Note: Candidates are expected to have available: The Housing Grants, Construction and Regeneration Act 1996 (as Amended 2009) ["the ACT"]
and
The Scheme for Construction Contracts (England and Wales) Regulations 1998 as amended (England) Regulations 2011), or as amended (Wales) Regulations 2011, or as amended (Scotland) Regulations 2011) ["the Scheme"]

1. Advice to a Disputant by the Adjudicator

You publish a Decision in which the Referrer is substantially successful but has not paid your fee in the first instance as required by your Terms & Conditions. The Defender asserts wrongly that the Decision is unenforceable and the Referrer requests your advice.

Q: What do you do?
Note: Quite often the Defender subsequently pays your fee in full including any interest for late payment.

A: Advise both Parties that you must not provide such advice which should be elicited elsewhere. It seems to me that this scenario is too common and enables payers to negotiate an unfair payment with the often naïve payee.

How about a note in one's Terms & Conditions that neither Party should rely upon their opponent for advice on something arising during the adjudication, particularly the enforceability or otherwise of the Decision. Such advice should be obtained from an independent reliable source because the Adjudicator is prohibited from giving unilateral advice to either Party. The general view was not to do this and either remain silent or 'Advise' as above.

2. Interest

The Parties' agreement for a construction contract provides that late payment by one to the other will attract simple interest at the rate of 2% per annum above the Bank of England Base Rate, accompanied by the phrase: '*and the Parties agree that the said rate is a substantial remedy'.*

The payee successfully claims payment in an adjudication before you and requests interest in accordance with the Late Payment of Commercial Debts (Interest) Act 1998, as amended ["the 1998 Act"].

Q1: As Adjudicator do you award interest in accordance with the1998 Act or the Agreement.

A1: See A&V Building Solutions Ltd. v J&B Hopkins Ltd. 6th September 202 EWHC 2295 (TCC) at Paras 71 to 74.
The judge decided that in the circumstances here as described at paras 71 to 74, the contractual rate of interest was not a substantial remedy despite the contractual phrase: '*and the Parties agree that the said rate is a substantial remedy'* purporting to state otherwise. The unequal bargaining strength of the Parties featured in his reasoning.
We like the idea that despite the contrary contractual provision the matter was concluded on the facts.
PART II para 8 of the Late Payment Act states:
(3) The parties may not agree to vary the right to statutory interest in relation to a debt unless either the right to statutory interest as varied or the overall remedy for late payment of the debt is a substantial remedy.
(4) Any contractual terms are void to the extent that they purport to confer a contractual right to interest that is not a substantial remedy . . .

Q2: Extract from Statutory Instrument 2002 No.1675 The Late Payment of Commercial Debts (Rate of Interest) (No.3) Order 2002 ["SI 1675"]
Rate of statutory interest
4. The rate of interest for the purposes of the Late Payment of Commercial Debts (Interest) Act 1998 shall be 8 per cent per annum over the official dealing rate ["the Base Rate"] *in force on the 30thJune (in respect of interest which starts to run between 1st July and 31st December) or the 31st December (in respect of interest which starts to run between 1st January and 30th June) immediately before the day on which statutory interest starts to run.*

The Explanatory Note in SI 1675 (This not is not part of the Order) states:

For the purpose of this Order the official dealing rate to be used is that in force on 30th June or 31st December in any one year. This rate will apply as the official dealing rate for the following six month period, namely 1st July to 31st December or 1st January to 30th June respectively.

Once interest commences under the 1998 Act does it alter with changes in the Bank of England Base Rate if it continues to run beyond the first six month period just mentioned?

A2: See Para 51 in A&V Building Solutions Ltd. v J&B Hopkins Ltd. 6th September 2024 EWHC 2295 (TCC). A&V appear to have relied upon the argument that the word 'starts' will only apply when the interest starts to run in the first six month period to which it applies whereas in any further six month periods the interest only 'continues' to run. The result, according to A&V, being that the interest rate stayed fixed until payment was eventually made.
In short, that was a literal construction of Part 4 of SI 1675. This is contrary to the (non-binding) guidance given in SI 1675. It is also contrary to what happened in the judgment just mentioned where the interest awarded did change by virtue of changes in the Base Rate at each six month period for more than three years. It follows that the judgment pertaining to 1998 Act interest, adopted the guidance in SI 1675 rather than the more literal construction just mentioned.
In many instances this will not matter because the awarded interest has not accrued for more than six months at the time of the Decision. It is useful to include the applicable daily interest rate in the Decision.

3. Employer/Subcontractor Agreements

Abbey Healthcare (Mill Hill) Ltd. v Augusta 2008 LLP 9th July 2023 UKSC 23 overruled Parkwood Leisure Ltd. v Laing O'Rourke Wales and West Ltd. 29th August 2013 EWHC 2665 (TCC) whereby 'collateral warranties' were previously thought to be 'construction contracts' pursuant to the ACT. In particular, warranties to third parties which merely provided that work already completed by a constructor was satisfactory could not be regarded as an agreement to perform 'construction operations' so as to fall within the ACT.

Q: Employer /Subcontractor Agreements [”ESAs”] are used where specialist subcontractors design and perform work of a kind outside the abilities of a main contractor who does not have a contractual obligation to the Employer for such specialist work. Their purpose is to link the Employer and Subcontractor contractually with rights and obligations which necessarily bypass the main contractor.
Are ESAs covered by the Act?

A: Yes, if the performance of the design or work in the ESA is ongoing and current. No, if it is not, or is only collateral to performance of design or work under a separate contract. See Lord Hamblin’s judgment as a whole and conclusion at Para 84 (1) and (2).
Past and future obligation to complete the Works?
e.g. The Contractor warrants to the Beneficiary that the Contractor has carried out and completed **or will carry out and complete** the Works with all due diligence, in accordance with and subject to the terms of the Construction Contract, and has observed and performed and will observe and perform all of its duties and obligations expressed in or arising out of the Construction Contract and (without qualification to or derogation from the foregoing) has exercised and will exercise all reasonable skill and care and diligence in and about the construction of the Works.
Do we think this will work in bringing the HGCRA into play, or is it simply better to include a contractual adjudication Clause?

4. Adjudication Appointment by an ANB which is not identified in the Construction Contract.

The Notice to Adjudicate identifies the contractually mentioned ANB as the one to be invited to appoint. The ANB is unable to appoint in time under the ACT and another ANB is requested to appoint instead and they appoint you.

Q: Are you properly appointed?
A: No you are not. The Notice to Adjudicate must describe the ANB who is actually to appoint. The Notice to Adjudicate should accurately set out the ‘four corners of the dispute’. See Whiteways Contractors (Sussex) Ltd. v Impresa Castelli Construction UK Ltd. 9th August 2000 EWHC HT-00-199 (TCC). Either the whole process should be started again with a Notice to Adjudicate which identifies the ANB to be approached, stating why; or an explanatory email should be sent to the defenders to

the same effect followed by an application to the new ANB. If meanwhile the defenders make no comment it can be argued that they waived any objection to this. If Part I of the Statutory Scheme itself applies then Para 5(2)(b) provides that the referrer may request any other ANB to appoint. Again, some sort of written explanation to the defenders would be of assistance.

5 A claim under the ACT related to cladding that fell foul of the extended retrospective limitation period of thirty years introduced by the Building Safety Act 2022.

It was argued that the claim was too wide to fall within the ACT because S108(1) limited adjudication to matters arising 'under the contract'.

Q: Was that argument correct?

A: No!. See Paras 41 to 80 in BDW Trading Ltd. v Ardmore Construction Ltd. 16th December 2024 EWHC 3235 (TCC) where a comprehensive analysis of the leading cases is to be found, 'arising under', 'arising out of'', 'in connection with' etc., are to be construed widely as in Fiona Trust & Holding Corp. & Othrs. v Privalov & Othrs. [2007] UKHL 40.
It was noted that the first instance judgment was under review.

6 You are representing a Party whose key witness is unconsciously biassed but believes his/her testimony is true. Unfortunately it is not true because there is overwhelming evidence otherwise.

Q: You are shortly to serve your client's pleadings and evidence. What do you do if a key witness's testimony will clearly be harmful to the outcome that your client desires?

A: One option is to point out to the witness that what they are planning to say does not bear scrutiny and that they should delete it in order to maintain credibility before the tribunal.
If that fails, consider whether to call the witness at all.

Discussion followed as to ethical matters including the resignation of the advocate with the conduct in the event of client intransigence.

7 A 'smash and grab' adjudication.

The Contract is the JCT Intermediate Contract 2016 with the following payment mechanism:

- the Contractor may, no later than the Interim Valuation Date, make an application to the Quantity Surveyor (a Payment Application);
- the due date for payment is seven days after the Interim Valuation Date;
- the Contract Administrator shall, not later than 5 days after the due date, issue an Interim Certificate;
- the final date for payment is 14 days after the due date;
- a Pay Less Notice may be given no later than 5 days before the final date for payment.

The Contractor makes an interim application for payment on the Valuation Date. The application is compliant and states the sum considered to be due (£345,678) and the basis on which that sum was calculated.

Five days after the due date, the Quantity Surveyor issues to the Contractor a detailed valuation in exactly the same format as the Contractor's application, stating the sum the Quantity Surveyor considers to be due (£123,456) and the basis on which that sum was calculated. The Quantity Surveyor's covering email states: *'Any questions please let me know or, if your happy with my approach, if you confirm [the Contract Administrator] will issue the payment certificate'.*

The Contractor does not respond to the Quantity Surveyor's email and no Interim Certificate is issued.

After the final date for payment has passed the Contractor notifies the Employer that, in the absence of a Payment Notice or a Pay Less Notice, his application represents the notified sum and is payable in full. The Employer disputes this and, within the next few days, pays the amount stated in the Quantity Surveyor's assessment (£123,456).

Q: In the adjudication the Responding Party (Employer) argues that the Quantity Surveyor's assessment represents a valid Pay Less Notice.

The Referring Party (Contractor) disagrees, arguing that a Pay Less Notice can only be given by the Employer, unless the Employer notifies the Contractor that the Contract Administrator or Quantity Surveyor or any other person is authorised to do so:

4.13.1 'A Pay Less Notice given by either Party shall specify the sum he considers to be due to the other Party at the date the notice is given and the basis on which that sum has been given. Such notice:

.1 (where it is to be given by the Employer) may be given on his behalf by the Architect/Contract Administrator or Quantity Surveyor or any other person who the Employer notifies the Contractor as being authorised to do so'

The Referring Party refers to the RIBA Guide to JCT IC16 which supports the Referring Party's view:

The pay less notice should be issued by the employer, unless the employer has notified the contractor that the contract administrator, quantity surveyor or other person is authorised to issue the notice on its behalf.

A:

RICS professional guidance, UK – Interim valuations and payment, 1st Edition, August 2015 in relation to the JCT Intermediate Form:

"The employer is required to specify in any pay less notice both the sum that he or she considers to be due to the contractor at the date the pay less notice is given and the basis on which that sum has been calculated. Alternatively, the contract conditions also state that the pay less notice can be given on behalf of the employer by the certifier, quantity surveyor or employer's representative or by any other person the employer has previously notified the contractor is authorised to do so".

8 Not discussed

9 Not discussed

10 A developer becomes insolvent owing a sum to a contractor.

The assets of the developer are bought for £1 by its erstwhile owners by way of an assignment. The contractor claims the sum due from the assignee who refuses to pay. Then the Contractor obtains a favourable Decision under an adjudication.

Q: What happens next?

A: See Grove Construction (London) Ltd. v Bagshot Manor Ltd. 13th March 2025 EWHC 591 (TCC)

The Decision was not enforced because an assignment only conveys benefits and rights but excludes obligations. This even applied to the outstanding retention monies owed to the contractor/claimant.

This seems extremely unfortunate to me. Too often Philip has witnessed or heard that administrators/receivers/liquidators sell the insolvent company's assets to the original owners under the guise of a separate company at a huge discount or a contrived auction. This leaves fewer resources for distribution amongst creditors, particularly trade creditors.

We refer to Sir Kenneth Cork of 'Cork Gully's report to the Government prior to passing of the Insolvency Act 1986.

Concern was expressed that retention monies should be held in trust for the eventual recipient. This did not become law although for a short while some building forms had provisions with that aim. The problem seems to have been the lack of a link between subcontracts having retention trusts whereas main contracts did not which was clearly unfair to main contractors. The differing drafting bodies at the time for subcontracts and main contracts were not integrated so as to allow trusts to work properly.

Since then there has been the Construction (Retention Deposit Schemes) Bill 2018 [the 'Aldous Bill'] which has since developed important support but is yet to receive a second reading in the House of Commons.

Does the assembly here consider that the rules of assignments should be amended to avoid such practices, or further, retention funds should be regarded as trust accounts outwith the clutches of the eventual payers for disposal purposes?

There was no resolution to this under current legislation.

In passing: the Corporate Insolvency and Governance Act 2020 at S22(1)(a) provides:

'A Company may not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose'.

With that in mind we refer to Bilta (UK) Ltd. (In Liquidation) & Othrs. v Tradition Financial Services Ltd. 7th May 2025 UKSC 18 in which S213 of the Insolvency Act 1986 is to be widely construed.

Not only are those 'running' the insolvent company caught by S213 but also any third parties who participate or assist when they know that the company is involved in a fraudulent purpose.

Similarly, what about protecting pension funds of companies and the like on behalf of their employees against company insolvency?

Once upon a time …….

Or a brief discussion of Employer-Subcontractor Design Agreements and how they might assist with a modern issue

Once upon a time, the designer of a construction project [“designer”] charged for his/her services on the basis of fee scales whereby a percentage of the value of the construction work [“the value”] was chargeable[1].

The value included all the various on site building operations but also the design costs by suppliers and subcontractors [“specialists”] for such things as reinforcement, piling, diaphragm walling, mechanical and electrical services, lift installations, curtain walling/cladding, and drainage, to name a few.

It followed that the designer[2] could achieve a hidden bonus fee on the design costs of others.

At the time that such things were rife, building contracts between employers and main contractors did not impose any of the permanent designs for the project upon the latter. Only the design of temporary work such as scaffolding was required of a main contractor. This left no contractual link between employers and specialists for the designs of the latter in the event that such designs were faulty or were in want of supervision on behalf of the employer. That caused serious difficulties in terms of the ability to claim against subcontractors absent a contractual relationship between the parties. Since Murphy v Brentwood District Council[3] it has not been possible to claim for “economic loss “absent a contractual relationship or assumption of responsibility.

To overcome this problem, mechanisms were devised for utilising the main contractor as a faux claimant on behalf of the employer or specialist, as the case may be, concerning specialist design and other matters which did not particularly concern the main contractor. Unfortunately, these were difficult to set up[4].

Fortunately, a thing known as an Employer/ Subcontractor Agreement [“ESA”] was eventually devised which established the contractual nexus enabling employers to hold specialists accountable in the event of the latter’s inadequate designs. A peppercorn sum of £1 or similar was set up as consideration to the specialist by the employer for entering into such ESAs for which there were and are standard forms.

Returning to our original theme, it was at this point that a mechanism was devised

[1] Fee Scales of this type were not regarded as competitive and were largely displaced by the time of the Competition Act 1998.

[2] and other professionals

[3] [1991] UKHL 2 26th July 1990.

[4] Philip remembers the difficulty in pursuing an employer of behalf of a subcontractor under the old ‘blue’ subcontract form using this mechanism. We do not recall reading any caselaw report where this was successfully achieved.

(by Philip and his colleagues) in their ESAs whereby the specialists were progressively paid for their designs directly via the ESA in order also to prevent the sometimes significant bonus just mentioned to the designer[5]. The contract documents described the design criteria and other features of the intended specialist works including the various consultants who would be involved. The tender process could commence before the process to appoint the main contractor but was often later. The periods for the design and construction stages of the specialist works were set out but were only finally crystallised upon the appointment of the main contractor.

In those days no one had any expectation that there would be a Housing Grant, Construction and Regeneration Act 1996 ["the HGCRA"].

Meanwhile for reasons that we will tell you all about, 'some other time'[6], it became fashionable to use standard form contracts 'with contractor design'. The need for ESAs disappears under such contractual arrangements because the main contract 'with contractor design' provides the necessary continuous link between employer and specialist and vice versa.

The conventional standard main forms absent main contractor design, however, still exist and if used then ESAs are needed for questions of specialist design.

Section 104 (2)(a) of the HGCRA clearly envisages any agreement for (this word is key to the issue of whether an agreement falls within the HGCRA) the performance of design work in relation to construction operations to fall within the statutory provisions of the HGCRA. Parliament clearly intended that construction specialists should have the statutory benefit of the payment and other provisions there set out. That is to say, for the carrying out and completion of specialist designs on or before the specialist's construction work progresses on site. Those benefits are not confined to the adjudication regime nor are they simply for the assistance of one party to the construction operations being performed.

As for collateral warranties in which a contractor or subcontractor warrants the performance of their respective works as properly performed and the like to the recipients of the warranty, they have been the subject of some important judgements[7] culminating in Abbey Healthcare (Mill Hill) Ltd. v Augusta 2008 LLP (formerly) Simply Construct (UK) LLP. 9th July 2024 UKSC 23 ["Abbey"]. As the judgments in the TCC, Court of Appeal and Supreme Court demonstrate there is a clear tension between the wish to allow the parties to have the benefits of the

[5] Philip notes that this was particularly successful on a multi-office project on a dried-up contaminated lake having underground car parking and basements under a civil engineering agreement with the superstructures under a building contract.

[6] With reference to Flanders' and Swans' very popular Gnu Song.

[7] In particular: Toppan Holdings Ltd. and Abbey Healthcare (Mill Hill) Ltd. v Simply Construct (UK) LLP 27th July 2021 EWHC 210 (TCC); Abbey Healthcare (Mill Hill) Ltd. v Simply Construct (UK) LLP 21st June 2022 EWCA Civ 823; and Parkwood Leisure Ltd. v Laing O'Rourke Wales and West Ltd. 29thAugust 2021 EWHC 2665 (TCC) which is now overruled.

HGCRA as against the interpretation of the statute and the warranties themselves on the conventional grounds as now understood.

In all these cases it was the main contractor or employer who provided a post completion warranty to a recipient or assignee who generally had no involvement with the construction operations on site. In Abbey the main contract incorporated ‘contractor design’ rendering an ESA of the kind we have described as unnecessary.

All the warranties in Abbey were unrelated to the performing of works, unlike with an ESA because the works were completed and a separate contract dealt with all that performance including its design such as was incorporated in the design portion of the main contract. Consequently none of those warranties were for construction operations and all of them fell outside the criteria under which the HGCRA could apply.

As stated in the Judgment of Lord Hamblen in Abbey:

65. As a generality, it is difficult to see how the object or purpose of a collateral warranty is the carrying out of construction operations. The main object or purpose of such a warranty is to afford a right of action in respect of defectively carried out construction work, not the carrying out of such work.

66. Whether or not the carrying out of construction operations has to be the main object or purpose of the agreement, it must surely be necessary for the agreement to give rise to the carrying out of such operations. A collateral warranty that merely promises to the beneficiary that the construction operations undertaken under the building contract will be performed does not do so. In such a case, it is the building contract that gives rise to the carrying out of the construction operations; not the “collateral” warranty. Any obligation undertaken to the beneficiary to carry out construction operations derives from and mirrors the obligations already undertaken under the building contract. Everything is referable to the building contract and replicates duties owed thereunder. There is no distinct or separate obligation undertaken to the beneficiary. There is no promise to carry out any construction operation for the beneficiary; merely a promise to the beneficiary that the construction operations to be carried out for someone else under the building contract will be performed.

It is, of course possible to include contractual provisions for adjudication in such a warranty but our concern is whether a construction specialist can enjoy the other significant statutory rights provided under the HGCRA in respect of the specialist’s design obligations while at the same time affording a contractual nexus between specialist and employer.

We suggest that an ESA of the type described will achieve both these things in the event that main contractors have no permanent design obligations which is now the majority of main contractors.

It might be argued that such an ESA is collateral to the purpose of the specialist subcontract itself and therefore falls foul of the almost blanket ban imposed by Abbey whereby the ESA is considered to merely replicate the obligations under the subcontract. However the ESAs as used involved direct payment for on-going work not simply a warranty for work. In addition, we point out that Paras 67 and 68 of Abbey which refers to Stuart-Smith LJ's dissenting judgment in the Court of Appeal and the "disconnect" between a collateral warranty and the carrying out of construction operations may well give an answer to this, in that the main contractor is principally concerned with the buildability and timing of the specialist's designs via the subcontract whereas the employer is more particularly concerned with the efficacy of the specialist's design the subject of the ESA. This is similar to the examples set out in Para 68 of Abbey where the employer's needs or wishes (under the ESA) can be distinguished with those of a beneficiary's needs under a collateral warranty notably in the case of the main contractor and employer who do not quite see 'eye to eye' and rely upon different routes for resolution between the parties concerned.

In passing we observe that Para 84 of Abbey is directed to collateral warranties which may or may not achieve the status necessary to come within the HGCRA whereas the ESA that we describe here does.

If we are wrong on this it merely results in the need to update standard employer specialist agreements in order to ensure certainty that they are for the carrying out of designs for construction operations unhampered by the nature of the specialist subcontract.

For the reasons stated above we do not see how we might do without ESAs where main contractors have no permanent design responsibility but are obliged to contract with design specialists for their building work.

We can confirm that artificial intelligence played no part in devising the arguments set forth in this article[8].

Philip Fidler, Chartered Quantity Surveyor, Chartered Arbitrator and certified Adjudicator

Andrew Singer KC, Kings Chambers

[8] Whether any intelligence at all was used is a question for the reader to decide.