator who confirms his/her appointment to the parties.

[1032] Scheme, pt.I/para.14.

[1033] Scheme, pt.I/para.15(a)&15(b).

[1034] Scheme, pt.I/para.15(c).

[1035] Scheme, pt.I/para.16(1).

[1036] Scheme, pt.I/para.16(2).

[1037] Scheme, pt.I/para.22.

[1038] Scheme, pt.I/para.20.

[1039] Scheme, pt.I/para.22A.

[1040] see ch.7/s.7.2.2.

The ANB's involvement ends upon the adjudicator's appointment. The referral and all other submissions are issued to the adjudicator (and the other party), not the ANB. By contrast, under BCISPA(NSW) the claimant issues an 'adjudication application' to the ANA containing its detailed case, which the ANA then refers to the nominated adjudicator.

The previous chapter argued that ANAs/ANBs should merely nominate an adjudicator, not administer the process. Therefore, HGCRA's version is preferred, whereby a simpler document is first issued enabling the responding party to understand the basics of the dispute and the ANA to appoint a suitable adjudicator. There is no benefit in sending the detailed case and supporting documents to the ANA, with the ANA then forwarding all documentation to the adjudicator, as this carries additional burden for the ANA.

The Scheme requires the referring party to issue the 'notice of adjudication' to the responding party first, and then to the ANB[1041]. By contrast, HGCRA s.108 is silent on this matter. Accordingly, under the Scheme, an adjudicator's appointment is invalid if the notice is sent to the ANB first and then to the responding party, or, sent to both at the same time by, for example, copying them in the same email[1042]. However, where the contractual adjudication regime is compliant with HGCRA s.108 and does not prescribe a sequential issuing or mode of issuing, then emailing the notice of adjudication to the ANB and copying the responding party to that email shall not invalidate the adjudication[1043].

By contrast, BCISPA(NSW) requires the adjudication application to be made to the ANA, with a copy issued to the respondent, without specifying a deadline for serving the copy to the respondent. In *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor*[1044] the court found that it shall be provided as soon as possible[1045]. When the referring party is legally represented it will likely be 'the

[1041] Scheme, pt.I/paras.1&2.

[1042] *Lee*, paras.15-16.

[1043] *C Spencer Ltd v MW High Tech Projects UK Ltd* [2021] EWHC 1284, paras.59-71.

[1044] [2019] QCA 177.

[1045] *Niclin*, paras.3&14.

same day… [whilst] in other cases it may take longer'[1046]. NSWFT states that it must be served to the respondent 'at the same time' as it is lodged with an ANA[1047]. Read literally, this requirement can only be achieved by copying the respondent on the email when sending the application to the ANA. Adjudicate Today, on the other hand, says that it should be served 'on the same day'[1048] which is more appropriate wording and consistent with *Niclin*. However, no judicial support was found that next day service invalidates the adjudication.

HGCRA's approach is preferred, since issuing the notice to the referring party first, and then to the ANA, may bring the responding party to the negotiations table, and therefore assist parties to settle without applying for adjudication. If resolution does not occur, and the referring party is concerned over the 7-day deadline between the 'notice' and 'referral', it can issue a fresh notice of adjudication restarting the clock.

To prevent jurisdictional objections, HGCRA and the Scheme should be amended to permit issuing the notice of adjudication to the responding party and the ANB at the same time, or, to the responding party first and then to the ANB. This is also consistent with Coulson's suggestion of issuing the notice of adjudication simultaneously to the responding party and the ANB[1049].

HGCRA does not require copying the responding party in the application form to the ANB, which usually includes important representations to assist the ANB in appointing a suitable adjudicator. For example, the RICS permits the referring party to specify the adjudicator's background 'e.g. surveyor, lawyer, architect etc.' and 'any adjudicators who would have a conflict of interest'.[1050] Abuse may occur

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[1046] *ibid*, para.41.

[1047] NSWFT, *Applying for adjudication* <https://www.fairtrading.nsw.gov.au/trades-and-businesses/construction-and-trade-essentials/security-of-payment/applying-for-adjudication> accessed 05 November 2022.

[1048] Adjudicate Today, *NSW: Claimant Prepares Adj Application* <https://www.adjudicate.com.au/nsw/served/claimant-not-paid-per-payment-schedule-prepares-adjudication-application> accessed 05 November 2022.

[1049] Coulson (n.57), para.18.16.

[1050] RICS, *Request for the appointment of a construction adjudicator in the United Kingdom* (RICS, March 2022), pp.3&4

if the adjudicator's expertise and qualifications are defined too narrowly, and/or exclude certain persons for alleged conflict of interest, thereby limiting potential adjudicators to very few or even a single person.

In *Eurocom Ltd v Siemens Plc*[1051] the referring party requested the exclusion of thirteen individuals, including the adjudicator in an earlier dispute between the parties for the same contract, due to conflicts of interest[1052]. This request to exclude the previous adjudicator was important since the same adjudicator is normally appointed in successive adjudications due to his/her familiarity which can save time and costs[1053]. The responding party was not copied in the application form and requested a copy shortly after the referral. The ANB initially refused, but later provided a copy after the matter escalated to the ANB's manager halfway through the adjudication.[1054] In the enforcement proceedings, the two main questions were whether the referring party's representation that the previous adjudicator had conflicts of interest was fraudulent, and if so, whether the appointed adjudicator lacked jurisdiction. Ramsey J answered both in the affirmative.[1055]

This decision deters referring parties from making unwarranted representations. However, the ANB's failure to copy the application form to the responding party did not breach natural justice even though the ANB's own policy required such copying[1056]. Ramsey J concluded that an ANB has no 'obligation to consult with the other party or seek to achieve a balance between the parties which may be required by procedural fairness'[1057].

<https://www.rics.org/contentassets/d5a806cd146a4144aaa692115b19d723/drs2c-mar-2022.pdf> accessed 05 November 2022.

[1051] [2014] EWHC 3710.

[1052] *ibid*, paras.3,4&7.

[1053] *ibid*, para.49; RICS (n.1050), p.6.

[1054] *Eurocom*, paras.9,25&26.

[1055] *ibid*, paras.57-75.

[1056] *ibid*, paras.80-82.

[1057] *ibid*, para.81.

The strict 7-day deadline between 'notice of adjudication' and 'referral notice' was determinative for this finding[1058]. However, this thesis aims to propose the legislation's version that promotes the highest degree of procedural justice whilst preserving its speed. Although ANBs merely appoint adjudicators rather than deciding the dispute[1059], their function is inherent to the adjudication process and affects the parties' perceived achievement of procedural justice. Therefore, since the referring party is permitted to make representations as to who shall or shall not be nominated, the respondent should have the opportunity to comment. Both legislations should therefore:

- Require the referring party to copy the responding party in the application form.
- Allow the responding party one working day to comment.
- Require the ANB to consider both parties' comments and give brief reasons for the nomination made.

BCISPA(NSW) s.17(6) requires the ANA to refer the dispute to an adjudicator as soon as practicable, without specifying a deadline. By contrast, HGCRA s.108(2)(b) and the Scheme pt.I/para.7(1) require the referring party to issue the 'referral notice' to the appointed adjudicator and the responding party within seven days after the 'notice of adjudication'. Failure to meet this deadline invalidates the adjudicator's appointment, and the responding party can challenge the adjudicator's jurisdiction[1060]. However, as with any jurisdictional challenge that could be raised, failure by the responding party to do so in the response and to reserve its position in subsequent communications waives the irregularity[1061].

Since an ANB has up to five days to appoint an adjudicator[1062], and the adjudicator has up to two days to confirm the appointment[1063], the referring party

[1058] *ibid*.

[1059] *ibid*.

[1060] *Hart Investments Ltd v Fidler* [2006] EWHC 2857, paras.50-51.

[1061] *ibid*, para.51.

[1062] Scheme, pt.I/para.5(1).

[1063] Scheme, pt.I/para.5(3).

must remain vigilant not to miss the deadline. Tips include applying to the ANB immediately after issuing the notice of adjudication to the responding party, or at the same time if the recommendation to amend HGCRA and the Scheme permitting this is adopted. Furthermore, the referral notice including all supporting documents must be ready for issuing as soon as the adjudicator confirms his/her appointment.

In *KNN Coburn LLP v GD City Holdings Limited*[1064], the referral was issued by email on 31.01.2013 but without its supporting documents 'clearly intended to be read in conjunction'[1065], hardcopy of which arrived via courier the next day 01.02.2013. The adjudicator found that the referral was served on 01.02.2013. However, Stuart-Smith J found that it was duly served on 31.01.2013 without specifying any length of delay in the arrival of the supporting documents that would invalidate the referral.[1066] Referring parties may abuse this by delaying sending the supporting documentation, leaving responding parties less time to consider and respond[1067].

Two questions arise as to the legislation's optimal version on this matter. First, whether an electronic version of the supporting documents should be sent to the responding party and the adjudicator on the same day as the referral notice. This is reasonably achievable since several platforms exist for sending large files electronically. Therefore, the legislation should require electronic submission of all supporting documents accompanying the referral on the same day as the referral. If the contract also requires hardcopies, then these can arrive within the marginal delay permitted by the courts. The legislation should also require electronic service of all documents pertaining to the adjudication. This leads to the second question, namely, whether adjudication should become paperless.

[1064] [2013] EWHC 2879.

[1065] *ibid*, para.3.

[1066] *ibid*, paras.3,7,17-27.

[1067] Jonathan Cope, *Take note of when your adjudication timetable starts* (PLCB, 8 October 2013).

The coronavirus pandemic led to adjudicators changing the standard practice of requiring hard copies of all documents, to only requiring electronic copies unless the contract required hard copies, and the parties did not agree with dispensing with this requirement. Reported difficulties include the need for clearer indexing and labelling, long files' titles preventing them from being downloaded and some problems with bespoke file hosting services. However, none of these issues caused an insurmountable hurdle.[1068] Furthermore, any difficulties associated with becoming paperless must be contrasted with the approach of delivering hard copies, which is not problem free[1069].

The construction industry has set ambitious targets for reducing its carbon footprint and the dispute resolution sector can contribute by becoming paperless. Calls for paperless arbitration and court proceedings existed before this pandemic[1070]. The pandemic encouraged the adoption of paperless proceedings and aided in making paperless the new custom. Both legislations should require only electronic submissions unless the contract requires all documents pertaining an adjudication to be served in hard copy form as well and the parties fail to agree dispensing with this requirement.

7.4 BCISPA(NSW)'s differing procedure for smash-and-grab adjudications versus HGCRA's consistent procedure for all adjudications

BCISPA(NSW) has two adjudication procedures depending on whether the payer issued a payment schedule[1071]. In a smash-and-grab adjudication, that is, where the payer allegedly failed to issue a payment schedule in response to the payee's

[1068] Jonathan Cope, *A few lessons I have learned from resolving disputes during the pandemic* (PLCB, 16 October 2020).

[1069] e.g. *AM Construction Limited v The Darul Amaan Trust* [2022] EWHC 1478, paras.15-62.

[1070] Leon Kopecký, *A Case for Paperless Arbitration* (Kluwer Arbitration Blog, 5 February 2017); David Jackson, *Is it time for paperless court hearings?* (Lawyer Monthly, 09 December 2019).

[1071] See ch.7/s.7.2.1.

payment application and subsequent reminder[1072], the payer is not entitled to issue a response[1073] and the adjudicator's decision must be issued within 10 business days from his/her appointment acceptance[1074] unless both parties agree to extend[1075]. In a true value adjudication, that is, where the payer issued a payment schedule, the payer may issue a response within 5 business days after receiving the adjudication application, or 2 business days after receiving the adjudicator's nomination acceptance, whichever is later[1076]. Unless both parties agree to extend[1077], the adjudicator's decision must be issued within 10 business days after the payer's response, or, if no response is issued, within 10 business days after the end of the period within which the payer could issue a response[1078].

By contrast, HGCRA has the same procedure irrespective of the dispute's nature. The adjudicator's decision must be issued within 28 days from the referral, extendable by up to 14 days with the referring party's consent, or longer with both parties' consent. There are no prescribed submissions between the referral and the decision. However, considering the adjudicator's duty to act impartially[1079], refusing a party the opportunity to be heard breaches the rules of natural justice[1080].

Therefore, two core differences are that:

1. In a smash-and-grab adjudication, BCISPA(NSW) prohibits the responding party from issuing a response whereas HGCRA allows it and requires the adjudicator's consideration thereof.

[1072] see ch.4.

[1073] BCISPA(NSW), s.20(2A).

[1074] BCISPA(NSW), s.21(3)(a)(ii).

[1075] BCISPA(NSW), s.21(3)(b).

[1076] BCISPA(NSW), s.20(1).

[1077] BCISPA(NSW), s.21(3)(b).

[1078] BCISPA(NSW), s.21(3)(a)(i).

[1079] Scheme, pt.I/para.12(a).

[1080] *CJP Builders Ltd v William Verry Ltd* [2008] EWHC 2025, paras.2,84-86: Adjudicator's decision unenforceable for refusing to consider response issued 6-10 hours late. Also see ch.7/s.7.6.3.

2. Subject to permissible extensions, BCISPA(NSW) requires the adjudicator's decision in a smash-and-grab adjudication to be issued within 10 business days from the adjudicator's nomination acceptance, or 12 business days in a true value adjudication[1081]. By contrast, subject to permissible extensions, HGCRA requires the adjudicator's decision to be issued within 28 days (20 business days) from the referral irrespective of the dispute's nature.

For both differences, HGCRA's approach is preferred. Although in a smash-and-grab adjudication the respondent cannot rely on any contractual defence or set-off[1082], it may nevertheless argue that it has complied with its statutory payment notification obligations (SPNO), or, that the referring party breached its SPNO, or, that the adjudicator lacks jurisdiction. BCISPA(NSW)'s approach, therefore, undermines procedural justice since it denies respondents the opportunity to participate in the decision-making process and voice their viewpoints, both central to parties' assessment of procedural fairness[1083].

Furthermore, this prohibition increases enforcement proceedings involving jurisdictional challenges. Obliging parties to raise jurisdictional challenges during the adjudication, whilst requiring the adjudicator to consider them and provide a reasoned decision, both increases procedural justice and reduces such litigation[1084].

Skaik encourages NSW adjudicators to refrain from deciding jurisdictional issues because of BCISPA(NSW)'s strict timeframes[1085]. HGCRA's timeframe, albeit also rapid, is longer and more flexible in extension than BCISPA(NSW).

[1081] Assuming the adjudication application was issued to the responding party at least three business days before the adjudicator's nomination acceptance and the responding party takes the two business days following such acceptance to issue its response.

[1082] see ch.4.

[1083] Meyerson, Mackenzie and MacDermott (n.376), pp.4-5.

[1084] explained in ch.7/s.7.5.

[1085] Samer Skaik, *Why should adjudicators refrain from deciding jurisdictional issues? (Part 1)* (27 June 2017) <https://www.linkedin.com/pulse/why-should-adjudicators-refrain-from-deciding-issues-samer-skaik-/> accessed 05 November 2022.

HGCRA's timeframe is therefore preferred. Although HGCRA is silent on when the response should be served, adjudicators ordinarily set the deadline in their timetable directions, falling between 7-14 days from the referral. It is not recommended to prescribe a deadline since this silence affords the adjudicator flexibility to direct the deadline for the response and any subsequent submissions based on the facts.

Whilst the recommended approach increases BCISPA(NSW)'s adjudication timeframe, this must be viewed in conjunction with Chapter Four's recommendation that the payee's reminder to the payer to comply with its SPNO be permitted to be issued earlier[1086], and also the upcoming Chapter Eight recommendation that the payee no longer have to apply to the ANA for an 'adjudication certificate' and then file that certificate to the court to enforce it, but instead, simply file the adjudicator's decision[1087]. These recommendations ultimately save time and contribute towards preserving the legislation's speed whilst improving its procedural justice.

7.5 Jurisdictional challenges

Subject to the differing obligations for raising and maintaining jurisdictional challenges explained in this section, both UK and NSW courts will not enforce an adjudicator's decision if satisfied that the adjudicator lacked jurisdiction[1088]. HGCRA and BCISPA(NSW) are silent on whether a party shall raise a jurisdictional challenge[1089] during adjudication to preserve its right to resist enforcement on that basis. Therefore, the courts determined the legislation's effect on this matter.

[1086] ch.4/s.4.4.8.

[1087] ch.8/s.8.3.

[1088] BCISPA(NSW), s.32A; *Probuild* (HCA), para.29; *Bresco* (UKSC), para.26.

[1089] For explanation of circumstances that the adjudicator lacks jurisdiction see: Adjudication Society and CIArb, *Construction Adjudication Practice Guideline: Jurisdiction of the UK Construction Adjudicator* (1 January 2016). BCISPA(NSW) has additional grounds due to its strict deadlines for applying to adjudication; see: ch.6/s.6.6.

In the UK, leading authority is *Bresco*[1090]. Coulson LJ, with whom McFarlane LJ and King LJ agreed, noted that a party actively participating in an adjudication that wishes to challenge the adjudicator's jurisdiction 'must do so "appropriately and clearly"'[1091] and reserve its jurisdictional challenge[1092] throughout the adjudication process, for example, whenever making a submission, requesting the adjudicator to correct an error or paying the adjudicator's fees[1093]. Failure to comply waives all known jurisdictional objections[1094].

Importantly, Coulson LJ recognised that the legislation's purpose would be undermined if a generic jurisdictional reservation at the start of the adjudication is deemed sufficient for the losing party to then 'comb through the documents' pertaining to the adjudication to find a jurisdictional point for resisting enforcement[1095]. After reviewing conflicting jurisprudence[1096], Coulson LJ supported the notion that generic jurisdictional reservations are insufficient if 'the objector knew or should have known of specific grounds for a jurisdictional objection but failed to articulate them' or aims to 'ensure that all options (including ones not yet even thought of) could be kept open'[1097].

In *Ove Arup & Partners International Ltd v Coleman Bennett International Consultancy Plc*[1098], O'Farrell J took ***Bresco's*** jurisprudence a step further, ruling that merely specifying a jurisdictional objection, for example the contract falling

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[1090] (EWCA) (n.6). Although *Bresco* progressed to the UKSC, the relevant jurisdictional points were not reviewed.

[1091] *Bresco* (EWCA), para.92(i).

[1092] *Aedifice Partnership Limited v Ashwin Shah* [2010] EWHC 2106 (Akenhead J), quoted in *Bresco* (EWCA), para.88: 'Words such as "I fully reserve my position about your jurisdiction" or "I am only participating in the adjudication under protest" will usually suffice…'.

[1093] Whether the party has waived its right will be fact specific. For relevant case law analysis see: Emma Healiss, *Received the adjudicator's decision? You still need to reserve your position on jurisdiction* (PLCB, 21 April 2021).

[1094] *Bresco* (EWCA), para.92(i).

[1095] *ibid*, para.91.

[1096] *ibid*, paras.85-90.

[1097] *ibid*, para.92(iv),93,94.

[1098] [2019] EWHC 413.

outside HGCRA's ambit, but without 'details as to the basis on which that assertion was made'[1099], shall not suffice in preventing waiver[1100]. Accordingly, a jurisdictional objection that should have been known during the adjudication cannot be relied upon in enforcement proceedings, unless specifically raised, with explanation of the argument, and maintained throughout the adjudication.

NSW courts ordinarily quash an adjudicator's decision where a jurisdictional error is established. However, the court may exercise wide discretion[1101] and refuse to quash the decision when a participating party does not raise before the adjudicator a known jurisdictional objection; thereby being deemed to have conferred 'jurisdiction by consent on a person exercising statutory functions, where otherwise that person did not have jurisdiction'[1102]. This prevents a party from taking 'its chances on other points before the adjudicator, whilst holding back the particular point, and raise it… [at enforcement stage] if the outcome of the adjudication were not to its liking'[1103] and in the process causing unnecessary expense to the other party[1104].

From this perspective, similarities can be drawn between UK and NSW jurisprudence. However, NSW's jurisprudence must be viewed considering BCISPA(NSW)'s 2018 amendment providing that if the court finds 'that a jurisdictional error has occurred in relation to an adjudicator's determination… the Court may make an order setting aside the whole or any part of the determination'[1105]. Therefore, BCISPA(NSW) now provides quashing an adjudicator's decision for jurisdictional errors, without expressly requiring such challenges to be raised in the adjudication.

[1099] *ibid*, para.24.

[1100] *ibid*, paras.19-27.

[1101] *Chase Oyster Bar v Hamo Industries* [2010] NSWSC 1167, para.9.

[1102] *Oppedisano v Micos Aluminium Systems* [2012] NSWSC 53, para.45 (McDougall J).

[1103] *Kembla Coal & Coke v Select Civil & Ors* [2004] NSWSC 628, para.110 (McDougall J).

[1104] *Oppedisano*, para.45.

[1105] BCISPA(NSW)(Amendment)(2018), para.33; BCISPA(NSW), s.32A.

Furthermore, BCISPA(NSW) limits arguments that respondents can raise during adjudication to those included in the payment schedule[1106]. Prospective jurisdictional challenges are seldom included in payment schedules, and therefore respondents can justify not raising them in the adjudication because BCISPA(NSW) prohibited it. Importantly, despite judicial encouragement to the contrary[1107], NSW adjudicators commonly refuse to consider jurisdictional objections based on BCISPA(NSW)'s limitation[1108]. Therefore, it is far more likely for a respondent in NSW to successfully introduce a jurisdictional challenge at enforcement stage than it is in the UK.

Skaik supports this trend of NSW adjudicators refusing to consider jurisdictional arguments. His rationale centres on BCISPA(NSW)'s tight timetable and adjudicators' lack of legal expertise.[1109] By contrast, courts and professional bodies in the UK strongly encourage adjudicators to consider jurisdictional objections. One of Coulson's seven golden rules for adjudicators reads:

> Address Jurisdiction Issues Early and Clearly. Adjudicators should always deal expressly with any jurisdictional challenge, and they should not abdicate the responsibility for providing an answer…[1110]

Consequently, UK adjudicators commonly provide a reasoned decision on jurisdictional challenges. The timetable for the substantive dispute usually continues to apply, with the adjudicator setting a separate quicker timetable inviting submissions on the jurisdictional objection. The adjudicator then confirms his/her findings on jurisdiction, and accordingly resigns or continues the adjudication. The adjudicator may reserve his/her reasoning to be issued with his/her decision.

[1106] BCISPA(NSW), s.20(2B).

[1107] *Acciona Infrastructure Australia Pty Ltd v Holcim (Australia) Pty Ltd* [2020] NSWSC 1330, para.38-39.

[1108] *ibid*, para.34.

[1109] Skaik, (June 2017) (n.1085).

[1110] Coulson (n.57), para.18.04.

Requiring parties to raise any jurisdictional objections and adjudicators to decide them increases the likelihood of decisions being substantively correct, as opposed to if those issues were not raised and considered. Furthermore, the process stimulates the core normative experiences of procedural justice, in that parties can voice any jurisdictional objections knowing that the adjudicator will consider them by applying the relevant rules and explaining the basis of his/her decision. By contrast, BCISPA(NSW)'s approach whereby adjudicators dismiss such objections as not included in the payment schedule, detracts that party's voice causing it to feel that it was treated with disrespect and even damaging its perception towards the adjudicator's neutrality and trustworthiness.[1111]

Finally, enforcement litigation is reduced for two reasons. Firstly, the objector, after reviewing the adjudicator's reasons, may find its jurisdictional argument to be weak, thus not worth the risk of additional costs that come with enforcement proceedings. Secondly, losing parties cannot comb through the decision and submissions in search of novel jurisdictional objections, since they are deemed to have waived them.

Therefore, it is recommended that parties participating in adjudication should raise jurisdictional objections promptly and clearly and reserve them throughout the adjudication to prevent waiver, and adjudicators should issue a reasoned decision on such objections. This promotes procedural justice as both parties are heard and considered, while it also improves the legislation's speed as parties are more likely to comply with the adjudicator's decision without the need of enforcement proceedings.

Although the UK position seems consistent with this recommendation, this has only been decided up to the CA stage. Furthermore, Cope suggests that case law still allows 'some wriggle room' for parties relying on general jurisdictional

[1111] See ch.2/s.2.7 for broader discussion on procedural justice.

reservations during adjudication to then particularise the challenge at enforcement stage[1112]. Therefore, both legislations merit amending.

Arbitration Act 1996 s.73 ‘Loss of right to object’, albeit with amendments, offers guidance in drafting the respective adjudication provision. The following wording is proposed for both legislations:

> If a party to adjudication proceedings takes part, or continues to take part, in the proceedings without making forthwith any objection that the adjudicator lacks jurisdiction, it may not raise that objection during enforcement proceedings unless it shows that, at the time it took part or continued to take part in the adjudication, it did not know and could not with reasonable diligence have discovered the grounds for the objection.
> A general reservation of a party's position as to jurisdiction does not serve to keep the right to object at enforcement stage open.
> For the responding party, the latest point to specify a jurisdictional objection that could with reasonable diligence be discovered after considering the ‘referral’ is with the ‘response’.
> For the referring party, the latest point to specify a jurisdictional objection that could with reasonable diligence be discovered after considering the ‘response’ is with the ‘reply to the response’.

7.6 Arguments that the adjudicator breached the rules of natural justice

The previous section explained the first of the two most common challenges to an adjudicator’s decision: the adjudicator lacked jurisdiction. This section reviews the second: the adjudicator breached the rules of natural justice. Natural justice

[1112] Jonathan Cope, *Does Cannon v Primus mean an end to general jurisdictional reservations?* (PLCB, 30 January 2019).

rules are two-fold, requiring the tribunal to, firstly, be unbiased, and secondly, afford parties an effective opportunity to be heard before making the decision[1113].

HGCRA s.108(2)(e) requires the adjudicator to act impartially, whilst Scheme pt.I/para.4 adds that the adjudicator 'shall not be an employee of any of the parties to the dispute and shall declare any interest, financial or otherwise'. BCISPA(NSW) s.18(2)(a) precludes a person that is party to the contract from acting as adjudicator, whilst recent regulations extend this preclusion to instances where 'a reasonable person would conclude the person has an actual or perceived conflict or would not adjudicate impartially'[1114]. Beyond these provisions, both legislations are silent regarding rules of natural justice.

Both UK and NSW courts declared the natural justice principles applicable to adjudication, whilst drawing a line between insignificant procedural irregularities and material breaches of these principles. To successfully resist enforcement of an adjudicator's decision, a party must demonstrate that there has been a serious breach, beyond mere procedural errors.[1115] A test applied in both jurisdictions is whether, but for the breach, the adjudicator could have been induced to come to a different view[1116].

The two rules explained in the first paragraph are distinct. That is, whilst a biased adjudicator may have afforded a party an effective opportunity to be heard, it is also possible for an unbiased adjudicator to have denied a party an effective opportunity to be heard. In both situations, the decision breaches the rules of natural justice and is unenforceable.[1117]

[1113] Originating from the Latin 'nemo judex in causa sua' and 'audi alteram partem' respectively; see: Muhammad Zubair and Sadia Khattak 'The Fundamental Principles of Natural Justice in Administrative Law' [2014] J. Appl. Environ. Biol. Sci. 68.

[1114] BCISPA(NSW)(Regulation)(2020), para.19(2)(b).

[1115] *Carillion* (n.316), para.52; *Brolton Group Pty Ltd v Hanson Construction Materials Pty Ltd* [2020] NSWCA 63, para.53.

[1116] *Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd* [2020] NSWSC 1423, paras.41,49&173.; *Pilon* (n.919), para.22.4.

[1117] *Amec Capital Projects Ltd v Whitefriars City Estates* [2004] EWCA 1418, para.14.

The following subsections review the:

1. importance of disclosure for avoiding appearance of bias;
2. overlap between the adjudicator's duty of impartiality and fair hearing;
3. extent of the adjudicator's obligation to consider defences, arguments and/or evidence not included in the payment notification documentation.

7.6.1 Disclosure and avoiding appearance of bias

Whilst NSW's Arbitration Act obliges arbitrators to 'disclose any circumstances likely to give rise to justifiable doubts as to [their] impartiality or independence'[1118], the English Arbitration Act is more akin to HGCRA and BCISPA(NSW) in that it does not specify disclosure requirements. However, in the leading case of *Halliburton Company v Chubb Bermuda Insurance Ltd*[1119] the UKSC ruled that arbitrators are legally obliged, as opposed to the obligation merely being a matter of best practice, to disclose circumstances that might lead the fair-minded and informed observer to conclude that there is a real possibility of bias[1120]. It is submitted that the same extends to adjudicators because of the common statutory duty of arbitrators and adjudicators to act impartially[1121]. This point is supported by literature[1122]. Complying with disclosure obligations does not imply a lack of impartiality; to the contrary, it denotes a 'badge of impartiality'[1123].

Even though *Halliburton* concerned arbitration, it has far wider impact on all forms of dispute resolution. It particularly explains the duty to disclose appointments in multiple references concerning the same or overlapping subject matter with only one common party. This is important in statutory adjudication, where certain

[1118] CAA(NSW), s.12(1).

[1119] [2020] UKSC 48.

[1120] *Halliburton*, paras.74-81.

[1121] AA(EW), s.33; HGCRA s.108(2)(e); BCISPA(NSW)(Regulation)(2020), para.19(2)(b).

[1122] Hamish Lal, *Halliburton vs Chubb: disclose, disclose, disclose* (Building, 30 November 2020); Jonathan Cope, *Does the Supreme Court's judgment in Halliburton v Chubb have any implications for adjudication?* (PLCB, 08 December 2020).

[1123] *Halliburton*, para.70.

adjudication specialists may be appointed on such multiple disputes with similar issues. If the adjudicator accepts the subsequent appointment, then, in the absence of an agreement to the contrary between the parties to whom disclosure should otherwise be made, he/she must disclose any such multiple appointments to the parties of both the current and proposed adjudication, offering them the opportunity to object to the adjudicator accepting the new appointment.[1124]

Whilst the Scheme contains a provision to this effect for concurrent adjudications[1125], *Halliburton* clarifies that this obligation exists even if the Scheme does not apply. Disclosure to the party of a completed adjudication may also be required for avoiding any breach of confidentiality in circumstances where the party in the new adjudication requests copies of documents exchanged in the completed adjudication to overcome the 'inequality of arms'[1126] between it and the party that is common to both adjudications[1127].

Although not necessarily representing the legal test, the UKSC also acknowledged[1128] the helpfulness of the IBA Guidelines on Conflicts of Interest[1129], which are formed by two parts. Part I explains the General Standards regarding impartiality, independence and disclosure[1130], while Part II involves a practical application of these general standards[1131] and divides several example situations into four categories:

1. Red Non-Waivable: Conflicts of interest that disqualify a person from acting as arbitrator[1132].
2. Red Waivable: Conflicts that are 'serious but not as severe' as the Non-Waivable Red category. The arbitrator is disqualified unless the parties,

[1124] *Halliburton*, paras.125-131,136.

[1125] Scheme, pt.I/para.8(2).

[1126] *Halliburton*, paras.164&172.

[1127] *Halliburton*, paras.146&188.

[1128] *Halliburton*, paras.54&71.

[1129] IBA, *International Bar Association Guidelines on Conflicts of Interest in International Arbitration* (IBA, 2014).

[1130] ibid, pp.4-16.

[1131] ibid, pp.17-27.

[1132] ibid, pp.6&20.

having knowledge of the conflict, agree that he/she may nevertheless act[1133].

3. Orange: Situations that may, in the parties' eyes, give rise to doubts as to the arbitrator's impartiality. The arbitrator shall disclose such situations.[1134]
4. Green: Situations which, from an objective view, do not give rise to conflict of interest or appearance of bias, therefore, the arbitrator has no duty to disclose them.[1135]

A survey published in 2015 found the IBA Guidelines on Conflicts of Interest alongside the IBA Rules on the Taking of Evidence to be 'the most widely known, the most frequently used and the most highly rated [soft law]'[1136]. However, an inevitable weakness of Part II of the IBA Guidelines is that its colour-coded categorisation of example situations does not consider particular facts that will be distinct in every real-life case. From this perspective, the general standards are more important than the indicative examples, and Part II relevantly recognises that, ultimately, 'the General Standards should control the outcome'[1137].

Therefore, a real-life situation does not have to fall squarely within a colour-coded example in order to merit disqualification or disclosure. Similarly, a real-life situation that on its face falls, for example, within the Red Non-Waivable category may, after considering its particular facts and the General Standards, be deemed to fall under a different category.

For example, in *W Ltd v M SDN BHD*[1138] the court found that the case fell within paragraph 1.4 of the Red Non-Waivable category, in that the arbitrator's firm

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[1133] ibid, pp.10,20-22.

[1134] ibid, pp.18,22-25.

[1135] ibid, pp.19,25-27.

[1136] White & Case and Queen Mary University, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration', p.3. <https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf > accessed 13 June 2023.

[1137] IBA (n.1129), p.17.

[1138] [2016] EWHC 422.

regularly advised a party's sister company and derived significant financial income therefrom[1139]. However, the court ultimately dismissed the challenge to the arbitrator's award because:

- The General Standards provide that the arbitrator's relationship with his/her law firm should be considered in each individual case. Any relationship between the arbitrator's firm and a party's sister company should be considered in each individual case, but shall not necessarily constitute by itself a source of a conflict of interest. Individual corporate structure arrangements vary widely, therefore, a catch-all rule is inappropriate.[1140]
- The arbitrator, although a partner, operated effectively as a sole practitioner using the firm for secretarial and administrative assistance for his work as an arbitrator.
- The arbitrator did not do any work for the client company.
- The arbitrator had made checks and disclosures albeit immaterial to the situation in question. The arbitrator was not alerted to the situation but would have disclosed it had he been alerted.[1141]

While non-disclosure of circumstances which ought to be disclosed 'inevitably colour the thinking of the observer'[1142] and damage the 'badge of impartiality'[1143], they are not conclusive evidence that the adjudicator is biased[1144]. The court shall consider the adjudicator's conduct when a party questions him/her on an undisclosed or disclosed circumstance. The adjudicator shall not respond evasively or aggressively[1145]. Instead, he/she shall review the request objectively and:

1. explain his/her failure to disclose;
2. make appropriate disclosure;

[1139] *ibid*, paras.6,11-13.

[1140] *ibid*, paras.38-39.

[1141] ibid, paras.20&21.

[1142] *Halliburton*, para.73.

[1143] *Halliburton*, para.70.

[1144] *Halliburton*, paras.38,73,133,155&156.

[1145] *Paice & Anor v MJ Harding (t/a Mj Harding Contractors)* [2015] EWHC 661, paras.39-51.

3. reconsider whether he/she has any doubts as to his/her ability to be impartial and independent when adjudicating the dispute and confirm to the parties.[1146]

With appropriate changes, the IBA Guidelines can assist drafting equivalent guidelines for adjudication. Where the adjudicator is appointed by an ANB, the preferred approach may be that the Non-Waivable and Waivable Red categories are merged into a (Non-Waivable) Red category. This will save time and costs since parties are unlikely to agree waiving the conflict. The IBA Guidelines acknowledge the thin borderline between categories[1147]. It is beyond the scope of this thesis to evaluate the appropriateness of IBA's categorisation in the context of construction adjudication. This is recommended for future research.

In a recent study involving 200 returned questionnaires, 14% of the participants stated that adjudicators never disclose circumstances that might give rise to an appearance of bias, whilst 31% stated that adjudicators rarely voluntarily do so. Furthermore, 40% suspected, at least once, that the adjudicator was biased because of his/her relationship with the other party or its advisors.[1148] In the study's foreword, Lord Coulson stated that this 'is a truly startling message… [which must be] promptly and fully addressed'[1149].

The way ANBs encourage disclosure can help addressing this issue. ANBs shall not ask potential adjudicators broad disclosure questions prior to appointment, for example, whether they are satisfied that there are no involvements within the past five years that may give rise to a perceived conflict of interest. Such broad questions, without any applicable objective standard, can lead to potential appointees erroneously believing that a particular circumstance did not require disclosure[1150]. Furthermore, such questions blend circumstances of the Red and

[1146] *Halliburton*, paras.148-150.

[1147] IBA (n.1129), pp.19&20.

[1148] Renato Nazzini and Aleksander Kalisz, *2022 Construction Adjudication in the United Kingdom: Tracing trends and guiding* (King's College London, October 2022), pp.5,10,34-36.

[1149] ibid, p.5.

[1150] *Cofely Ltd v Bingham & Anor* [2016] EWHC 240, paras.82-85,106-109.

Orange categories and can discourage disclosure since potential appointees may view them as reducing their chances of appointment.

Let us assume that the potential nominee acted as counsel once for a party within the last three years. If the ANB concurs with the IBA's categorisation, and therefore would class this within the Orange category, hence presumably not affecting its nomination decision-making, then why does the ANB require such disclosure prior to appointment? If instead, the ANB considers this circumstance to affect its decision-making on appointment, then it should class it within the Red category.

Therefore, ANBs should ask potential appointees two specific questions prior to appointment:

1. Do you have any doubts as to your ability to be impartial and independent when adjudicating this dispute?
2. Are there any circumstances that fall within the Red category?

ANBs should then require the appointed adjudicator to make the broader disclosure (Orange category) directly to the parties following his/her appointment. This recommendation coupled with clear guidelines on disclosure specifically for adjudicators will improve procedural justice by providing transparency on any circumstances that might give rise to doubts as to the adjudicator's impartiality, reducing perceptions among the parties that the adjudicator may be biased and reinforcing the adjudicator's trustworthiness.

7.6.2 Overlap between the adjudicator's duties of impartiality and fair hearing

Although the adjudicator's duties of impartiality and fair hearing are distinct, they are not mutually exclusive and may overlap in practice. That is, a circumstance that arose in the adjudication may lead to a challenge that the adjudicator both is biased and did not afford a party an effective opportunity to be heard. However,

that party only needs to persuade the court on one ground to successfully resist enforcement.

The test for determining bias in the UK and NSW is expressed differently, respectively whether, after considering the facts, 'the fair-minded and informed observer… would conclude that there was a real possibility that the [adjudicator] was biased'[1151] and 'the fair-minded lay observer might reasonably apprehend that the [adjudicator] might not bring an impartial mind to the resolution of the [dispute]'[1152]. Nevertheless, as the cases cited in the next paragraph indicate, the two main circumstances that may lead to an overlap between the duties of impartiality and fair hearing are consistent.

Firstly, the adjudicator having unilateral contact with one party that is not disclosed to the other[1153], and secondly, deciding the dispute upon a basis that neither party contended without first informing them of that basis and considering their comments[1154]. The overlap occurs because, whilst the dissatisfied party may argue that the adjudicator is biased due to the unilateral contact and predetermination of outcome respectively, it can also respectively contend that it was deprived of the opportunity to respond to arguments submitted by the other party during the communication and the adjudicator's basis for deciding the dispute.

The abovementioned principles positively developed the adjudication process by enhancing procedural justice. Nevertheless, as explained in the next section, a determinative matter the courts had to decide was the extent of the adjudicator's

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[1151] *Magill v Porter* [2001] UKHL 67, para.103.

[1152] *Charisteas v Charisteas* [2021] HCA 29, para.11.

[1153] *Discain Project Services Ltd v Opecprime Developments Ltd No1* [2000] BLR 402; *Paice*, paras.21-52; *Fifty Property Investments Pty Limited v Barry J O'Mara & anor* [2006] NSWSC 428, paras.43-45&55; *Filadelfia Projects Pty Limited v Entirity Business Services Pty Limited & Anor (No 2)* [2011] NSWSC 116, para.47.

[1154] *Musico & Ors v Davenport & Ors* [2003] NSWSC 977, para.108; *Acciona v Holcim* (n.1107), paras.53&74; *Balfour Beatty Construction Ltd v London Borough of Lambeth* [2002] EWHC 597, paras.33,36&38.

duty to consider arguments or evidence advanced in the adjudication but not detailed in the payment notification documentation.

7.6.3 The extent of the adjudicator's duty to consider arguments or evidence

Subject to fraud or jurisdictional challenges, the decision in a 'smash-and-grab' adjudication depends on whether timeous and valid payment notifications were issued. Should the payer seek to rely on any set-off claims, an adjudicator's failure to consider their merits does not breach the rules of natural justice[1155]. Nevertheless, adjudicators should expressly refer to any such set-off claims in their decision and dismiss them on the basis that no timeous and/or valid payment notification was served[1156].

This section reviews whether in a 'true value' adjudication, the adjudicator should consider a party's argument or evidence advanced in the adjudication but not detailed in the payment notification documentation. This raises two sub-issues:

1. Raising in the adjudication arguments or evidence that further develop and hone a claim or defence included in the payment notification documentation.
2. Raising in the adjudication a claim or defence not included in the payment notification documentation.

The dilemma is that, on one hand, requiring the adjudicator to consider such information renders the adjudication process more complex and susceptible to ambush tactics. On the other hand, limiting the information to the payment notification documentation conflicts with the natural justice rule of affording parties an effective opportunity to be heard. This is because a claim or defence included in the payment notification documentation may not be fully articulated,

[1155] *HS Works Ltd v Enterprise Managed Services Ltd* [2009] EWHC 729, para.51.

[1156] *CC Construction Ltd v Mincione* [2021] EWHC 2502, paras.113-133; Jonathan Cope, *TCC makes interesting findings relevant to Final Statement dispute* (PLCB, 26 October 2021).

and therefore requires additional evidence or pleadings to be properly understood, particularly by the adjudicator who is not as conversant as the parties into the factual background. Furthermore, a defence (or reply to a defence) might not have been know until after the circulation of the payment notification documentation.

Regarding the UK, in *Northern Developments (Cumbria) Ltd v J&J Nichol*[1157], Bowsher J considered HGCRA's SPNO and the temporary striking of balance intended thereof, finding that an adjudicator has no jurisdiction to consider matters not raised in the payment notification documentation[1158]. A similarly narrow approach was adopted in *Edmund Nuttall Ltd v R G Carter Ltd*[1159], where Seymour J refused to enforce the decision because the adjudicator considered a report on delay and prolongation featuring different methodology and conclusions from the pre-adjudication submissions. He reasoned that to find otherwise means 'that a party to an adjudication might be ambushed by new arguments and assessments which have not featured in the *"dispute"* up to that point'[1160].

However, case law subsequently took a different turn. In *Cantillon Ltd v Urvasco Ltd*[1161], Akenhead J disagreed with *Edmund Nuttall*, finding that parties are free to raise any arguments, contentions, evidence, or defences irrespective of whether those were advanced before the dispute crystallised[1162]. Similarly, expert reports constitute expert opinion evidence supporting the claim for which a dispute exists, not a new claim affecting the existence of the dispute already crystallised[1163].

Likewise, the responding party can raise any defence. The referring party cannot frame narrowly its notice of adjudication seeking a tactical advantage in that the

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[1157] [2000] EWHC 176.

[1158] *ibid*, para.29.

[1159] [2002] EWHC 400.

[1160] *ibid*, para.36.

[1161] [2008] EWHC 282.

[1162] *ibid*, para.55.

[1163] *MW* (n.946), paras.22,59,60.

responding party's set-off claims are outside the adjudicator's jurisdiction[1164]. However narrow the notice of adjudication, a claim confers jurisdiction to determine every defence including set-off[1165]. In *Global Switch Estates 1 Ltd v Sudlows Ltd*[1166], O'Farrell J developed this further, finding that where the referring party seeks payment redress as opposed to declaratory relief without payment[1167], failure to consider a set-off breaches the rules of natural justice[1168].

By contrast, BCISPA(NSW) s.20(2B) prohibits the payer from introducing new reasons for withholding payment not included in the payment schedule. However, BCISPA(NSW) s.20(2)(c) permits the payer to raise such relevant submissions as the payer chooses to. Similarly, BCISPA(NSW) s.17(3)(h) permits the payee to raise such relevant submissions as the payee chooses to. BCISPA(NSW) ss.22(2)(c)&(d) oblige the adjudicator to consider all submissions duly made. This raises the question of whether reports introduced in the adjudication to support claims or defences contained in the payment notification documentation constitute new reasons, thus prohibited, or, relevant submissions duly made, thus shall be considered.

In *Brodyn v Davenport*[1169], although the NSWCA regarded this adjudicator's obligation under s.22(2) as a natural justice measure essential to validity, it concluded that the duty is discharged by applying s.22(2) in good faith when deciding whether the submission was duly made[1170]. That is, as reaffirmed by the NSWCA in *John Holland v Roads & Traffic Authority*[1171], should the adjudicator consider a submission and reasonably conclude that it was not duly made,

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[1164] *Pilon* (n.919), paras.22,25,27&66.

[1165] *Bresco* (UKSC), para.44.

[1166] [2020] EWHC 3314.

[1167] e.g. valuation of specific elements, entitlement to an extension of time, or that that the other party acted in breach.

[1168] *Global*, para.50.

[1169] [2004] NSWCA 394.

[1170] *ibid*, para.56&57.

[1171] [2007] NSWCA 19.

thereby dismissing it when reaching his/her decision, the decision is still valid even if on true construction the submission was duly made[1172].

In *Laing O'Rourke v H&M Engineering*[1173] and *Owners Strata v Stratabuild*[1174] the court refused enforcement because the adjudicator did not consider submissions raised in the adjudication but not included in the payment schedule. In these cases, the adjudicator's duty to consider submissions was interpreted as obliging the adjudicator to intellectually engage with their merits and substance.[1175] However, *John Holland* was not considered by these lower court cases.

By contrast, *John Holland* was considered in *Broad Construction Services (NSW) Pty Limited v Michael Vadasz*[1176] and *Pittwater Council v Keystone Projects Group Pty Ltd*[1177] where the decision was enforced despite allegations that the adjudicator breached the rules of natural justice for dismissing submissions as not duly made. Both cases reaffirmed that, insofar as the adjudicator acted in good faith and arrived at a reasonable conclusion, enforcement shall be granted irrespective of whether the adjudicator was correct.[1178]

In *State Water Corporation v Civil Team Engineering Pty Ltd*[1179] and *CC Builders v Milestone Civil*[1180] the court emphasised that *John Holland* requires the adjudicator's decision on whether a submission was duly made to be 'reasonable'. Consequently, if the adjudicator unreasonably and without foundation decides that a submission was not duly made, his/her decision is unenforceable.[1181] This, combined with the precedent that payment schedules

[1172] *ibid*, paras.57,63,71.

[1173] [2010] NSWSC 818.

[1174] [2011] NSWSC 1000.

[1175] *Laing O'Rourke*, paras.38,39,102; *Owners Strata*, paras.42-49.

[1176] [2008] NSWSC 1057.

[1177] [2014] NSWSC 1791.

[1178] *Broad Construction*, paras.4,18,22-27,38,46; Pittwater Council, paras.116,118,143.

[1179] [2013] NSWSC 1879.

[1180] [2019] NSWSC 1251.

[1181] *State Water*, paras.59,60&65; *CC Builders*, paras.18,29&33.

shall indicate the reasons for withholding payment but not give full particulars of those reasons[1182], make it extremely subjective to distinguish between an 'erroneous but reasonable' and an 'erroneous and unreasonable' decision on whether a submission was duly made.

Murray favoured BCISPA(NSW)'s approach, which prohibits raising in the adjudication reasons not included in the payment schedule[1183]. However, Murray did not address the crucial question of whether pleadings, reports or evidence introduced in the adjudication to support an argument or defence mentioned in the payment notification documentation should constitute new reasons, thus prohibited, or relevant submissions duly made, thus shall be considered.

Because of this uncertainty, significant time and costs are spent in adjudications on whether a submission was duly made, when those resources could be more efficiently utilised on the merits of the submissions. For example, in *Laing O'Rourke* the adjudicator spent 144 hours reading the submissions and preparing the decision finding in claimant's favour. His reasoning included that the respondent's submissions 'go far beyond merely supporting the payment schedule'[1184] and whether the claimant's case 'would suffice to prove the entitlement in court is not relevant'[1185]. Therefore, significant resources were expended, both by the parties in arguing and the adjudicator in reading their submissions and justifying his/her decision, with little contribution towards achieving a high degree of procedural justice because the adjudicator ultimately refused to consider the substance of the respondent's submissions.

Chapter Six argued that the adjudicator ought to eliminate from his/her decision-making thinking process the fact that this is adjudication, not arbitration/litigation. In the scales of justice, the adjudicator must weigh and be perceived as weighing the facts and the law alone, with no place in either scale for considering that the

[1182] *Clarence Street v Isis Projects* [2005] NSWCA 391, paras.27-31.

[1183] Murray (n.55), p.189.

[1184] *Laing O'Rourke*, para.52.

[1185] *ibid*, para.56.

decision is temporarily binding. BCISPA(NSW) is inconsistent with this recommendation, since it allows adjudicators wide discretion to dismiss submissions for the subjective reason that they were not duly made.

A decision finding that a submission was not duly made, thus its substance not considered, results in the following negative experiences, which are determinative for parties' assessment of procedural justice. Whilst the losing party technically had the opportunity to present its case, it will not experience the adjudicator considering its substance because the decision simply explains why in the adjudicator's view the submission was not duly made. Consequently, the losing party will feel that the adjudicator treated it disrespectfully and that the substance of its submission was not weighed on an equal scale against the other party's submissions. Inevitably, this negatively affects the losing party's perception of the adjudicator's neutrality and trustworthiness.

By contrast, HGCRA requires adjudicators to consider new arguments and evidence that develop and hone a claim or defence included in the payment notification documentation, as well as new defences not featured in the payment notification documentation. Adjudicators in a true value adjudication under HGCRA are not allowed to dismiss a submission on the basis that it was not included in the payment notification documentation. This ensures that parties can present their arguments and evidence, and that the adjudicator will weigh the substance of the competing submissions and decide the dispute on the merits of those submissions. For these reasons, HGCRA's approach is preferred.

However, this is not to suggest that HGCRA's approach has no disadvantages. The adjudicator's obligation to consider the substance of all submissions enables ambush tactics by both parties. The referring party has, figuratively speaking, unlimited time to prepare its case, whilst the responding party has a limited period to respond. Insofar as the adjudicator finds the response period sufficient, the court is highly unlikely to intervene even if, for example, the referral is 92 pages

and accompanied by 37 lever arch files, from which five files are entirely new material including two expert reports and other submissions[1186].

BCISPA(NSW)'s difference is that the respondent can argue that the new material were not duly submitted and hence their substance should not be considered. However, as explained, this is a subjective question for which the submitting party cannot predict the adjudicator's decision. Therefore, the responding party has, within a limited time, to present a case that the five files were not duly submitted, respond to their substance in case the adjudicator finds that they were duly submitted, as well as responding to the substance of the other 32 files. Even from this perspective, HGCRA's approach is preferred, in that it clearly advises parties to focus their efforts in responding to the substance of the submissions instead of arguing whether they were duly made.

According to a UK Government survey, 28% of responding parties experienced such ambush tactics in 75% or more of the adjudications taken against them[1187]. By the same token, an experienced responding party anticipating the adjudication can prepare similar material and raise them for the first time with its response. Consequently, the referring party, which prepared its 'referral' based on limited and/or undeveloped defences included by the responding party in the payment notification documentation, now has a much harder case to meet, having only a few days to review the 'response' and prepare its 'reply to response'. Ambush tactics have also been reported at the 'reply to response' stage, in that it consists of voluminous submissions notwithstanding that the referral notice had minimal content[1188]. The responding party then often requests to serve a 'rejoinder', the referring party a 'surrejoinder' whilst thereafter both parties seek to have the 'last word'[1189].

[1186] *Dorchester Hotel Ltd v Vivid Interiors Ltd* [2009] EWHC 70, paras.1,5,26.

[1187] BEIS (2020) (n.30), p.23.

[1188] ibid, p.24.

[1189] James Levy, *Referral, Response, Reply, Rejoinder, Surrejoinder… Surely this madness has got to stop?* (PLCB, 24 February 2010).

To manage such procedure, the adjudicator needs the power to set the timetable to his/her discretion. Therefore, this thesis favoured HGCRA's more flexible timetable over BCISPA(NSW)'s restrictive. However, the adjudicator should be mindful of HGCRA's 28-day to 42-day[1190] period for reaching his/her decision and avoid requesting further extensions unless necessary.

The courts reprimanded the approach of requesting piecemeal extensions whereby adjudications last multiple times the statutory period. Although HGCRA permits extensions agreed by both parties, the adjudicator must be mindful that parties may agree only to avoid unfavourable treatment.[1191] Empirical evidence published in 2019 suggests that 53% of UK adjudications conclude within 28-days, 33% within 42-days and 14% take over 42-days.[1192]. However, another study published in 2022 suggests more prolonged proceedings, with only 16% of adjudications concluding within 28 days, 56% 29-42 days, 4% 76-90 days, 3% 91-120 days and 2% over 120 days[1193].

No comparable study could be found for the average duration of adjudications under BCISPA(NSW). The lack of evidence or industry complains that adjudication under BCISPA(NSW) lasts longer than envisaged indicates that its intended statutory timeframes are usually met and that it is quicker than an adjudication under HGCRA in practice.

The main criticism of adjudication under HGCRA is that the process is uncertain and complex involving voluminous submissions, and consequently not as quick, simple, and inexpensive as originally envisaged.[1194] These features have their root in the adjudicator's obligation to consider the substance of every claim and

[1190] With the referring party's consent.

[1191] *Enterprise* (n.259), paras.95-97.

[1192] Milligan and Jackson (n.252), p.28.

[1193] Nazzini and Kalisz (n.1148), p.27.

[1194] Peter Clyde, *Perception of the UK Adjudication Process* (SCL, 24 March 2021); Andrew Agapiou, 'UK construction participants' experiences of adjudication' (2013) 166 Management, Procurement and the Law 137.

defence and associated submissions. This is unfortunately the price that must be paid for achieving a higher degree of procedural justice in statutory adjudication.

7.7 Low value adjudication schemes and expert determination

Low value adjudication initiatives have been introduced to alleviate these disadvantages explained in the previous section. For example, the CIC[1195], TeCSA[1196] and UK Adjudicators[1197] schemes cap the adjudicator's fees as follows:

Claim value	CIC	TeCSA	UK Adjudicators
Up to £10,000	£2,000	£2,000	£1,750
£10,001 to £25,000	£2,500	£2,500	£2,188
£25,001 to £50,000	£3,500	£3,500	£3,063
£50,001 to £75,000	£4,500	£4,500	£3,938
£75,001 to £100,000	£5,000	£5,000	£4,375
£100,000 to £150,000	n/a	n/a	£6,500
£150,000 to £200,000	n/a	n/a	£8,000
£200,000 to £250,000	n/a	n/a	£10,000
Declarations only	n/a	n/a	£5,000

Under CIC's scheme, the adjudicator decides if the dispute is suitable considering, among other things, whether the response documentation exceeds one lever arch file and any jurisdictional challenge that cannot be dealt within two hours of the adjudicator's time.[1198] Therefore, CIC's scheme requires both parties' cooperation, since it can be challenged easily.

[1195] CIC, *CIC low value disputes model adjudication procedure* (Second edition, May 2023).

[1196] TeCSA, *TeCSA Low Value Disputes (LVD) Adjudication Service: guidance for TECSA adjudicators on the TECSA LVD Adjudication Service* (March 2021).

[1197] UK Adjudicators, Capped Fee Scheme <https://www.ukadjudicators.co.uk/uka-capped-fee-scheme> accessed 26 July 2023.

[1198] CIC, paras.15&48.

By contrast, TeCSA's and UK Adjudicators' schemes only limit the adjudicator's fees, not the length of the parties' submissions. Therefore, they do not require the respondent's agreement, unless the contract specifies a different ANB.[1199] Furthermore, the adjudicator is prohibited from resigning due to the dispute being complex, or involving voluminous submissions or numerous defences[1200]. A disadvantage is a potential breach of the rules of natural justice if the adjudicator does not devote the necessary time, given his/her capped fee, to consider all claims and defences and address them in his/her reasoning. At the time of writing, no case law was found on this issue.

On certain occasions, particularly when the dispute centres around a technical issue, the process of expert determination could be more efficient than that of adjudication. An expert determiner adopts an inquisitorial approach and is entitled to determine the dispute based entirely on his/her investigations, knowledge and expertise[1201]. By contrast, although an adjudicator may question the parties to ascertain the facts or law, the process is adversarial and the parties are responsible for finding and presenting the evidence to the adjudicator.

Nevertheless, adjudication's present approach better suits the rapid nature of the process as it is simpler for the dispute resolver to restrict his/her findings to the parties' submissions than ascertaining the facts himself/herself[1202]. Furthermore, a form of statutory expert determination would involve additional interference with the parties' freedom of contract than adjudication does because an expert determiner may choose not to consider any submissions of the parties. Therefore, this thesis does not recommend the introduction of statutory expert determination as a substitute for statutory adjudication. However, the parties should be free to agree to refer a dispute for expert determination as opposed to adjudication, insofar as the statutory timeframes are met.

[1199] TeCSA, paras.4&10.

[1200] TeCSA, para.15.

[1201] RICS, *Independent Expert Determination: Guidance Note* (December 2016), p.4.

[1202] Matt Molloy, *Expert determination and adjudication: an adjudicator's view* (PLCB, 27 October 2009).

7.8 Parties' costs for conducting the adjudication

The award of parties' adjudication costs is not included under BCISPA(NSW) s.22(1), which lists the matters an adjudicator can determine. Therefore, the allocation of such costs falls outside the adjudicator's jurisdiction. Consequently, a party cannot recover any costs it incurred for conducting the adjudication.

HGCRA and the Scheme were originally silent on the adjudicator's jurisdiction to award parties' adjudication costs and the validity of contract terms apportioning such costs. In *Bridgeway Construction Ltd v Tolent Construction Ltd*[1203], the contract required the referring party to bear both parties' legal and expert fees incurred in the adjudication, as well as the adjudicator's fees. The referring party asked the court to declare these terms void for restraining parties pursing their statutory remedies. However, Mackay J favoured 'freedom of contract', and, since these terms did not breach HGCRA, refused to declare them void.[1204] Such terms became known as 'Tolent clauses'. Industry bodies, government consultations and the parliament criticised Tolent clauses and recommended their prohibition.[1205]

In *Yuanda*[1206], Edwards-Stuart J disagreed with *Bridgeway* and found that Tolent clauses conflict with HGCRA s.108 because they deprive or limit a party's right to refer a dispute to adjudication at any time[1207]. Edwards-Stuart J concluded that if Tolent clauses are present, the Scheme shall replace the entire contractual adjudication regime[1208].

[1203] 2000 WL 1027055.

[1204] *ibid.*

[1205] CUB (n.45), para.3.1; DTI and WAG (2005) (n.48), p.17; DTI and WAG (2007) (n.50), pp.24-25; BERR and WAG (n.51), p.11; HC Deb 13 October 2009, vol.497, cols.172,179,180; HL Deb 09 November 2009, vol.714, cols.667,668.

[1206] (n.781).

[1207] *Yuanda*, paras.48-54.

[1208] *ibid*, paras.55-65.

LDEDCA s.141 introduced HGCRA s.108A providing that any provision concerning the allocation of costs relating to the adjudication is ineffective unless:

(a) made in writing, contained in the contract and confers power on the adjudicator to allocate his/her fees and expenses as between the parties, or

(b) made in writing after the giving of notice of intention to refer the dispute to adjudication.

Despite early concerns that s.108A is ambiguous[1209], it has eliminated Tolent clauses given the lack of conflicting case law or industry complaints on Tolent clauses thereafter. In *Leander Construction Ltd v Mulalley & Company Ltd*[1210], Coulson J said, obiter, that s.108A renders Tolent clauses invalid[1211]. In *Enviroflow Management Limited v Redhill Works (Nottingham) Limited*[1212], O'Farrell J reaffirmed that s.108A provides that parties' costs relating to the adjudication are recoverable only 'where an agreement to that effect is made in writing after the giving of the notice of intention to refer the dispute to adjudication'[1213].

Consequently, an adjudicator has no jurisdiction to award costs under the Late Payment of Commercial Debts (Interest) Act 1998 s.5A, because such an implied term is captured under HGCRA s.108A and hence is ineffective[1214]. This decision improves procedural justice because if the referring party was permitted to recover its adjudication costs without the responding party having an equal right, this would have encouraged the referring party to invest more money in the adjudication whereas the responding party would lack such an incentive.

[1209] Jonathan Cope, *The "great" section 108A debate – part 1* (PLCB, 08 March 2011); Jonathan Cope, *The "great" section 108A debate – part 2* (PLCB, 15 March 2011; Chris Hallam, *The "not so great" section 108A debate* (PLCB, 30 March 2011).

[1210] [2011] EWHC 3449.

[1211] *ibid*, para.12.

[1212] [2017] EWHC 2159.

[1213] *ibid*, para.52.

[1214] *ibid*, para.53.

This thesis favours HGCRA's current position whereby each party bears its own costs of adjudication, unless the parties agree otherwise after the referral. The only recommended clarification is for the legislation to expressly provide that the adjudicator, in addition to having jurisdiction to allocate his/her fees, also has jurisdiction to apportion the ANB's nomination fee. Although there are cases where adjudicators have awarded the nomination fee to the successful referring party and the courts enforced their decision[1215], such case law is not ratio decidendi. Molloy suggests that the nomination fee is not recoverable unless the parties agree otherwise[1216]. Therefore, the recommended amendment will offer clarity and, importantly, avoid discouragement of a party wishing to adjudicate, particularly a have-not looking to adjudicate a low value dispute.

7.9 Withdrawing from adjudication

Under both HGCRA and BCISPA(NSW), if the responding party refuses to participate in the adjudication, then, subject to any apparent jurisdictional lack, the adjudicator shall proceed and reach a decision based on the available information. The difference between the legislations concerns the referring party's right to withdraw from adjudication.

HGCRA is silent on the matter and the courts refused to read an implied term limiting the referring party's right to withdraw from adjudication the entire dispute or any head of claim thereof. Therefore, HGCRA permits the referring party to unilaterally withdraw the entire dispute or any head of claim thereof at any time before the adjudicator's decision is reached, without ordinarily affecting its right to refer the same dispute or head of claim to new adjudication.[1217] The court may

[1215] *Tera Construction Ltd v Lam* [2005] EWHC 3306, paras.11(f)&49; *Allen Wilson Shopfitters v Buckingham* [2005] EWHC 1165, para.46.

[1216] Matt Molloy, *What parts of the adjudicator's decision can you challenge, if any?* (PLCB, 14 May 2013).

[1217] *Midland Expressway Ltd & Ors v Carillion Construction Ltd & Ors (No.3)* [2006] EWHC 1505, para.101; *Lanes Group Plc v Galliford Try Infrastructure Ltd (t/a Galliford Try Rail)* [2011] EWCA 1617, paras.38-40; *Jacobs UK Ltd v Skanska Construction UK Ltd* [2017] EWHC 2395, paras.27,28,34,40(i).

grant an injunction preventing the further adjudication if satisfied that the conduct amounts to unreasonable and oppressive behaviour[1218].

No case could be found where such injunctive relief was granted. In *Jacobs*, the referring party withdrew and started a fresh adjudication for substantially the same dispute with adjustments to its claims and submissions. Its justification for withdrawing from the original adjudication was that its counsel became unavailable and was unable to serve its reply to the response by the agreed date and an extension was refused. O'Farrell J found this conduct unreasonable but not oppressive, and therefore refused the injunctive relief. Although the responding party was deemed entitled to any wasted or additional costs caused by the withdrawal, this was based on the facts of the case. That is, the referring party breached the ad hoc agreement reached before the referral notice, which set out an agreed procedure and timetable that went beyond the typical timetable ordinarily directed by an adjudicator.[1219]

By contrast, although originally silent too, in 2019 BCISPA(NSW) was amended[1220] to provide that the referring party may withdraw by serving notice to the respondent and the ANA (or the adjudicator). If served before an adjudicator is appointed, it becomes effective irrespective of whether the responding party concurs.[1221] However, when served after the adjudicator's appointment, the withdrawal has no effect if the payer 'objects to the withdrawal and, in the opinion of the adjudicator, it is in the interests of justice to uphold the objection'[1222].

Section 7.3 above favoured HGCRA's approach of sending two different notices to commence adjudication over BCISPA(NSW)'s approach of sending a single notice. It also favoured HGCRA's 7-day deadline between the issuance of the notice of adjudication and the referral notice, as well as HGCRA's freedom to send a fresh notice of adjudication. Consequently, this thesis already supported

[1218] *Jacobs*, paras.31-33,40(ii).

[1219] *ibid*, paras.7-17,36-38,40(iv).

[1220] BCISPA(NSW)(Amendment)(2018), para.17.

[1221] BCISPA(NSW), s.17A(1).

[1222] BCISPA(NSW), s.17A(2).

the referring party's right to withdraw from adjudication before issuing the referral. Therefore, the outstanding question is whether the referring party should be able to unilaterally withdraw from adjudication after the referral. Subject to some amendments, BCISPA(NSW)'s position is preferred because it improves procedural justice by ensuring that the parties have balanced procedural rights and obligations during the adjudication.

BCISPA(NSW)'s disadvantages include its silence on whether the referring party must include reasons for withdrawing, the period for the responding party to object and whether it must include reasons for objecting, whether a responding party with an effective jurisdictional challenge loses the right to object, the period in which the adjudicator must confirm his/her decision, and whether adjudication deadlines are extended considering the time lost. It is therefore recommended that the legislation should provide that:

- If the referring party wishes to withdraw from the adjudication the entire dispute or any head of claim thereof after the referral has been issued, it shall notify the responding party and the adjudicator including any reasons. This gives the referring party an opportunity to be heard, while also allowing the responding party and the adjudicator to consider the reasons for the request.
- Unless the responding party has an effective jurisdictional challenge at the time of the withdrawal, it may object including reasons within one working day from receiving the referring party's withdrawal notice or any longer period allowed by the adjudicator. This allows the responding party an opportunity to be heard should it choose to object, while also preventing a responding party that requires at the time the adjudicator's resignation to suddenly change view.
- The adjudicator shall resign (or confirm that the relevant head of claim is deemed withdrawn) unless the responding party objects and in the adjudicator's opinion it is in the interests of justice to uphold the objection. The adjudicator shall confirm his/her decision within one working day from when any objection should have been raised unless the parties agree otherwise.

- The adjudication timetable is not extended unless otherwise agreed between the parties. The quick timetable proposed in the above points increases the likelihood that the main timetable remains unchanged, thereby preserving the legislation's speed.

Therefore, the adjudicator shall decide whether to uphold any objection based on the parties' reasons. If, for example, the referring party wishes to withdraw because the responding party introduced new arguments and/or evidence in its adjudication response not included in the payment notification documentation, then the adjudicator should resign unless, for example, the responding party objects because the referring party also introduced new arguments and/or evidence in its referral and is equally represented by legal advisors and expert witnesses, and the adjudicator is persuaded that it is in the interests of justice to uphold the objection.

7.10 Adjudicator requesting payment of interim fees and/or exercising lien over his/her decision

Although under BCISPA(NSW) s.29(4) an adjudicator loses entitlement to his/her fees if he/she fails to 'make' his/her decision within the prescribed timeframes, s.29(5)(a) permits the adjudicator to refuse to communicate the decision until payment of his/her fees. NSW adjudicators often, if not always, rely on this provision and exercise a lien over their decision. The adjudicator ordinarily communicates the decision to the ANA within the relevant timeframe. The ANA confirms this to the parties, but only reveals the decision's section apportioning the adjudicator's fees. For example, in *Brodyn v Davenport*[1223] the ANA confirmed that the decision required the responding party to pay 100% of the adjudicator's fees. The responding party refused to pay, and the decision was not communicated until three months later when the referring party paid the

[1223] [2003] NSWSC 1019.

fees.[1224] Another common practice is for the ANA to always bill the referring party and withhold the decision until the referring party pays the fees[1225].

By contrast, HGCRA has no express provisions entitling the adjudicator to delay communicating the decision until payment of his/her fees. In *Cubitt* the adjudicator's terms expressly entitled the adjudicator to exercise a lien over the decision[1226]. However, Coulson J found that HGCRA s.108 'envisages both completion and communication' of the adjudicator's decision within 28 days. Accordingly, an open-ended extension to that communication imposed by a lien clause is 'contrary to the whole principle of adjudication [under HGCRA]'.[1227] Therefore, an adjudicator is not entitled to exercise a lien over his/her decision irrespective of any contract terms to the contrary[1228].

However, Coulson J also agreed with the Scottish case of *St. Andrews Bay Development Ltd v HBG Management Ltd*[1229], where Lord Wheatley said that an adjudicator can:

> require parties to come to a separate arrangement about the payment of her fees… [insofar as it does not] frustrate or impede the progress of the statutory arrangements… If the adjudicator wishes to impose such an arrangement upon parties, then it is her responsibility to see that that arrangement is accommodated within the statutory or contractual time limits.[1230]

Consequently, professional bodies preclude UK adjudicators from imposing a lien. However, they permit adjudicators to submit interim invoices for fees

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[1224] *ibid*, para.4.

[1225] Adjudicate Today, *NSW: Adjudicator's Determination* <https://www.adjudicate.com.au/nsw/adjudication/adjudicators-time-for-determination> accessed 06 November 2022.

[1226] *Cubitt*, para.55.

[1227] *ibid*, para.79.

[1228] *ibid*, para.81.

[1229] [2003] ScotCS 103.

[1230] *ibid*, para.19 quoted in *Cubitt*, para.80.

incurred provided that any lack of payment will not delay communicating the decision.[1231]

In *Mott Macdonald Ltd v London & Regional Properties Ltd*[1232], the adjudicator's terms required payment of his fees by the referring party prior to releasing the decision[1233]. The court found that this provision rendered the adjudicator biased because '[t]he imposition of a lien on his decision which has to be lifted by the referring party in order to obtain his decision gives an appearance of partiality'[1234].

This thesis favours the UK approach which prohibits imposing a lien. This both increases procedural justice and improves adjudication's speed, while also allowing the adjudicator to request interim payment of fees incurred insofar as lack of payment does not delay communicating his/her decision. Although BCISPA(NSW) does not expressly require the referring party to pay the adjudicator's fees, NSW's de facto situation is that the referring party pays the adjudicator's fees to lift the lien. Therefore, applying *Mott Macdonald,* adjudicators under BSCISPA(NSW) are apparently biased since they are 'financially beholden' to the referring party[1235]. Imposing a lien also slows down the adjudication process since the referring party may not have the funds immediately available to release the decision.

The final issue is the way an adjudicator should request interim payment of his/her fees notwithstanding that the parties are jointly and severally liable[1236]. Molloy states that:

[1231] Jonathan Cope, *Surveyors acting as adjudicators in the construction industry* (RICS, 4th edition, January 2017), pp.7&8; CIArb & Adjudication Society, *Guidance Note: Adjudicator's Liens* (Second edition, 2020).

[1232] [2007] EWHC 1055.

[1233] *ibid*, para.71.

[1234] *ibid*, para.77.

[1235] *Mott Macdonald*, para.77.

[1236] BCISPA(NSW), s.29(2); *Linnett v Halliwells LLP* [2009] EWHC 319, paras.37&38.

> some adjudicators always ask the referring party to pay their [interim] fees (even if [it has] won) and recover any proportion attributable to the responding party when it seeks payment of any sum awarded…[1237]

This approach risks perceptions of bias because even if the adjudicator's terms do not expressly require the referring party to pay his/her interim fees, this situation arguably exists de facto. Although *Mott Macdonald* relates to a lien that must be discharged by the referring party, its principle may extend to payment of interim fees. If an adjudicator always requires the referring party to pay his/her fees then he/she may appear to be financially beholden to that party. No case could be found testing this argument.

This potential problem is better addressed through professional guidance recommending that adjudicators equally apportion any interim fees between the parties. If a party refuses to pay, then the adjudicator may request the other party to pay the full interim amount. This can avoid perceptions of bias stemming from the situation that the adjudicator 'always' requires the referring party to pay his/her interim fees.

7.11 Conclusion

This chapter involved a comparative analysis of the adjudication process under HGCRA and BCISPA(NSW). HGCRA's approach of sending two different notices to commence adjudication, the simpler notice of adjudication followed by the detailed referral notice, was favoured over BCISPA(NSW)'s approach of sending a single notice. The recommended approach dispenses with ANA's burden of having to forward the detailed documentation to the appointed adjudicator and aligns with the previous chapter's recommendation that an ANA's role should be confined to appointing the adjudicator, not managing the adjudication process.

[1237] Matt Molloy, *Adjudication enforcement background to successful injunction application* (PLCB, 25 May 2022).

HGCRA's requirement of sending the notice of adjudication to the responding party first and then to the ANB was also preferred over BCISPA(NSW)'s requirement of sending the corresponding notice to the ANA first and then to the responding party, since the former affords parties an opportunity to negotiate before applying for adjudication. However, this chapter recommended amending HGCRA to also permit simultaneous service of the notice to the responding party and the ANB, requiring the referring party to copy the responding party in the email serving the adjudication application form to the ANB, allowing the responding party one working day to comment and requiring the ANB to consider both parties' comments and give brief reasons for the nomination made.

The importance of disclosure to avoid appearance of bias was discussed. Further research was recommended to develop guidelines on disqualification and disclosure for adjudicators, dividing example situations into three categories:

- Red: disqualifying a person from acting as adjudicator
- Orange: requiring disclosure
- Green: not requiring disclosure

When nominating an adjudicator, the ANB should ask candidates if they have any doubts as to their ability to be impartial and independent when adjudicating the dispute, and whether there are any circumstances falling into the Red category. The appointed adjudicator should then make the broader disclosure to the parties following the appointment.

This chapter concurred with HGCRA's 7-day deadline between the issuance of the notice of adjudication and the referral notice, as well as HGCRA's freedom to send a fresh notice of adjudication where the deadline is missed, or the referring party is concerned it might be missed. It also recommended amending the legislation to require:

- electronic submission of the referral's supporting documents on the same day as the referral notice; and
- all documents pertaining to the adjudication be served only electronically unless the contract requires them to be served in hard copy form as well and the parties fail to agree dispensing with this requirement.

HGCRA's requirement that every contract meets the same procedural rules for all adjudications was preferred over BCISPA(NSW)'s differing procedural rules between smash-and-grab and true value adjudications. In addition to the 7-day deadline between 'notice' and 'referral' explained above, these rules include that:

- the adjudicator's decision must be issued within 28 days from the referral, extendable by up to 14 days with the referring party's consent, or longer with both parties' consent.
- the adjudicator shall act impartially.
- the adjudicator can take the initiative in ascertaining the facts and the law.
- the adjudicator's decision is binding until the dispute is determined by arbitration or litigation, with the parties being able to agree that the adjudicator's decision is final.
- the adjudicator can correct any clerical or typographical errors in his/her decision.
- the adjudicator (including his/her employees or agents) is not liable for any act or omission unless the act or omission is in bad faith.

This thesis favoured HGCRA's approach of requiring the adjudicator to consider new arguments and evidence that develop and hone a claim or defence included in the payment notification documentation, as well as any new defences not included in the payment notification documentation. Parties shall raise and maintain any specific jurisdictional objections to preserve their right to resist enforcement on that basis, and the adjudicator shall issue a reasoned decision on any such objections.

This thesis favoured BCISPA(NSW)'s position that, following the referral, the responding party should be entitled to object to any request by the referring party to withdraw from the adjudication the entire dispute or any head of claim thereof. If the responding party objects, then it should be for the adjudicator to decide the matter.

Subject to clarifying that the adjudicator has jurisdiction to apportion the ANB's nomination fee (in addition to his/her fees), HCGRA's approach that each party bears its own costs of adjudication unless the parties agree otherwise after the referral was preferred. Finally, HGCRA's position of allowing adjudicators to request interim payment of fees incurred insofar as lack of payment does not delay communicating his/her decision was preferred. This thesis also recommended that adjudicators equally apportion any interim fees between the parties, instead of apportioning them to the referring party entirely. This increases procedural justice by preventing perceptions that the adjudicator is financially beholden to the referring party, while the prohibition of imposing a lien over the decision avoids delays in circumstances where the referring party does not hold the relevant amount.

Chapter Eight: Enforcement process of an adjudicator's decision

8.1 Introduction

Chapter Two argued that the best way to mitigate the potential injustice caused by adjudication's pseudo-temporary nature while preserving the legislation's effectiveness is by amending the legislation's three fundamental pillars to the version promoting the highest degree of procedural justice while preserving speed. Chapters Three to Seven addressed the first two pillars, namely statutory payment provisions and the adjudication process. Yet no matter how efficient, effective, or procedurally just adjudication might be, a losing party may refuse to comply with the decision. Therefore, the legislation would be undermined without a streamlined enforcement procedure.

Consequently, Chapter Eight comparatively analyses the enforcement process of an adjudicator's decision under HGCRA and BCISPA(NSW), which represents the legislation's third pillar. It first explains a limitation in recommending a universal enforcement process for all jurisdictions, followed by an analysis of HGCRA's and BCISPA(NSW)'s differing enforcement procedures. It then comparatively analyses the extent to which the UK and NSW courts may refuse to enforce an adjudicator's decision for jurisdictional error, breach of the rules of natural justice, fraud, and non-jurisdictional error. Finally, it reviews the circumstances in which courts may sever an adjudicator's decision.

8.2 The caveat in recommending a universal enforcement process

For payment provisions and adjudication process, Chapters Three to Seven recommended a universal approach that promotes procedural justice while preserving speed. For payment provisions, the main components of the legislation's recommended version include at least monthly interim payment cycles, their default 'valuation date' being the last day of the month, the cycles

commencing with an application by the payee, the deadlines for the application and the payer's payment notice calculated with reference to the 'valuation date', requiring the payee to remind the payer of its notification obligations, and setting maximum payment terms. The recommended adjudication process includes an equal right to adjudication and requiring adjudicators in true value adjudications to consider new arguments and evidence not included in the payment notification documentation, whilst obliging parties to particularise any jurisdictional objections.

Recommending a universal approach for payment provisions and adjudication process was viable due to the common nature of the UK and NSW construction industry, as well as the common aim and common problem caused by the legislation in both jurisdictions as explained in Chapters One and Two. Indeed, all jurisdictions that have or consider introducing comparable legislation are likely to have these traits in common.

However, the appropriate version of components forming the enforcement process of an adjudicator's decision depends on the courts' performance. The jurisdictions differ in their courts' structure and the timing in which courts can conclude enforcement proceedings. This is true even between jurisdictions within the UK. For example, the next section explains that England and Wales have the specialist Technology and Construction Court (TCC), which developed a bespoke enforcement process concluding within two months. By contrast, Scotland lacks a specialist construction court and enforcement procedure; therefore, the payee must raise an ordinary court action for the adjudicated amount requiring six to eight months to conclude[1238].

[1238] Julie Scott-Gilroy, *Enforcing adjudicators' decisions in Scotland and the impact of D McLaughlin v East Ayrshire Council* (PLCB, 28 January 2021); Anne Struckmeier, *Scottish enforcement of adjudications* (6 February 2019) <https://www.addleshawgoddard.com/en/insights/insights-briefings/2019/construction/scottish-enforcement-of-adjudications/> accessed 06 November 2022.

It is easy to say that the English approach is preferred due to its speed and ability to quickly examine both jurisdictional and non-jurisdictional errors[1239], however, this will simply be unrealistic for most jurisdictions to implement. This limitation does not render comparative analysis on enforcement procedure less important. Contrarywise, it reveals similarities and differences on key components forming the enforcement process, which can assist drafting the legislation's optimal version both for jurisdictions that currently implement comparable legislation, as well as those considering it. But it is for this limitation that this thesis cannot recommend a universal approach for some components.

8.3 Procedure for enforcing an adjudicator's decision

HGCRA s.108(3) renders an adjudicator's decision 'binding until the dispute is finally determined by legal proceedings, by arbitration... or by agreement', however, offers no guidance on the enforcement procedure. The Scheme originally addressed this by empowering the adjudicator to order peremptory compliance with his/her decision[1240], and incorporating Arbitration Act 1996 s.42, which deals with enforcement of an arbitral tribunal's 'peremptory orders', simply substituting the terms 'tribunal' with 'adjudicator', 'arbitral proceedings' with 'adjudication', and deleting ss.42(2)(c) and 42(3)[1241].

This was an unusual structure whereby an adjudicator's decision was treated as a 'peremptory order', a measure normally issued when a party fails to comply with an arbitral tribunal's procedural order. In *Macob* Dyson J said it is unclear why Arbitration Act 1996 s.42 was incorporated into the Scheme[1242].

The Parliament's rationale is found in Hansard. Recognising that enforcing an adjudicator's decision would be a novel point requiring primary legislation, the

[1239] see ch.8/s.8.5.

[1240] Scheme, pt.I/para.23(1).

[1241] Scheme, pt.I/para.24.

[1242] *Macob* (n.317), para.38.

Parliament deemed those provisions of the Arbitration Act as 'suitable' and 'up-to-date'.[1243] Clearly, Parliament was influenced by the fact that the Arbitration Act was debated virtually at the same time as HGCRA back in 1996.

Ultimately, Dyson J confirmed the court's power to enforce an adjudicator's decision, even in the face of pending arbitration proceedings, stating that 'the usual remedy for failure to pay in accordance with an adjudicator's decision will be to issue proceedings claiming the sum due, followed by an application for summary judgment'.[1244] The Scheme was later amended to omit its reference to the Arbitration Act[1245].

The TCC has since 'moulded a rapid procedure for enforcing an adjudication decision'[1246]. This ordinarily involves issuing a claim for the adjudicated amount under CPR Part 7, together with an application for summary judgment under CPR Part 24[1247]. The court normally issues directions within 3 working days from receipt of an application[1248] providing for an enforcement hearing within 28 days while inviting the defendant to submit any grounds and evidence for resisting enforcement within 14 days[1249]. However, the recently amended TCC guide increases the enforcement hearing's lead time from the aforesaid 28 days to 6-8 weeks (though it could be less)[1250].

BCISPA(NSW) originally provided that the payee 'may recover the unpaid… portion of the adjudicated amount… as a debt… in any court of competent jurisdiction'[1251], but was silent regarding procedural details and whether the payer

[1243] HL Deb 23 July 1996, vol.574, cols.1345&1346.

[1244] *Macob*, para.37.

[1245] Scheme(Amendment)(England)(Regulations)(2011), para.3(12).

[1246] HM Courts & Tribunals Services, *The Technology and Construction Court Guide* (Second Edition, Fourth Revision Crown, 2015), para.9.1.3.

[1247] ibid, paras.9.2.1&9.2.4.

[1248] ibid, para.9.2.5.

[1249] ibid, para.9.2.8.

[1250] Courts and Tribunals Judiciary, *The Technology and Construction Court Guide* (Crown, October 2022), para.9.2.8.

[1251] BCISPA(NSW) (Historical version 05 October 1999 to 02 March 2003), s.25(2)(a).

could raise set-off defences. During BCISPA(NSW)'s first review, the Minister explained that during enforcement proceedings the courts allowed set-off or other defences, which often sufficed for refusing summary judgment and directing the matter for full trial. The legislation's purpose was therefore undermined since payment was delayed.[1252]

Consequently, in 2002 BCISPA(NSW) was amended[1253] prescribing a bespoke enforcement procedure. Following an adjudicator's determination, the payee can request the ANA to provide an adjudication certificate[1254] stating the parties' names, the adjudicated amount, and its payment date[1255]. The adjudication certificate can 'be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly'[1256]. Whilst the payer may commence proceedings to have the judgment set aside, it cannot in those proceedings bring any set-off or other contractual defence or challenge the adjudicator's determination. The payer must also pay into the court the unpaid portion of the adjudicated amount pending determination.[1257]

In such proceedings, the payer would seek a certiorari order under the Supreme Court Act 1970 s.69 quashing the adjudicator's determination[1258]. The adjudicator and, sometimes, the ANA are named defendants together with the payee[1259]. This is because, notwithstanding their immunity under BCISPA(NSW) s.30, a certiorari order lies against the adjudicator[1260], and removes the legal consequences of the adjudicator's determination and, consequently, of the judgement debt entered pursuant to that determination[1261].

[1252] LAH 12 November 2002 (Iemma).

[1253] BCISPA(NSW)(Amendment)(2002).

[1254] BCISPA(NSW), s.24(1)(a).

[1255] BCISPA(NSW), s.24(3).

[1256] BCISPA(NSW), s.25(1).

[1257] BCISPA(NSW), s.25(4).

[1258] *Musico* (n.1154); affirmed in *Probuild* (HCA), para.27.

[1259] e.g. *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 935, where the adjudicator, the payee and the ANB were the first, second and third defendant respectively.

[1260] *Musico*, paras.22&32.

[1261] *Probuild* (HCA), para.28.

The adjudicator and ANA usually file a submitting appearance[1262]. This adjudicator's immunity for acts or omissions committed in good faith present in both legislations, and consequent privilege of filing a submitting appearance in enforcement proceedings without being obliged to actively participate and give evidence, promote procedural justice. Absent this immunity, adjudicators, as every tribunal performing quasi-judicial functions, 'would be inclined to make an award in favour of a party who is more likely to sue them'[1263].

This section explained that the UK enforcement procedure was developed by the courts, whereas in NSW via legislative intervention amending BCISPA(NSW). Statutory law overrules or adds to an area of common law, whereas common law interprets statutory law. New jurisdictions introducing comparable legislation should describe the enforcement procedure within the relevant statute to ensure certainty and prevent litigation. BCISPA(NSW)'s two unique features of filing an adjudication certificate into the court as judgment debt and obliging the payer to pay into the court the adjudicated amount before challenging it could only be introduced via statutory law, since courts are unlikely to interpret a statute as requiring these absent express terms.

Both jurisdictions aimed at discouraging payers from challenging an adjudicator's decision, and consequently prevent a backlog of cases being created that could prolong enforcement proceedings thereby undermining the legislation. The English TCC developed a quick enforcement process specifically for adjudication, coupled with the usual risk of an adverse costs order for unsuccessful challenges. NSW took an even more robust approach, namely filing an adjudication certificate as judgment debt and obliging the payer to pay into the court the adjudicated amount before challenging it. The payer, having paid into the court the adjudicated amount, is less inclined to delay the process.

[1262] *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140, para.5.

[1263] Hong-Lin Yu and Laurence Shore, 'Independence, Impartiality, and Immunity of Arbitrators: US and English Perspectives' [2003] ICLQ 935, p.951.

Furthermore, being the claimant in those proceedings, the payer must specify from the outset the grounds for challenging enforcement or risk having its application dismissed[1264]. Similarly, the payee has no incentive to cause delay because it may only receive the adjudicated amount upon the conclusion of those proceedings. Therefore, NSW's approach can be particularly helpful for jurisdictions that do not have a specialist construction court or have a slow judicial system, since both parties are disincentivised from causing delay, which would risk undermining the legislation.

However, NSW's approach may cause injustice where the payer has a meritorious challenge but does not hold the relevant amount to pay into the court, and, consequently, is potentially forced into insolvency without the opportunity to have its challenge reviewed. Therefore, NSW's approach is only recommended for jurisdictions that do not have a court with equivalent expertise and resources to those of the TCC, and the aforesaid potential injustice is conceded so that the entire legislation is not undermined at enforcement stage.

BCISPA(NSW)'s enforcement process can further undermine procedural justice via the lack of notifications required when filing an adjudication certificate to the court as judgment debt, or seeking to enforce that judgment debt. For example, the payee can apply ex parte for a garnishee order for the judgment debt, that is, without the payer's knowledge or participation apply for a court order allowing the payee to recover the judgment debt from the payer's bank account.[1265]

The duration between filing the adjudication certificate as judgment debt and obtaining garnishee order can be as quick as 10 days[1266]. The onus is with the payer to act quicker and apply for interlocutory injunctive relief restraining the payee from enforcing the adjudicator's decision, even if the payer has

[1264] Judicial Commission of NSW, *Judicial Review* (Supervisory Jurisdiction) <https://nswca.judcom.nsw.gov.au/judicial-review/#1582154156915-efa9d768-f029> accessed 06 November 2022.

[1265] *Fitz Jersey* (NSWCA) (n.299), paras.37-38,48&51.

[1266] *Atlas Construction Group Pty Limited v Fitz Jersey Pty Limited* [2017] NSWSC 72, para.11.

commenced separate proceedings challenging the adjudicator's decision[1267]. This risk of undermining procedural justice is mitigated by amending BCISPA(NSW) to require the payee to notify the payer when filing the adjudication certificate to the court and when seeking to enforce such judgment debt, effectively preventing ex parte applications.

Another recommendation for BCISPA(NSW) relates to the requirement that the payee must apply to the ANA for an adjudication certificate and then file it in the court as judgment debt along with the relevant form and an affidavit[1268]. The ANA ordinarily charges a fee for issuing this certificate[1269]. It is recommended that the requirement of adjudication certificate is dispensed with. The payee should file into the court the adjudicator's decision (together with the relevant form and an affidavit). This saves time and money without compromising on procedural justice. It also aligns with the recommendation of Chapter Six that, to improve procedural justice, ANAs shall merely appoint adjudicators, not administer the process. This section also explained that, from a procedural justice perspective, what matters most is giving notice when lodging the adjudicator's decision to the court as judgment debt and when taking steps to enforce it.

8.4 The extent to which enforcement can be resisted for jurisdictional errors, breach of the rules of natural justice or fraud

The three fundamental grounds for resisting enforcement of an adjudicator's decision in the UK and NSW are jurisdictional errors, serious breach of the rules of natural justice and fraud[1270]. These have been reviewed in Chapters Six and

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[1267] *Fitz*, paras.6,34&101.

[1268] NSWFT, *Enforcing payment* <https://www.fairtrading.nsw.gov.au/trades-and-businesses/construction-and-trade-essentials/security-of-payment/enforcing-payment> accessed 06 November 2022.

[1269] e.g. Adjudicate Today charges between $110 and $825 depending on the adjudicated amount: Adjudicate Today, 'Claimant Applies for Adjudication Certificate' <https://www.adjudicate.com.au/2019-nsw-amendment/adjudication/claimant-applies-for-adjudication-certificate> accessed 06 November 2022.

[1270] *Carillion* (n.316), para.87; *PBS* (n.918), para.23; *Probuild* (HCA), para.29; *YTO* (NSWCA) (n.295), para.82.

Seven since they are directly related to the development of adjudication process. This section outlines the findings and recommendations relevant to the enforcement stage. While it is imperative for preserving justice that the courts continue to exercise this supervisory jurisdiction, it is equally important for protecting the legislation's aim that the associated enforcement proceedings conclude quickly while reasonably limiting the extent to which such challenges can be raised.

UK courts shall consider a jurisdictional challenge from a party actively participating in an adjudication only if raised promptly before the adjudicator, with appropriate explanation of the argument, and maintained throughout the adjudication[1271]. By contrast, in NSW a broad jurisdictional reservation should suffice to prevent waiver[1272]. While NSW's approach keeps an adjudication simpler as jurisdictional challenges are not considered, this thesis favoured HGCRA's approach and recommended that adjudicators should issue a reasoned decision on jurisdictional challenges because this promotes procedural justice while avoiding future litigation on the point. This also prevents parties combing through the decision and documents hoping to find a jurisdictional objection, thereby reducing the scope for successfully resisting enforcement.[1273]

Both UK and NSW courts shall not enforce an adjudicator's decision if there has been a serious breach of the rules of natural justice[1274]. That is, if persuaded that there is a real possibility that the adjudicator is biased, or he/she did not afford a party the opportunity to be heard albeit unbiased[1275].

In a true value adjudication, UK courts should not enforce a decision if the adjudicator refused to consider the substance of new arguments and evidence that develop and hone a claim or defence included in the payment notification documentation, or new defences not included in the payment notification

[1271] *Bresco* (EWCA), paras.91-94; *Ove Arup*, paras.19-27.

[1272] BCISPA(NSW), s.32A.

[1273] see ch.7/s.7.5.

[1274] *Carillion* (n.316), para.52; *Brolton*, para.53.

[1275] ch.7/s.7.6.

documentation[1276]. BCISPA(NSW)'s position is less clear, in that although it prohibits introducing in the adjudication reasons not indicated in the payment notification documentation, it permits raising relevant supporting submissions to reasons indicated.

Consequently, NSW enforcement proceedings often concentrate on whether the adjudicator acted reasonably in not considering the substance of pleadings, reports or other evidence introduced in the adjudication. The UK approach is preferrable, as it ensures that an adjudicator considers the substance of all arguments, defences and evidence, thereby promoting procedural justice. Furthermore, by making clear that adjudicators shall consider all submissions, the focus shifts to resolving the substantive dispute instead of whether a submission should be considered.[1277]

The third reason courts may refuse enforcement is fraud. NSW courts should not enforce an adjudicator's decision if the party resisting enforcement provides clear and unambiguous evidence that the other party procured the adjudicator's decision by making a false representation knowingly, or without belief in its truth, or recklessly as to its truth[1278]. Similar jurisprudence exists in the UK with the distinction that a fraud defence cannot be raised at enforcement stage if the party could reasonably have raised it during the adjudication but did not. Furthermore, where the adjudicator considers a fraud defence raised in the adjudication and decides on its merits the court should not interfere.[1279]

These two UK governing principles have been upheld by the EWCA. Although not binding on adjudication enforcement proceedings, the UKSC ruled that there is no precondition of reasonable diligence imposed on the party seeking to set aside a judgment obtained by fraud[1280]. Therefore, it is open for the UKSC to determine whether this principle shall extend to adjudication, thereby reversing

[1276] *Bresco* (UKSC), para.44; *Global Switch*, para.50.

[1277] see ch.7/s.7.6.3.

[1278] *YTO* (NSWCA), para.46.

[1279] *PBS*, para.23; ch.6/s.6.5.

[1280] *Takhar v Gracefield Developments Ltd & Ors* [2019] UKSC 13.

the presently prevailing principle set by the EWCA. Although the UK position is preferred as it encourages known issues of fraud to be raised and determined in the adjudication, this must be contrasted with the gravity of the fraud allegation and whether the substantive evidence was available in the adjudication.

8.5 Non-jurisdictional error

BCISPA(NSW)'s 2002 amendments provide that the payer cannot 'challenge the adjudicator's determination' during enforcement proceedings. However, BCISPA(NSW) does not state that the court cannot set aside an adjudicator's determination due to an error of law on its face. This led to two conflicting judgments being handed down on 20/10/2003 and 31/10/2003 respectively.[1281] In *Abacus* Gzell J found that BCISPA(NSW) does not preclude judicial review of an adjudicator's decision for non-jurisdictional error on its face[1282], whereas in *Musico* McDougall J adopting a purposive approach concluded that BCISPA(NSW) prohibits judicial review on this ground[1283].

The following year, the NSWCA in *Brodyn*[1284] supported the jurisprudence in *Musico* that BCISPA(NSW) prevents judicial review for non-jurisdictional error on the face of the adjudicator's decision[1285]. While for 11 years the debate seemed settled, in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[1286] Emmett AJA refused to follow *Brodyn* on the basis that its remarks were *obiter*, and concluded that judicial review is available for non-jurisdictional error on the face of the record[1287]. The NSWCA reversed this decision six months later[1288], however, special leave to appeal at the HCA was granted due to the importance

[1281] *Abacus* (n.1259); *Musico* (n.1154).

[1282] *Abacus*, paras.22,23&39.

[1283] *Musico*, paras.20,35,54,55&60.

[1284] (n.1169).

[1285] *Brodyn* (NSWCA), paras.51&56.

[1286] [2016] NSWSC 770.

[1287] *ibid*, paras.55-74.

[1288] *Shade Systems v Probuild Constructions (No 2)* [2016] NSWCA 379.

of this point[1289]. This led to the final nail in the coffin for any arguments that an adjudicator's decision can be quashed for non-jurisdictional errors, with the HCA stating from the outset that:

> The only question in this appeal is whether… [BCISPA(NSW)] ousts the jurisdiction of the… [Court] to quash a determination by an adjudicator for error of law on the face of the record that is not a jurisdictional error. The answer is yes: [BCISPA(NSW)] does oust that jurisdiction.[1290]

In the UK, Dyson J confirmed in the first adjudication enforcement case that the decision is summarily enforced even if it contains errors[1291]. Later that year he took it a step further confirming it is enforceable even when errors are 'glaringly obvious'[1292]. The EWCA reaffirmed that, insofar as the adjudicator answered the correct question, the court at enforcement stage should not be concerned with whether it contains errors[1293].

However, conflicting jurisprudence was then developed and prevailed. *Alstom*[1294] confirmed that a losing party in adjudication may pre-empt enforcement via issuing Part 8 proceedings[1295], which are available when a party is seeking the court's decision on a question which is unlikely to involve a substantial dispute of fact[1296]. If the declaration sought 'is one of law or otherwise capable of being tried early' then the Part 8 and enforcement proceedings may be heard together.[1297] *Walter Lilly & Co Ltd v Dmw Developments Ltd*[1298] reaffirmed this while

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[1289] *Probuild* (HCA), para.25.

[1290] *ibid*, para.2.

[1291] *Macob*, para.18,19&34.

[1292] *Bouygues* [1999] (n.320), para.35.

[1293] *Carillion* (n.316), paras.76&85.

[1294] (n.459).

[1295] *ibid*, paras.16-20.

[1296] CPR 8, para.8.1(2).

[1297] *Alstom*, paras.13,17&20.

[1298] [2008] EWHC 3139.

emphasising that the party bringing Part 8 proceedings must demonstrate that the dispute is unlikely to involve a substantial dispute of fact[1299].

Resisting enforcement where the adjudicator has made a clear error is also confirmed in the TCC guide, with earlier versions suggesting that the matter can be raised at enforcement proceedings even if no Part 8 proceedings were commenced[1300]. Although in 2015 Coulson J endorsed this point[1301], in 2017[1302] due to the rise in relevant cases[1303] he overrode this guidance in favour of the following principles. The party seeking to resist enforcement must promptly issue a Part 8 claim setting out the declarations sought, or at least detail its defence, counterclaim and consequential declarations sought to the enforcement claim, the former being the best option. It must also demonstrate that the issue arose in the adjudication, it is short, self-contained, unconscionable for the court to ignore, and capable of being handled during the enforcement hearing.[1304] These directions are embodied in the recently amended TCC guide[1305].

The law's current state is that, depending on the factual background and parties' conduct, judges have wide discretion on whether to decide the disputed point of law and enforcement proceedings together. In *Hutton* the adjudicator's decision was enforced without considering the substance of the Part 8 claim because, inter alia, of the delay in issuing the Part 8 claim and its inadequate pleading[1306]. By contrast, in *Willow Corp S.À.R.L. v MTD Contractors Ltd*[1307] the Part 8 claim was proactively issued prior to the winning party in the adjudication commencing enforcement proceedings[1308]. Importantly, the winning party in the adjudication served late evidence in the Part 8 and enforcement proceedings which were not

[1299] *ibid*, para.7.

[1300] ibid, para.9.4.3.

[1301] *Caledonian Modular* (n.688), para.12.

[1302] *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517.

[1303] *Ibid*, paras.6&37.

[1304] *ibid*, paras.15-17.

[1305] Courts and Tribunals Judiciary (n.1250), para.9.4.5.

[1306] *Hutton*, paras.31-33.

[1307] [2019] EWHC 1591.

[1308] *ibid*, para.31.

admitted by the court[1309]. The court agreed to determine the enforcement proceedings together with the Part 8 claim concerning the correctness of the adjudicator's construction of the parties' agreement[1310]. The court found that the adjudicator erred in his interpretation and accordingly 'severed' his decision, a term explained in the next section[1311].

Therefore, a different approach exists between the UK and NSW regarding non-jurisdictional errors. In NSW enforcement cannot be resisted for non-jurisdictional errors, whereas UK courts have discretion to decide alleged errors together with the enforcement proceedings. The caveat in recommending a universal approach was explained in section 8.2. Unless the error is obvious, most courts around the world lack the expertise and resources of the TCC that would render them capable of determining such issues within the tight timescale intended for adjudication enforcement proceedings. Nonetheless, adopting a blanket approach whereby judicial review is impermissible even for obvious non-jurisdictional errors can significantly undermine procedural justice.

Consequently, the recommended approach is that of the UK, whereby a non-jurisdictional error may be raised at enforcement stage, and it is then at the judge's discretion to answer or otherwise that question as part of the enforcement proceedings. This is because, considering the theory of adjudication's pseudo-temporary nature explained in Chapter Two, if an adjudicator's decision is enforced in its entirety despite obvious errors, then those errors will likely have a permanent effect upon the parties.

8.6 Severability of adjudicator's decision

Both HGCRA and BCISPA(NSW) were originally silent on whether courts may sever an adjudicator's decision. That is, where a pleaded ground for resisting

[1309] *ibid*, paras.5-7.

[1310] *ibid*, paras.25&31.

[1311] *ibid*, paras.51&75.

enforcement succeeds, whether the court may still enforce part of the decision, or instead the entire decision is unenforceable.

In *Cantillon*[1312] Akenhead J summarised the conflicting opinions[1313] and concluded, *obiter*, that an adjudicator's decision may be severed if it addresses more than one dispute[1314]. This is rare in practice, since HGCRA only permits a single dispute to be referred in each adjudication unless the parties agree otherwise[1315]. However, it was subsequently ruled that severance can be ordered even if the adjudicator's decision addresses a single dispute[1316]. Pepperall J's principle of whether the decision has 'a core nucleus' that can be safely enforced[1317] was adopted by the Scottish Court of Session[1318] and should be deemed as prevailing.

In 2019, following recommendations of Murray's Report[1319], BCISPA(NSW) was amended[1320] to provide that if the court finds a jurisdictional error in the adjudicator's decision it may set aside the whole or any part of the decision. Without limitation, the court may identify and set aside the part affected by jurisdictional error while enforcing the unaffected part.[1321]

Therefore, both UK and NSW courts have discretion to order severance of an adjudicator's decision where a ground for resisting enforcement is successfully pleaded but does not affect the entire decision. This approach supports the legislation's purpose because the unaffected part of the decision is still enforceable, while also promoting procedural justice since an appropriate adjustment is applied to exclude the affected part.

[1312] (n.1161).

[1313] *Cantillon*, paras.58-62&78.

[1314] *ibid*, para.65.

[1315] HGCRA, s.108(1).

[1316] *Willow*, paras.67-74.

[1317] *ibid*, para.74.

[1318] *Dickie* (n.952), paras.15,16,38&48.

[1319] Murray (n.55), pp.214-216.

[1320] BCISPA(NSW)(Amendment)(2018), para. 32A.

[1321] BCISPA(NSW), s.32A.

8.7 Conclusion

This chapter reviewed the procedure for enforcing an adjudicator's decision in the UK and NSW. In determining the governing rules and processes, both jurisdictions sought to balance two competing policies. Firstly, that adjudicators' decisions must be enforced promptly to avoid undermining the legislation, and secondly, the extent and circumstances to which the courts should refuse enforcement to prevent apparent injustice. Due to the differing structure and capabilities of the courts in each jurisdiction, the recommendations made for some components forming the enforcement process are not universal.

The approach in England and Wales ordinarily involves issuing a claim to the TCC under CPR 7 for the adjudicated amount together with an application for summary judgment under CPR 24. Directions are issued within three working days, providing for an enforcement hearing within 6-8 weeks while inviting the defendant to submit its case for opposing enforcement within 14 days. By contrast, in NSW, following an adjudication the payee can request an adjudication certificate from the ANA, which is then filed as judgment debt in the court. It is therefore for the payer to commence proceedings seeking to set aside the judgment debt, on the precondition that it pays into the court the adjudicated amount pending the outcome of those proceedings.

NSW's approach was recommended for jurisdictions that do not have a specialist construction court or have a slow judicial system. The potential injustice of a payer being prevented to challenge enforcement due to not having the adjudicated amount to pay into the court was conceded to avoid undermining the legislation at enforcement stage. A recommendation for BCISPA(NSW) was the filing of the adjudicator's decision as judgment debt, instead of having to apply to the ANA for an adjudication certificate, since the latter incurs additional time and costs. This thesis also recommended that the payee shall notify the payer when

filing the adjudicator's decision to the court as judgment debt and when seeking to enforce such judgment debt.

The UK and NSW have three common grounds for resisting enforcement, namely jurisdictional errors, serious breach of the rules of natural justice and fraud. However, a distinction exists in that the UK courts require any known jurisdictional challenges or fraud accusations to be raised promptly and clearly before the adjudicator. The UK position is preferred as it encourages any such issues to be raised and determined in the adjudication and limits the scope for challenging enforcement.

A different approach currently exists regarding non-jurisdictional errors. UK courts may decide such issues at enforcement stage if they do not involve a substantial dispute of fact, always considering the parties' conduct including whether the party seeking to resist enforcement promptly commenced separate Part 8 proceedings. By contrast, NSW courts shall not resist enforcement for any non-jurisdictional errors committed by the adjudicator. The UK approach is preferred, since allowing the courts discretion to determine non-jurisdictional errors when that does not delay enforcement proceedings increases procedural justice without undermining the legislation.

A common approach exists between the UK and NSW regarding severability of an adjudicator's decision. That is, where a pleaded ground for resisting enforcement succeeds, provided it does not affect the entirety of the adjudicator's decision, the courts may order severance and enforce the unaffected part. This approach is preferred over quashing the entire decision, since it promotes both the legislation's purpose and procedural justice, by enforcing the unaffected part of the decision through an appropriate adjustment.

Conclusion

The legislation under review and its problem that led to this research

This thesis studied the statutory payment provisions, adjudication process and enforcement proceedings of an adjudicator's decision applicable to the UK and NSW construction industries. Albeit governed by different rules, every comparable legislation around the world introduces an entitlement to interim payment, imposes statutory payment notification obligations (SPNO) in respect of each payment, enables referring a dispute for adjudication producing a decision that is binding on the parties until resolved by agreement or litigation/arbitration, and permits suspending performance for non-payment of a sum due.

This thesis argued that every comparable legislation suffers from a common problem. That is, in tackling the injustice caused by the advantages that 'haves' get over 'have-nots' from delaying dispute resolution, the legislation creates a different kind of injustice caused by adjudication's 'pseudo-temporary' nature. 'Haves' are usually larger employers and contractors who receive works under the contract, whilst 'have-nots' are their smaller contractor counterparties providing the work. The term 'pseudo-temporary' describes the phenomenon whereby an adjudicator's decision is in practice final, albeit in principle temporary.

Injustice arises when the cause of this phenomenon is the insolvency, or the risk of intervening insolvency, of (usually) a have-not winning party in an adjudication before the conclusion of subsequent arbitration/litigation and actual repayment of any sums ordered, thereby deterring the other party from pursuing such litigation/arbitration proceedings. This thesis aimed to recommend the best solution to this problem.

Methodological approach for mitigating this injustice

Since over 12 jurisdictions have comparable legislation, it was impractical for this thesis to analyse them all. Therefore, the first methodological objective was to narrow the jurisdictions under review to a manageable extent without compromising on substantive aspects of any comparable legislation existing around the world. The selection of HGCRA and BCISPA(NSW) as research objects serves this purpose well because they are representative of the two different adjudication regimes currently existing around the world as explained in the Introduction.

Due to the novelty of the identified problem explained in the previous section, the second methodological objective was to prove its plausibility. Chapter One analyses reports and case studies of the pre-legislation era and argues that the legislation's primary aim is to tackle the injustice caused by the advantages that 'haves' get over 'have-nots' from delaying dispute resolution. Chapter Two presented existing empirical literature and judicial remarks supporting the notion that very few adjudicated disputes progress to final determination via litigation/arbitration.

Adjudication's fast track process inevitably affects its accuracy, whilst smash-and-grab adjudications can award the payee the full amount claimed without the payer being able to rely on any set-off or contractual defences other than whether the valid payment notifications were issued. Chapter Two cited several cases from both jurisdictions involving winning parties in an adjudication becoming insolvent shortly after receiving an adjudicated amount, thereby proving the plausibility of the central problem submitted by this thesis.

Once the problem's plausibility was established, the third methodological objective was to determine the best approach towards its resolution. Chapter Two examined possible countermeasures including introducing additional barriers in the enforcement of an adjudicator's decision and amending the legislation to the version that promotes the highest degree of procedural justice whilst preserving its speed. The former was rejected for undermining the legislation. In

recommending the latter, this thesis presented literature supporting the notion that the disputants' perception of substantive justice is directly proportional to their perception of the procedural justice leading to that outcome.

The fourth and final methodological objective was achieving a structured and systematic analysis of the legislation's substantive rules. This was achieved by dividing the legislation to the components forming its three fundamental pillars, namely, statutory payment provisions, adjudication process and enforcement of an adjudicator's decision. Each component was in turn comparatively analysed from the perspective of recommending the version that promotes the highest degree of procedural justice whilst preserving the legislation's speed.

Major findings and recommendations

Chapter One found that the reality of the UK and NSW construction industries prior to the legislation's introduction paralleled closely with Galanter's theory that the architecture of the legal system benefits the 'haves'. Larger contractors and employers personified 'haves', usually enjoying financial strength with each disputed amount being small compared to their capital. By contrast, smaller contractors personified 'have-nots', lacking liquidity and possessing large claims relative to their capital strength, rendering prompt resolution and payment crucial for their survival because they already incurred the expense of carrying out the work that is the subject of the claim.

'Have' defendants could resist a summary judgment application by 'have-not' claimants, and effectively withhold payment until completion of full trial, by raising a relatively weak set-off claim. In turn, both litigation and arbitration were unable to eliminate a 'have's' incentive to delay and complicate the dispute resolution process, causing their 'have-not' antagonists to abandon their claims or settle for significantly lesser amounts than they considered just. This had devastating social consequences for the 'have-not's' directors, employees, and creditors.

The legislation's primary aim was to eliminate a party's incentive to delay and complicate the dispute resolution process. To this day, the legislation plays a crucial role in tackling this injustice and therefore must be preserved, and, where appropriate, improved.

Chapter Two argued that the legislation's greatest disadvantage is the potential injustice caused by adjudication's pseudo-temporary nature, a phenomenon created by the legislation whereby a party's right of having an adjudicated dispute finally determined by litigation/arbitration is superficial. The most representative example is an adjudication between a 'have-not' claimant and a 'have' (or 'have-not') defendant, whereby the 'have-not' claimant is successful and receives a payment; however, it then becomes insolvent before the conclusion of any subsequent litigation or arbitration and actual repayment of any sum ordered. Most cases cited involve this scenario. Another example is a defendant losing an adjudication and not having the funds to pay the adjudicated amount, therefore, being forced into liquidation without the opportunity to litigate or arbitrate the dispute.

Chapter Two found that this potential injustice cannot be eliminated if the legislation's objective is to be preserved. The countermeasures of more readily staying the enforcement of an adjudicator's decision or imposing freezing injunctions are not recommended as undermining the legislation. The courts have considered such safeguards and dismissed them in favour of maintaining the legislation's force as an equalising reform. The injustice caused by adjudication's pseudo-temporary nature can only be mitigated by amending the legislation to the version that provides the highest degree of procedural justice while preserving its speed. Therefore, Chapters Three to Eight comparatively analyse HGCRA and BCISPA(NSW) aiming to recommend the legislation's version that promotes these parameters.

Chapter Three analysed the statutory right to interim payment due to its importance for the legislation's operation. It is this right to payment that leads to other rights and obligations under the legislation, whilst also reducing the debt owed to the payee during construction stage. Therefore, regulating the interval

between interim payments enhances the legislation's effectiveness. While BCISPA(NSW) requires monthly interim payments as a minimum, HGCRA allows parties freedom to agree the interval between interim payments. BCISPA(NSW)'s approach was recommended because it prohibits imposing long intervals between interim payments.

Furthermore, where parties agreed a schedule of interim payments up to the expected project completion date, but completion is subsequently delayed, HGCRA does not allow interim payments past the agreed schedule and until the project's completion. Requiring monthly interim payments as a minimum prevents this potential injustice.

The legislations also differ on the default position in the absence of agreement as to commencement of each payment cycle. HGCRA requires valuations in cycles of 28 days, whereas BCISPA(NSW) has the last day of the month as fixed reference point. BCISPA(NSW)'s monthly fixed-date approach was preferred for achieving clarity and certainty regarding the commencement of each payment cycle. This thesis recommended having the default reference as the last day of each month, with parties having freedom to agree an earlier date in respect of any particular month, insofar as that date falls within that month.

New insights were provided into the interplay between milestone payments and the prohibition of conditional payment provisions. Under HGCRA, where completion of a milestone is prevented for reasons beyond the payee's responsibility, the payee is still not entitled to payment until completion of the milestone. Therefore, the payment regime conflicts with the common law principle that no party can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself, as well as HGCRA's prohibition of making payment conditional on the performance of another contract. By contrast, BCISPA(NSW) renders milestone payment provisions ineffective if completion is delayed for reasons unrelated to the payee's performance.

Both HGCRA and BCISPA(NSW) merit amending, albeit for different reasons, to balance the freedom of agreeing milestone payments and the prohibition of conditional payment provisions. Chapter Three recommended rendering ineffective milestones (except retentions) whose duration of works extends beyond 30 days for reasons beyond the payee's responsibility.

Chapter Four addressed SPNO imposed for every payment, which establish the sum that must be paid and its final date for payment. If the payee complied with its SPNO but the payer failed to comply, then the payer must pay the full sum notified by the payee. This is critical for the legislation's success, as it compels notifying the reasons for paying any lesser amount than claimed, thereby enabling prompt referral of any resulting dispute for adjudication.

However, this also creates the controversial smash-and-grab adjudications, which have greater potential for injustice caused by the phenomenon of adjudication's pseudo-temporary nature because the payee is awarded the full amount claimed without the payer being able to rely on any contractual defence or set-off. To mitigate this problem whilst preserving the legislation's efficiency, the components forming SPNO were comparatively analysed recommending the version that better promotes transparency in the exchange of information relating to payments, affords the payer every reasonable opportunity to comply with its SPNO, and requires the payer to comply with its SPNO quickly.

BCISPA(NSW) creates a parallel statutory payment regime that is separate from any contractual regime. By contrast HGCRA's regime is mandatory, in that where the contract is silent, or does not comply with HGCRA's minimum requirements, HGCRA's relevant provisions are implied into the contract to the necessary extent as to render it compliant. HGCRA's mandatory payment regime was preferred to avoid having an application that is valid under the legislation but invalid under the contract, or vice versa.

HGCRA's term payment 'due date' is a reference point for calculating the deadline for issuing the payment notice, whereas under BCISPA(NSW) it means the final date for payment. Chapter Four recommended replacing HGCRA's term

‘due date’ with ‘valuation date’ to avoid this confusion. Each payment cycle should have a ‘valuation date’ and each payment should be valued up to its respective valuation date. From this perspective, both HGCRA and BCISPA(NSW) merit amending since they currently allow parties freedom to agree that a payment shall be valued up to a different date than its valuation date, which can undermine the legislation.

BCISPA(NSW) requires payment cycles to commence with an application by the payee, limits applications to one per cycle, and requires the document to state that it is an application made under BCISPA(NSW). By contrast, HGCRA allows freedom to agree which party shall instigate the cycle. If the contract provides for a ‘due date’[1322] without rendering it conditional upon the payee issuing an application, then HGCRA obliges the payer to issue a payment notice irrespective. Failing to do so enables the payee to issue a default notice, with the payer then having a shorter deadline for issuing a pay-less notice. A ‘default notice’ and an ‘application’ under HGCRA have similar contents, without any requirement for the document to state what it is, thereby causing disputes on whether a document is a default notice or an application. To prevent such disputes, BCISPA(NSW)’s approach was preferred, namely requiring payment cycles to commence via an application stating on its face that it is made under the legislation, while also limiting applications to one per cycle.

BCISPA(NSW) also requires applications to be issued ‘on and from’ the relevant valuation date and, for main contractors, accompanied by a supporting statement identifying all sub-contractors and whether they are paid in full. However, this thesis did not endorse either of these provisions. The former prevents parties from agreeing an earlier submission date while the latter has no practical benefit other than holding main contractors *in terrorem*. Chapter Four recommended requiring applications to be submitted not later than three business days after the relevant valuation date and not earlier than ten business days before the relevant valuation date, with parties having freedom to agree the deadline insofar as it falls within these limits and has at-least two business days’ time slot.

[1322] this thesis recommended replacing ‘due date’ with ‘valuation date’: see ch.4/s.4.4.2.

HGCRA allows parties freedom to agree payment terms, whereas BCISPA(NSW) prescribes maximum payment terms of 15 business days from employer to main contractor and 20 business days for all other payments from the application's date. HGCRA's leeway is abused by payers resulting in social problems, as well as undermining the legislation because it takes longer for a dispute to crystallise. Therefore, BCISPA(NSW)'s approach was preferred but with additional recommendations that maximum payment terms should be 28 days / 20 business days for all contracts, and calculable from the valuation date as opposed to the application date.

HGCRA requires issuing the payment notice within five days from the 'due date'[1323], whereas BCISPA(NSW) requires issuing the payment schedule within ten business days after the application. BCISPA(NSW)'s approach prevents main contractors from setting a consistent deadline for all sub-contractors, which causes unnecessary administrative burdens without improving the legislation's efficiency. Therefore, Chapter Four recommended requiring the payer (reference to 'payer' includes any 'specified person') to issue a payment notice within five business days from the valuation date. The payer shall pay the sum specified in the payment notice unless the payer issues a pay-less notice not later than one day before the final date for payment valuing the works up to the date the pay-less notice is issued.

HGCRA allows a payer who failed to issue a payment notice to issue a pay-less notice not later than seven days, or any other period agreed, before the final date for payment. HGCRA does not require the payee to remind the payer to comply. Under BCISPA(NSW), failing to issue a payment schedule and failing to pay the sum claimed by the final date for payment entitle the payee to suspend performance and/or commence court proceedings to recover payment with the payer having no defence other than whether the application and/or payment schedule were duly served. However, to refer this same dispute to adjudication, the payee must first notify the payer of the payee's intention to apply for

[1323] recommended replacing with 'valuation date'.

adjudication, with the payer then having a second opportunity to provide a payment schedule within five business days.

This thesis recommended that the payer should be obliged to remind the payer to comply with its SPNO in a manner that neither interferes with rights already acquired nor delays the commencement of adjudication. Therefore, it was recommended that where the payer fails to issue a payment notice, the payee shall remind the payer of the payer's failure to issue the payment notice and the payer's obligation to issue a pay-less notice. Such reminder shall be issued at any time after the payment notice deadline, up to the date falling ten business days after the original final date for payment. Failure to issue this reminder shall relieve the payer from its payment notification obligations in respect of that payment cycle.

Where the payer issues this reminder, the final date for payment shall be the date falling five business days from the payee's reminder, or, 28 days / 20 business days from the valuation date or any earlier date agreed between the parties, whichever is later. The payer shall pay the sum specified in the payee's application, unless the payer issues a pay-less notice not later than one day before this revised final date for payment, valuing the works up to the date the pay-less notice is issued.

Chapter Five reviewed the available remedies, besides adjudication, for non-payment of a sum due or under-certification. HGCRA and BCISPA(NSW) entitle the payee to suspend performance for non-payment of a sum due by the final date for payment after giving seven days' and two business days' notice respectively. HGCRA compensates for costs and delay caused by the suspension, whereas BCISPA(NSW) is silent on costs and allows three business days for continuing the works following payment which is not always enough. Therefore, HGCRA's version was preferred.

BCISPA(NSW) entitles a payee applying for adjudication to require the payer's payer to retain enough money from the payer to cover the payee's claim, whereas HGCRA does not have an equivalent provision. In the event of the payer's

intervening insolvency, the payer's payer can refuse to pay the payee, which in turn defeats this provision's purpose. Furthermore, this provision introduces obligations to third-parties who are or perceived to be the payer's payer, impedes the payer's cashflow irrespective of the merits of the payee's case, and risks losing the funds in the event of the payer's payer's intervening insolvency. Therefore, HGCRA's version was preferred.

BCISPA(NSW) mandates minimum interest for late payment of 6% over base, whereas HGCRA allows parties freedom to agree a 'substantial remedy' with the statutory rate of 8% over base applying where parties fail to agree. BCISPA(NSW)'s version was preferred for prescribing a minimum rate as opposed to HGCRA's subjective notion of 'substantial remedy'. However, the legislation should limit the maximum interest an adjudicator can award to 90 days to prevent high interest amounts caused by the payee's delay to commence adjudication.

Chapter Five also reviewed the matters of retention and pay-when-paid in the event of an upstream insolvency. Whilst both legislations permit retentions, BCISPA(NSW) requires contractors whose contract with the employer is over $20m to deposit their sub-contractors' retentions into secured trust accounts, whereas HGCRA has no such requirement. HGCRA was preferred because depositing retentions into trust accounts has disadvantages including administrative burden, costs, cashflow restrictions and insolvency risk of the financial institution holding the trust accounts.

HGCRA permits pay-when-paid provisions in the event of an upstream insolvency, whereas BCISPA(NSW) does not. This thesis favoured BCISPA(NSW), and recommended abolishing HGCRA's exemption because it can result in a windfall for the payer.

Chapter Six reviewed the statutory right to commence adjudication, the nature of disputes that can be referred and the timing in which they can be referred. HGCRA's right to adjudication is equal, permitting either party to commence adjudication, whereas BCISPA(NSW)'s right is asymmetric, allowing only the

party undertaking to carry out work under the contract to commence adjudication. Furthermore, HGCRA allows parties to agree an ANB in their contract, whereas BCISPA(NSW) prescribes unilateral choice by the claimant. Additionally, under HGCRA the ANB's role is confined to nominating the adjudicator, whereas in NSW it also advises the parties and administrates the adjudication process. For all these matters, HGCRA's version was preferred for achieving a higher degree of procedural justice.

HGCRA allows any dispute arising under the contract to be referred for adjudication, whereas BCISPA(NSW) only allows referral of a payment dispute. HGCRA's wider scope was preferred for permitting referral of a single disputed issue instead of an entire payment dispute consisting of several disputed issues thereby simplifying the adjudication. Furthermore, the adjudicator should have jurisdiction to determine issues of fraud, negligence, and misrepresentation, which is consistent with HGCRA's current prevailing interpretation by the courts.

HGCRA allows commencement of adjudication at any time, whereas BCISPA(NSW) prescribes strict deadlines. HGCRA's version was preferred for facilitating parties in negotiating a resolution to the dispute, whilst also simplifying the process and preventing jurisdictional objections that the adjudication was commenced late. However, the right to commence adjudication at any time should be subject to the following limitations:

- Consistent with HGCRA, the earliest point for referring a dispute to adjudication is upon its 'crystallisation', a term denoting that a dispute exists, which normally arises once a claim is rejected during payment notification exchanges though it can also arise through silence.
- Adjudication should be subject to the limitation defence.
- To encourage prompt resolution of disputes, the contract may provide that a decision/certificate is conclusive insofar as it permits commencement of adjudication within at least 28 days from the issuance of such decision/certificate.
- If a 'smash-and-grab' adjudication has commenced within 30 days (or other longer deadline agreed) from the final date for payment of the sum

claimed to be due, then an adjudicator in a ‘true value’ adjudication shall have no jurisdiction until the ‘smash-and-grab’ adjudication is concluded and the payer has made any payments ordered.

Chapter Seven comparatively analysed HGCRA’s and BCISPA(NSW)’s adjudication processes. To commence adjudication, HGCRA requires issuing a simpler ‘notice of adjudication’ to the responding party and the ANB, followed by the detailed ‘referral notice’ to the responding party and the appointed adjudicator within seven days from the ‘notice of adjudication’. By contrast, BCISPA(NSW) requires a single ‘adjudication application’ containing the detailed case, which the ANA forwards to the appointed adjudicator.

HGCRA’s version was preferred for being consistent with the previous chapter’s recommendation that ANBs should merely appoint the adjudicator, not manage the process, whilst also facilitating parties to negotiate without formally applying for adjudication. Consistent with HGCRA’s approach, Chapter Seven recommended allowing the referring party to issue a fresh notice if concerned about missing the 7-day deadline between the notice and the referral. HGCRA should be amended to permit simultaneous service of the notice to the responding party and the ANB, require the referring party to copy the responding party in the email to the ANB, allow the responding party one working day to comment on any representations made by the referring party as to the adjudicator’s traits, and require the ANB to consider both parties’ comments and give brief reasons for the nomination.

To prevent late delivery of submissions, Chapter Seven recommended requiring electronic service of all documents. Furthermore, ‘paperless’ adjudication was recommended as the legislation’s default position, unless the contract also requires hard copies.

Both HGCRA and BCISPA(NSW) require better rules regarding the adjudicator’s duty to disclose circumstances that might give rise to an appearance of bias in the parties’ eyes. This thesis recommended producing guidelines, akin to the IBA

Guidelines but specifically for adjudicators, dividing example situations into three categories:

- Red: disqualifying a person from acting as adjudicator
- Orange: requiring disclosure
- Green: not requiring disclosure

The ANB should ask potential nominees if they have any doubts as to their ability to be impartial and independent when adjudicating the dispute, and whether there are any circumstances falling into the Red category. Following his/her nomination, the adjudicator must disclose to the parties any circumstances falling into the Orange category.

BCISPA(NSW) prescribes a different procedure between 'smash-and-grab' and 'true value' adjudications, the former being quicker and with the payer not allowed to respond. By contrast, a respondent in an adjudication under HGCRA always has the right to respond, and the adjudicator's decision must be issued within 28 days from the referral, extendable by up to 14 days with the referring party's consent, or longer with both parties' consent. HGCRA's approach was preferred because, although in a smash-and-grab adjudication the respondent cannot rely on any contractual defence or set-off, it may nevertheless argue that it has complied with its SPNO, or, that the referring party breached its SPNO, or, that the adjudicator lacks jurisdiction.

HGCRA and BCISPA(NSW) oblige the adjudicator to act impartially, permit the adjudicator to correct accidental errors in his/her decision, provide that he/she is not liable for any act or omission done in good faith, and render his/her decision binding until reversed by litigation/arbitration. Furthermore, both legislations enable the adjudicator to ask the parties questions, although HGCRA includes a broader power to take the initiative in ascertaining the facts and the law. However, if the adjudicator contemplates deciding the dispute upon a basis contended by neither party, then both legislations require the adjudicator to inform the parties of that basis and consider their comments.

A determinative factor for the procedural justice achieved in a true value adjudication is the extent of the adjudicator's duty to consider arguments or evidence not detailed in the payment notification documentation. HGCRA requires adjudicators to consider new arguments and evidence that develop and hone a claim or defence included in the payment notification documentation, as well as new defences not featured therein. By contrast BCISPA(NSW), sets a subjective standard that permits parties to raise 'relevant submissions', prohibits the payer from introducing new reasons for withholding payment, and obliges the adjudicator to consider all submissions 'duly made'. HGCRA's version was preferred for enhancing procedural justice, whilst focusing the adjudication on resolving the substantive dispute instead of whether a submission was duly made. Furthermore, consistent with HGCRA's approach, parties shall specify any jurisdictional objections early in the adjudication and maintain them throughout the process to preserve their right to resist enforcement on that basis, and the adjudicator shall issue reasoned decisions on such objections.

Following the dispute's referral, HGCRA permits the referring party to unilaterally withdraw the entire dispute or any head of claim, whereas BCISPA(NSW) allows the respondent to object and then it is for the adjudicator to decide. BCISPA(NSW)'s version was preferred, subject to clarifying that the referring party must include any reasons with its request to withdraw, the responding party must issue any objection including reasons within one working day, and the adjudicator must decide the matter one working day thereafter. The adjudication's timetable is not extended unless the parties agree.

Under BCISPA(NSW) the adjudicator has no jurisdiction to award a party's costs of adjudication. Similarly, under HGCRA each party bears its own costs, however, HGCRA allows the parties to agree otherwise after the referral of the dispute. HGCRA's version was preferred, with the clarification that the adjudicator has from the outset jurisdiction to apportion the ANB's nomination fee (in addition to his/her fees).

An adjudicator under HGCRA may request interim payment of fees incurred insofar as lack of payment does not delay communicating his/her decision,

whereas BCISPA(NSW) entitles the adjudicator to refuse communicating his/her decision to the parties until payment of his/her fees. HGCRA's version was preferred for promoting procedural justice as it prevents perceptions that the adjudicator is financially beholden to the referring party, whilst also improving adjudication's speed by avoiding delays in the notification of the outcome. To further prevent any appearance of bias this thesis also recommended that any interim fees should be equally apportioned between the parties, instead of apportioning the entire amount to the referring party.

Chapter Eight comparatively analysed the procedure for enforcing an adjudicator's decision in the UK and NSW. Enforcement must conclude quickly to avoid undermining the legislation. However, considering adjudication's pseudo-temporary nature, the courts should refuse enforcement on appropriate grounds to prevent any apparent error or injustice becoming permanent. The courts of each jurisdiction have differing structure and capabilities; therefore, it was impractical to recommend a universal approach for some components forming the enforcement process.

In England and Wales, the TCC developed a bespoke enforcement process, whereby directions are issued three working days from receiving a claim, providing for an enforcement hearing within 6-8 weeks. By contrast, BCISPA(NSW)'s enforcement process was developed by statute, providing that the payee can file an adjudication certificate in the court as judgment debt. Furthermore, the payee must pay into the court the adjudicated amount before being allowed to challenge it.

For jurisdictions with a slow judicial system, NSW's approach was preferred since both parties are disincentivised from delaying the process. However, for jurisdictions with a specialist court akin to the TCC, the English approach was preferred for preventing any potential injustice where the payer does not have the adjudicated amount to pay into the court, thereby being forced into insolvency without having its challenge reviewed.

This thesis made two recommendations for BCISPA(NSW)'s enforcement process. Firstly, dispensing with the requirement of applying to the ANA for an adjudication certificate and instead filing into the court as judgment debt the adjudicator's decision (together with the relevant application and affidavit). Secondly, requiring notification to the other party when filing the adjudicator's decision to the court as judgment debt, and when seeking to enforce such judgment debt.

Both the UK and NSW courts consider jurisdictional errors, serious breach of the rules of natural justice and fraud as valid grounds for resisting enforcement. Nevertheless, UK courts require any known jurisdictional challenges or fraud accusations to be raised promptly and clearly before the adjudicator. This approach is preferred for encouraging such issues to be raised and determined in the adjudication, whilst limiting the scope for challenging enforcement.

NSW courts cannot quash an adjudicator's decision for non-jurisdictional errors, whereas UK courts have discretion to decide such issues at enforcement stage if they do not involve a substantial dispute of fact and considering the parties' conduct. Based on the theory of adjudication's pseudo-temporary nature, enforcing an adjudicator's decision despite obvious errors increases the likelihood of those errors becoming permanent. Therefore, the UK approach is preferred because permitting judicial review of such issues in circumstances where enforcement proceedings are not delayed increases procedural justice without compromising on speed.

Both UK and NSW courts may sever an adjudicator's decision, as opposed to declaring the entire decision unenforceable, where a ground for resisting enforcement succeeds but does not affect the entire decision. The current approach is preferred for supporting the legislation's purpose because it leaves the unaffected part enforceable, whilst also promoting procedural justice since an appropriate adjustment is applied to exclude the contaminated part of the decision.

Implications of the findings

The findings of this thesis are important for theory, policy, and practice, paving the way for further research in all these areas. Regarding practical implications, this thesis discussed the importance of disclosure for avoiding the appearance of bias and recommended further research to develop guidelines on disqualification and disclosure for adjudicators.

From a theoretical perspective, this thesis presented the problem of adjudication's pseudo-temporary nature, a phenomenon caused by every legislation introducing adjudication in a jurisdiction. Further empirical research can aid in better understanding the effect of adjudication's pseudo-temporary nature on the disputants' decision-making process when negotiating a dispute. Semi-structured interviews with decision-makers of 'haves', or, lawyers representing 'haves', can provide new and deeper insights into the extent that their decision-making was influenced by the likely inability of the other party to repay any sums ordered in a subsequent litigation/arbitration.

Policymakers must consider, on the one hand, the legislation's need to operate quickly to eliminate the advantages that 'haves' obtain from delaying dispute resolution, and, on the other hand, the requirement of promoting procedural justice to mitigate the potential injustice caused by the phenomenon of adjudication's pseudo-temporary nature. This thesis recommended the legislation's version that better meets these parameters, aiding in the adoption of a model in other jurisdictions or industries that do not currently operate comparable legislation, as well as implementing changes in those jurisdictions where comparable legislation currently exists.

A limitation stems from the fact that this thesis had to balance breadth, depth and permitted wordcount. Regarding breadth, it was imperative to provide a holistic and up-to-date critical comparative review of the legislation's three pillars, namely payment provisions, adjudication, and enforcement. If any of these pillars or their key components was omitted from the scope, then this thesis would have

suffered loss of coherence due to lack of analysing substantive rules that are crucial for the legislation's operation.

Although this thesis analyses the legislation's components at a significant depth, there is always room to undertake empirical research. For example, conducting interviews on the central problem identified by this thesis, and the recommended optimum version of the legislation that better resolves this problem, can bring new and deeper insights. The Law Commission of England and Wales launched a review of the Arbitration Act 1996 on 30 November 2021.[1324] It would be helpful if a similar funded initiative was launched for HGCRA too.

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