Chapter 4
The Act: The Payment Provisions Sections 109–113

There have been no surprises in that the majority of disputes referred to adjudication have revolved around money and payment.

In the first year or so of the operation of the Act a considerable number of adjudications related to the payment provisions of the Act. This was a reaction to the introduction of the various notice requirements in sections 110 and 111. Paying parties were failing to recognise the need to issue the required notices, and adjudications were started by those seeking payment on the basis of the absence of these notices creating an entitlement to payment. Paying parties generally have now recognised the need to issue these notices and there seems to be a reduction in the number of adjudications which relate solely to these notices. The payment provisions are however still a very relevant factor in respect of adjudication.

The provisions of the Act as to payment are approached in a different way from those relating to adjudication. Section 108 deals with all the matters that a contract is required to include in respect of adjudication. Failure to include any one of these in a contract means that any adjudication provisions that may be included in the contract are superseded by the provisions of the Scheme which then govern any adjudication that may be brought under that contract. The provisions on payment are different in that they require compliance on a section by section basis. Where the payment provisions in a contract comply only with parts of the Act, those that comply remain binding on the parties but those parts that do not comply with the Act are replaced by the equivalent provisions in the Scheme.

Section 109: Entitlement to stage payments

Section 109(1)

(1) A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless–
   (a) it is specified in the contract that the duration of the work is to be less than 45 days, or
   (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.

This section gives a statutory right to some form of interim payment with only the two exceptions noted. Before the Act applied, unless there were express provisions in the contract for interim payments, the assumption was that the contract was entire. This meant that completion of the whole of the works was condition precedent to payment[1]. There is

[1] See *Sumpter* v. *Hedges* [1898] 1 QB 673 and *Ibmac* v. *Marshall (Homes)* (1968) 208 EG 851.

however some authority at common law to suggest that interim payments can be implied into construction contracts even when the Act does not apply.

> 'Having heard their evidence as to the custom of the industry, I concluded that it was an implied term of a contract that application could be made for payment not more frequently than monthly. Payment would then be due within a reasonable period of such application, for the work done and any unused material on site, valued in each case in accordance with the contract between the parties. I announced in the course of the hearing my intention to hold that I construed a reasonable time in all the circumstances as 30 days with a period of grace to allow 42 days in all, and I now hold that 42 days was a reasonable time for payment.'[2]

This case follows evidence of custom and practice in the industry. Such terms would also be implied where there is a course of dealing between the parties that shows that they habitually adopted a monthly payment process.

Most of the forms of contract (standard and non-standard) in use in the construction industry make provision for periodic or stage payments. The usual basis on which periodic payments are made is monthly and relates to the value of work done. Traditionally the value of work done is established from measurement or remeasurement of the works. Where however a stage payment regime applies, payment depends on the completion of a set stage before any payment is due.

There is no definition in the Act as to what the terms 'instalments, stage payments or other periodic payments' mean. Instalments could mean a series of equal payments such as those found in a hire purchase agreement. Stage payments are a much clearer matter through their existing use in construction industry payment terms. A system of monthly payments reflecting work completed remains probably the most common method by which payment is made in construction industry contracts.

The statutory entitlement to a payment system envisaged by the Act is subject to the two qualifications in sub-sections 109(1)(a) and (b). If it is specified in the contract that the duration of the work is to be less than 45 days there is no entitlement to payment under the interim payments structure envisaged in this section.

It is conceivable that works may be broken into packages, each with a declaration stated in the contract that it is of less than 45 days duration so that interim payments need not be made. Alternatively the parties may agree that the duration of the work is estimated to be less than 45 days even if it is actually longer. Again there is scope for an overoptimistic estimate of the duration simply to avoid interim payments. These are matters that will be the subject of the parties' respective bargaining positions at the time that they make their contract.

Section 109(2)

> (2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.

This sub-section confirms a freedom that already exists in practice in the construction industry. There may be hybrid situations in non-standard forms that seek to impose some payment mechanism that is unattractive or onerous, but market forces apply in such cases and the imposition of onerous terms will only serve to increase costs of construction projects.

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[2] *D R Bradley (Cable Jointing)* v. *Jefco Mechanical Services* (1989) 6 CLD 7-21, Mr Recorder Rich QC sitting as an Official Referee.

(3) In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.

The scheme will provide the default position where the parties have failed to reach an agreement on payment systems. This is dealt with in paragraphs 2–4 of the Scheme.

(4) References in the following sections to a payment under the contract include a payment by virtue of this section.

Section 109 provides the basic concept concerning payment and the subsequent sections provide more detail. On any matter concerning payment, sections 109 to113 inclusive must be read as a whole.

Section 110: Dates for payment

Section 110(1)

(1) 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.

There is no definition in the Act of what constitutes an 'adequate mechanism' for determining payment. Adequate means 'sufficient for a particular purpose or need', 'able to satisfy a requirement', also 'standard', 'suitable'. Whatever the mechanism is, it must determine what payment is due and when it becomes due.

The concept of dates for payment in construction contracts is not new. There is a date on which payment becomes due. This is a date on which the legal liability to pay the sum occurs. Sub-section 110(1)(b) makes the distinction between this, the date when payment becomes due, and the final date on which actual payment must be made. This distinction is not unusual and already exists in the DSC/C (formerly DOM/1) Standard Form of Domestic sub-contracts and related sub-contracts. The final date for payment is not to be confused with the familiar practice in connection with final certificates. What is required here is a final date for payment which relates to each and every payment. As a result every interim payment will have a final date on which payment is to be made. This is a further feature that the adequate payment mechanism must provide. The period between a due date and the actual final payment date is a matter for agreement between the parties. The final date for payment has two effects. Where this date is exceeded the money is then overdue and action can be taken to pursue the sum. This is also the date which triggers a right to suspend performance of the works given by section 112.

Section 110(2)

(2) Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if–
   (a) the other party had carried out his obligations under the contract, and
   (b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,

specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.

This sub-section imposes a requirement that every construction contract must provide for giving a notice of the amount due. The notice must state the amount due and the basis on which it is calculated. The obligation is on the paying party to give the notice. This goes beyond any practice previously prevalent in the industry and has led to a far greater openness as to the basis of payments made. The general practice of those making payments has not changed; it is still a notice in the form of a certificate or a notification of payment but details of calculation must now be given and payees must at least know why they are not being paid the sum that they have applied for. The notice is required even if the amount of the payment is nil due to set-off or abatement.

There is however no sanction in section 110(2) for not issuing a notice of payment. Some commentators have suggested that this makes the amount of money applied for the amount due. This is a step too far in the authors' view. The position was clarified in *SL Timber* v. *Carillion*[3]:

> '19. In my opinion the adjudicator fell into error in the first place by conflating his consideration of sections 110 and 111 of the 1996 Act. In my opinion Mr Howie was correct in his submission that these sections have different effects and the notices which they contemplate have different purposes. Section 110(2) prescribes a provision which every construction contract must contain. Section 110(3) deals with the case of a construction contract that does not contain the provision required by section 110(2) by making applicable in that case the relevant provision of the Scheme, namely paragraph 9 of Part II. By one or other of these routes every construction contract will require the giving of the sort of notice contemplated in section 110(2). But there the matter stops. Section 110 makes no provision as to the consequence of failure to give the notice it contemplates. For the purposes of the present case, the important point is that there is no provision that failure to give a section 110(2) notice has any effect on the right of the party who has so failed to dispute the claims of the other party. A section 110(2) notice may, if it complies with the requirements of section 111, serve as a section 111 notice (section 111(1)). But that does not alter the fact that failure to give a section 110(2) notice does not, in any way or to any extent, preclude dispute about the sum claimed. In so far, therefore, as the adjudicator lumped together the defenders' failure to give a section 110(2) notice with their failure to give a timeous section 111 notice, I am of opinion that he fell into error. He ought properly to have held that their failure to give a section 110(2) notice was irrelevant to the question of the scope for dispute about the pursuers' claims.'

There may be unique circumstances in the contract which result in payment of the amount applied for becoming the amount that is due and payable. This is a peculiarity of the particular contract and not the general rule from the Act[4]. There is specific provision in the JCT Standard Form of Building Contract With Contractors Design 1998 edition that where there is no equivalent of the section 110 notice the amount stated in the application for payment is the amount that the employer must pay (clause 30.3.5).

Section 110(2) requires the payer to give a notice not later than 5 days after the due date and states specifically that it must be given even where nothing is due because of the circumstances identified in sub-sections (a) and (b). Where there is a failure to perform the obligations under the contract, for example failure to construct in accordance with the specification, the value of the work executed may be abated by the amount that the work is

[3] *SL Timber Systems Limited* v. *Carillion Construction Limited* (27 June 2001), Opinion of Lord Macfadyen.
[4] *VHE Construction PLC* v. *RBSTB Trust Co Limited* (13 January 2000).

worth less than had it been properly performed. The contract price for that work has not been earned. The contract price for that work can therefore be extinguished or reduced. This is abatement of a sum that would otherwise have been due.

> RALPH GIBSON: 'The words of [the contract]... do not affect the right of a contractor to defend a claim for an interim payment by showing that the sum claimed includes sums to which the subcontractor is not entitled under the terms of the contract or to defend by showing that, by reason of the subcontractor's breaches of contract, the value of the work is less than the sum claimed under the ordinary right of defence established in *Mondel* v. *Steel* (1976) 1 BLR 106.'[5]

It is suggested here that there ought to be a distinction between work which wholly fails to comply with the contract and work which complies but has some defect which would be remedied in the normal course of events.

The distinction is between, on the one hand, the failure to earn the contract price under the contract and, on the other, having earned the contract price but some matter is not entirely complete or entirely in accord with the contract. The failure to earn the contract price would mean that nothing is due for that work. Work that is defective would create a situation where something is due even if it were not the whole sum in the contract. Both are reduced by abatement.

The JCT Standard Form Contracts provide for work properly executed to be included in interim certificates. If the work is not properly executed it does not warrant inclusion in the interim certificate and abatement does not apply; it is simply a matter of account under the contract.

Sub-section 110(2)(b) permits set-off or abatement from one or more other contracts. It is the authors' view that this provision is complex and unhelpful to the overall scheme of payments and adjudication. In the first instance abatement or set-off under another contract will serve to extinguish the sums due under that other contract[6]. All counterclaims are set-offs but not all set-offs are counterclaims. The questions are always whether a counterclaim is in truth a full defence, a counterclaim only or a counterclaim that is also a set-off which can be utilised as a defence.

> 'A counterclaim is a different thing entirely from a set-off. It is any claim which the defendant is entitled to bring as a separate action against the plaintiff. It might be something entirely different in nature from the claim.
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> Until the Supreme Court of Judicature Act 1873, counterclaims in fact always had to be a separate action, i.e., the defendant in the first case between the parties became the plaintiff in a second case.'[7]

It is not a simple matter where claims arise under different contracts between the same parties. It is exceptional for a party to be allowed to use a claim under one contract as a set-off in response to a claim made against it on the other. It may amount to a counterclaim but it will not amount to a set-off by way of a defence. In serial contracts there may be an argument that the fact that there is more than one contract is incidental and that the transactions are so closely connected that it would be unfair to consider the claim without the counterclaim.

This was considered by Lord Denning in *Anglian Building Products* v. *French*:

> 'Anglian, in respect of the M3, have brought an action claiming the sum due to them for the beams (pre-stressed concrete units) which they supplied under that contract. The claim of Anglian on the

[5] *Acsim (Southern) Ltd* v. *Dancon, Danish Construction & Development Company Ltd* (1989) CILL 538; (1989) 7-CLD-08-01.
[6] See Neil F Jones *Set-off in the Construction Industry* for the history and distinction of types of set-off, Blackwell, 1999.
[7] *Hanak* v. *Green* [1958] 1 BLR 1, Morris LJ.

> M3 beams is £136,519.98. They are met in that action by a cross action by French for £600,000 also on the M3. Those matters in the M3 motorway dispute have been consolidated. They will have to be sent to an Official Referee or some one to try the rights and wrongs of it; and that can be tried out there.
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> The question is whether the counterclaim in respect of the M3 can also be used as a ground for staying the action in respect of the M4 and M6 goods. The judge has said No; he says it is a matter which should be fought out in the M3 litigation. It should not be used to stay the judgment or the execution of the judgment in the M4 and M6 action. And now French appeal to this court.
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> This matter of a stay is primarily for the discretion of the judge. I must say that I see nothing wrong in the way he has exercised his discretion. There is no doubt as to the solvency of Anglian Building Products Ltd. They are a subsidiary of Ready Mixed Concrete. If there are any damages payable on any cross claim, Ready Mixed Concrete will see that they are paid.
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> So that there is no question that French will get their money if they are right in their counterclaim. In those circumstances I do not see why this counterclaim on the M3 should be used to hold up payment for the work on the M4 and M6, for which, as I have said, French have actually had the money from the employers; they have actually been paid for these very units which have been delivered. I see no reason for interfering with the judge's discretion and I would dismiss the appeal.'[8]

There is also a distinction between common law set-off and abatement:

> 'It must however be considered, that in all these cases of goods sold and delivered with a warranty ... the rule which has been found so convenient is established; and that it is competent for the defendant ... not to set-off by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject matter of the action is worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent; but no more.'[9]

Abatement only applies to contracts for the sale of goods and contracts for work and materials. It has the effect, not of discharging payment, but of preventing the obligation to make payment arising in the first place. Since the work is defective (or has not been completed according to the contract) payment has not been earned.

The set-off or abatement from other contracts also needs to be permitted under the extant contract. In some of the standard forms the common law right of set-off is restricted:

> 'I now come to what I think is Mr Palmer's main point in relation to the claim by the defendants to a set-off. He submits that, even if the letter of 24 July 1987 from the defendants did not raise a valid claim to a set-off under condition 21 of the contract, the defendants have a valid claim to a set-off at common law which is not excluded by the provisions of condition 21.4. I will repeat the provisions of condition 21.4. It reads:
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> > ''The rights of the parties to the sub-contract in respect of set-off are fully set out in these sub-contract conditions and no other rights whatsoever should be implied as terms of the sub-contract relating to set-off''.
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> Mr Palmer has pointed out that the authorities show that clear words are necessary in a contract to exclude a common law right which a party would otherwise have. In my view, those clear words are to be found in condition 21.4 which says that the rights of the parties in respect of set-off ''are fully set out in these sub-contract conditions''. It seems to me that those words clearly indicate that the right to set-off is to be governed exclusively by the contract itself, and, more particularly, by condition 21. I consider that the words ''no other rights whatsoever should be implied as terms of the subcontract

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[8] *Anglian Building Products Ltd* v. *W. & C. French (Construction) Ltd* (1976) 16 BLR 1, CA.
[9] *Mondel* v. *Steel Court of Exchequer* (1976) 1 BLR 107, Park B.

relating to set-off'' reinforce the conclusion that condition 21 was intended to limit the right to set-off to the express provisions contained in condition 21.

In my judgment, therefore, the defendants cannot in these proceedings set off their cross claims against the plaintiffs' claim. However, there is nothing to stop them from making a counterclaim.'[10]

Abatement has been examined in cases on enforcement of adjudicator's decisions. The Whiteways case established some first principles:

> 'There may be some difficulty about the concept of an abatement claimed to be due under other contracts under section 110(2)(b), but we are not concerned here with other contracts. Section 110 requires the giving of a notice stating the amount of any payment proposed to be made, and that notice is to be given within 5 days after the date when payment would have been due if the party had performed its contract, i.e. inter alia if there had been no ground for abatement. Section 111 provides for notice of intention to withhold payment. It is common for a party to a building contract to make deductions from sums claimed on the Final Account (or on earlier interim applications) on account of overpayments on previous applications and it makes no difference whether those deductions are by way of set-off or abatement. The scheme of the HGCRA is to provide that, for the temporary purposes of the Act, notice of such deductions is to be made in a manner complying with the requirements of the Act. In making that requirement, the Act makes no distinction between set-offs and abatements. I see no reason why it should have done so, and I am not tempted to try to strain the language of the Act to find some fine distinction between its applicability to abatements as opposed to set-offs. Of course, in considering a dispute, an adjudicator will make his own valuation of the claim before him and in doing so, he may abate the claim in respects not mentioned in the notice of intention to withhold payment. But he ought not to look into abatements outside the four corners of the claim unless they have been mentioned in a notice of intention to withhold payment. So, to take a hypothetical example, if there is a dispute about Valuation 10, the adjudicator may make his own valuation of the matters referred to in Valuation 10 whether or not they are referred to specifically in a notice of intention to withhold payment. But it would be wrong for him to enquire into an alleged overvaluation on Valuation 6, whether the paying party alleges abatement or set-off, unless the notice of intention to withhold payment identified that as a matter of dispute.'[11]

Judge Bowsher QC identified the difficulty with abatement in connection with other contracts. An adjudicator can apply abatement where it comes within the four corners of the claim. The example used was for an adjudicator to arrive at his own value of the claim where the claim concerns value of the work. We doubt whether this is abatement alone. It may be simply a matter of account or the combination of account and abatement.

Even where the payment is to be nil, the notice should show how the sum has been calculated showing which work is not in accordance with the contract and what amounts arise through set-off or abatement under other contracts.

The effect of the notice showing the amount to be paid and how it is to be calculated is to bring disputes to a head at a much earlier date than would otherwise be the case.

Section 110(3)

> (3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) or (2), the relevant provisions of the Scheme for Construction Contracts apply.

[10] *BWP (Architectural) Ltd* v. *Beaver Building Systems Ltd* (1988) 42 BLR 86.

[11] *Whiteways Contractors (Sussex) Limited* v. *Impresa Castelli Construction UK Limited* (9 August 2000).

The Scheme thus provides the default position where the contract does not wholly reflect the provisions of sub-sections (1) and (2).

Section 111: Notice of intention to withhold payment

Section 111 includes additional notice requirements to Section 110. These deal with the intention to withhold payment, which is one of the principal issues in many of the cases that have been brought to adjudication.

Section 111(1)

> (1) A party to a construction contract 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.
> The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.

There is no right to withhold payment of a sum that is due under the contract unless an effective notice has been given. This is a strict requirement of the Act. If no notice is given at all there is no right to withhold payment. If a notice is given but it is defective in some way, for example being given out of time, again there is no right to withhold payment.

The notice given under section 110(2) may suffice as a section 111 notice as well, but to do so it must not only comply with section 110(2) but also with section 111.

There are a number of examples of the view of the courts on where a withholding notice is required.

> '18. To the extent to which the sums sought to be retained are overpayments which have already been made under the contract on previous invoices, the clear effect of section 111(1) in my judgment is to prevent the defendant from exercising any right it may have had under the general law to recover that overpayment by way of deduction or retention from the 10 invoices unless the requisite notice has been given. No such notice was given. The circumstance that a previous overpayment may operate under the general law by way of an equitable set-off and thus technically be a matter of defence or that it may perhaps be able to be characterised as an abatement which technically in law prevents the amount claimed from ever becoming due does not in my judgment obviate the need for the paying party if he wishes to rely upon a right to deduct previous overpayments to give the requisite notice under section 111(1). If this were not the case, it is difficult to see what practical effect section 111 would have. The effect of section 111 is to prevent the paying party if he does not give the appropriate notice from exercising his right to retain or withhold payment of monies which would otherwise be due and payable but for the existence of some right to withhold payment. Section 111 refers to ''withholding'' payment generally. It must have been intended to include situations where the paying party was legitimately entitled under the general law or under the terms of the contract to withhold monies which were otherwise payable. The section clearly cannot be read simply as a provision which is restricted to requiring a notice of intention to withhold a payment to be given when there is no right to withhold any payment.
> 19. So far as set-off is concerned the question was considered by Judge Hicks QC in *VHE Construction Plc* v. *RBSTB Trust Co Limited* [2000] BLR 187, 192 where, at paragraph 36 of his judgment he said:
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> > ''The first subject of dispute as to the effect of section 111 is whether section 111(1) excludes the right to deduct money in exercise of a claim to set-off in the absence of an effective notice of intention to withhold payment. Mr Thomas for RBSTB submits that it does not. I am quite clear, not only that it does, but that that is one of its principal purposes. . . The words 'may not withhold

payment' are in my view ample in width to have the effect of excluding set-offs and there is no reason why they should not mean what they say.''

I respectfully agree. It is clear from this decision that ''the final date for payment of a sum due under the contract'' may exist although technically if a valid notice had been given the paying party would have been entitled to exercise a right of retention or to withhold the sum in question and thus not have been obliged to make the payment.'[12]

In *Woods Hardwick* v. *Chiltern*[13] Judge Thornton QC characterised abatement as being outside the provisions of section 111:

'10. Any abatement, properly relied on by Chiltern, would not of course be caught by section 111 of the HGCRA, so Chiltern's abatement defence could, in principle, defeat or reduce Woods Hardwick's claims.

Chiltern's defence was not put forward in terms as an abatement. However, the nature of Chiltern's defence was to the effect that such fees as might otherwise have been due were eliminated or reduced because the value of Woods Hardwick's work was greatly reduced by the alleged breaches of contract. It is for this reason that I have characterised Chiltern's principal defence as being one of abatement.'

In *Re A Company*[14] the seriousness of failing to follow the withholding notice was examined in winding up proceedings:

'12. Emphasising the words ''payment of a sum due...'' in section 111(1), Counsel for CCL argued that the section only applies where the monies are in fact due, and that this requires the court to consider whether the sum demanded by the contractor is irrecoverable (in whole or in part) because of its defective performance of the contract. But the clear intent of sections 110(2) and section 111 is to preclude the employer (in the absence of a withholding notice with specified content) from contending that all or part of the sum demanded by the contractor is not in fact due. If the work is defective, the employer retains the right to recover damages for breach of contract in subsequent litigation or arbitration, and can obtain a provisional order to the same effect by adjudication under section 108 of the Act. That does not however alter the position that by virtue of section 111 the employer is obliged to pay forthwith without deduction absent a withholding notice, the rule is ''pay now, litigate later''. Indeed, any other construction of sections 110 and 111 would rob them of all practical significance.

13. Given the absence of a withholding notice in the present case, section 111 therefore requires CCL to pay the £9,702.47 without deduction regardless of any defence which might otherwise have existed by reason of the alleged defects in the works. The cross-claim and/or abatement thus provides no basis on which it can properly be disputed that the £9,702.47 is due and payable, GAL must therefore be regarded as a creditor of the company with *locus standi* to present a winding-up petition.'

Judge Bowsher in *Northern Developments (Cumbria)* v. *J & J Nichol*[15] said:

'29. The [1996] Act by section 111 imposes on the parties a direct requirement that the paying party may not withhold a payment after the due date for payment unless he has given an effective Notice of Intention to Withhold Payment. That seems to me to have a direct bearing on the ambit of any dispute to be heard by an adjudicator. Section 110 requires that the contract must require that within 5 days of any sum falling due under the contract, the paying party must give a statement of the amount due or of what would be due if the payee had performed the contract. Section 111 provides that no deduction can be made after the final date for payment unless the paying party has given

[12] *Millers Specialist Joinery Company Limited* v. *Nobles Construction Limited* (3 August 2001).
[13] *Woods Hardwick Ltd* v. *Chiltern Air Conditioning* (2 October 2000).
[14] *Re A Company* (Number 1299 of 2001) (15 May 2001).
[15] *Northern Developments (Cumbria) Limited* v. *J & J Nichol* (24 January 2000).

notice of intention to withhold payment. The intention of the statute is clearly that if there is to be a dispute about the amount of the payment required by section 111, that dispute is to be mentioned in a notice of intention to withhold payment not later than 5 days after the due date for payment. Equally it is clear from the general scheme of the Act that this is a temporary arrangement which does not prevent the presentation of set-offs, abatements, or indeed counterclaims at a later date by litigation, arbitration or adjudication. For the temporary striking of balances which are contemplated by the Act, there is to be no dispute about any matter not raised in a notice of intention to withhold payment.'

In *SL Timber* v. *Carillion*[16], a Scottish first instance case, Lord McFadyan said this:

'22. In my opinion, the absence of a timeous notice of intention to withhold payment does not relieve the party making the claim of the ordinary burden of showing that he is entitled under the contract to receive the payment he claims. It remains incumbent on the claimant to demonstrate, if the point is disputed, that the sum claimed is contractually due. If he can do that, he is protected, by the absence of a section 111 notice, from any attempt on the part of the other party to withhold all or part of the sum which is due on the basis that some separate ground justifying that course exists. It is no doubt right, as the adjudicator pointed out, that, if the section did require a notice of intention to withhold payment as the foundation for a dispute as to whether the sum claimed was due under the contract, it would be relatively straightforward for the party disputing the claim to give such a notice. But that consideration does not, in my view, justify ignoring the fact that the section is expressed as applying to the case where an attempt is made to withhold a sum due under the contract, and not as applying to an attempt to dispute that the sum claimed is due under the contract. Nor, in my view, is there merit in the adjudicator's concern that acceptance of the defenders' construction of section 111 would render the 1996 Act largely ineffective. I see no difficulty for an adjudicator in reaching a provisional determination of a dispute as to whether the sum claimed is due under the contract. That is what, on the adjudicator's own view of the section, the adjudicator would require to do if the party disputing the claim on the basis that the sum claimed was not due under the contract gave a notice of intention to withhold payment on that ground. In my opinion, therefore, the adjudicator erred in holding that the pursuers were relieved, by the defenders' failure to give a timeous notice of intention to withhold payment, of the need to show that the sums claimed were due under the contract.'

The Court of Appeal considered the question of the requirement for withholding notices in *Morgan* v. *Jervis*[17]. This case refers specifically to a contract where monies had been certified by an architect. It is worth repeating a considerable amount of this judgment:

'1. This appeal involves a point of some importance in the world of building contracts. Mr Iain Wallace QC correctly forecast (in an article entitled *The HGCRA: A Critical Lacuna?* (2002) 18 Const LJ 117) that a Scottish case dealing with it, *SL Timber Systems* v. *Carillion Construction* [2001] BLR 516, ''seems certain to be reviewed at some future date by an appellate court in England''. And here it is. The point concerns the meaning of section 111(1) of the Housing, Grants (Construction and Regeneration) Act 1996. . . .
3. . . . Under the contract the architect is to issue an interim certificate, in practice based on his scrutiny of a bill presented by the builder. In this case there was a 7th interim certificate in the sum of £44,000 odd plus VAT. The clients accept that part of that is payable but dispute the balance amounting to some £27,000. The builders seek summary judgment for the balance.
4. The clients did not give ''a notice of intention to withhold payment'' before ''the prescribed period before the final date for payment''. The builders contend that it follows, by virtue of section 111(1) that the clients ''may not withhold payment''. So they seek summary judgment. The clients say they

[16] *S L Timber Systems Limited* v. *Carillion Construction Limited* (27 June 2001).
[17] *Rupert Morgan Building Services (LLC) Limited* v. *David Jervis and Harriet Jervis* [2003] EWCA Civ 1583, CA.

can withhold payment, that it is open to them by way of defence to prove that the items of work which go to make up the unpaid balance were not done at all, or were duplications of items already paid or were charged as extras when they were within the original contract, or represent ''snagging'' for works already done and paid for.

5. The rival arguments as presented in the courts below were for what can be termed ''wide'' and ''narrow'' constructions. The wide construction espoused by the builders is that once it is shown that there is a certificate and no withholding notice, the certified sum must be paid – it cannot be withheld. The narrow construction is roughly to the effect that if work has not been done there can be no ''sum due under contract'' and that accordingly section 111(1) simply does not apply. As HHJ Humphrey Lloyd put it in *KNS Industrial Services* v. *Sindall* (17th July 2000) ''one cannot withhold what is not due''.

6. Each construction has some basis in authority and learned writings. For the wide construction there is HHJ Bowsher QC in *Whiteways Contractors* v. *Impresa Castelli* (2000) 16 Const LJ 453, HHJ Humphrey Lloyd QC in *KNS,* HHJ Gilliland QC in *Millers Specialist Joinery* v. *Nobles* (3 August 2000) and *Keating on Building Contracts* (7th edn 2001, para15–15H). For (or apparently for) the narrow construction there is HHJ Thornton QC in *Woods* v. *Hardwicke* [2001] BLR 23, (arguably) HHJ Hicks QC in *VHE Construction* v. *RBSTB Trust* [2000] BLR 187 and Lord Macfadyen in *SL Timber Systems* v. *Carillion Construction* [2001] BLR 516 and Mr Wallace's article The views expressed in most of these cases are more or less oblique to the point directly in issue here. Moreover there were variants of the narrow construction, that is why I said ''roughly to the effect''. The variants were around the theme of whether the section merely prevented the raising of counterclaims or did it also cover matters of abatement and set-off? And what about a counterclaim based on work allegedly done badly?

7. I do not think these questions arise at all. This is because some of the debate seems to have been based upon an unspoken but mistaken assumption, namely that the provision is dealing with the ultimate position between the parties. That is not so as is pointed out by Sheriff J.A. Taylor in *Clark Contracts* v. *The Burrell Co* [2002] SLT 103. He casts a flood of light on the problem.

. . .

11. In this ASI contract, the sum is determined *by the certificate*. Clause 6.1 provides that ''payments shall be made to the Contractor only in accordance with the Architects certificate''. Clause 6.32 defines the sum – essentially the approved gross value of work done less retention and amounts previously paid. Clause 6.33 says when it is to be paid: ''the employer shall pay to the Contractor the amount certified within 14 days of the date of the certificate, subject to any deductions and set-offs due under the Contract.'' So it is not the actual work done which either defines the sum or when it is due. The sum is the amount in the certificate. The due date is 14 days from certificate date. The certificate may be wrong – the architect may (though this is unlikely because he will be working from the builder's bill) have missed out work done (which would operate against the contractor) or he may have included items not in fact done or items already paid for (which would operate against the client). In the absence of a withholding notice, section 111(1) operates to prevent the client withholding the sum due. The contractor is entitled to the money right away. The fundamental thing to understand is that section 111(1) is a provision about cash-flow. It is not a provision which seeks to make any certificate, interim or final, conclusive. Analysed this way one sees that there is something inconsistent about the clients' argument here. Their duty to pay now and the sum they have to pay arise only because of the certificate. Yet they wish to ignore the certificate to reduce the amount they have to pay.

12. All this becomes blindingly clear following Sheriff Taylor's analysis. He was dealing with a case like this, one involving a system of architect's certificates. This is what he said:

> ''There was no dispute that the architect had issued an interim certificate. It therefore seems to me that the defenders became entitled to payment of the sum brought out in the interim certificate within 14 days of it being issued. In my opinion that is an entitlement to payment of a sum due under the contract. In order to reach the figure in the interim certificate one has made use of the contractual mechanism. To use the words deployed by Lord Macfadyen [in *SL Timber Systems*] in

para. 20, the issue of an interim certificate was the occurrence of 'some other event on which a contractual liability to make payment depended'. This situation falls to be contrasted with the position in *SL Timber Systems* where, before the adjudicator, there had been no calculation of the sum sued for by reference to a contractual mechanism and which gave rise to an obligation under the contract to make payment. There had been no more than a claim by the pursuers which claim had not been scrutinised by any third party. Thus, in my opinion, if The Burrell Co (Construction Management) Ltd wished to avoid a liability to make such payment because the works did not conform to the contractual standard they would be withholding payment of a sum due under the contract. In order to withhold payment they would require to give notice in terms of section 111(1) of the Act. No such notice was given.

The interim certificate is not conclusive evidence that the works in respect of which the pursuers seek payment were in accordance with the contract (see clause 30.10). That however does not preclude the sum brought out in an interim certificate being a sum due under the contract. The structure and intent of the Act, as I understand it, and accepted by the solicitor for the defenders, is to pay now and litigate later.''

13. Sheriff Taylor earlier explained why Lord Macfadyen's case was different. The contract there had no architect or system of certificates. The builder simply presented his bill for payment. The bill in itself did not make any sums due. What, under that contract, would make the sums due is just the fact of the work having been done. So no withholding notice was necessary in respect of works not done – payment was not due in respect of them.'

The judgment of the Court of Appeal should be read in full.

A withholding notice on the grounds that nothing was due under the contract until the adjudicator made his decision, issued prior to enforcement, was held not to be a valid withholding notice in *The Construction Centre Group* v. *The Highland Council*[18] even in the circumstances of unusual contract provisions.

'22. Mr Currie founded his submission that a section 111 notice could competently be given after an adjudicator had issued his decision at least in part on the terms of the section which relate the notice to a ''sum due under the contract''. It is, no doubt, correct that the defender's obligation to pay the sum awarded by the adjudicator is of contractual nature, founded on the provisions made in the contract in order to comply with section 108(3). But that is not enough to persuade me that the language of section 111 is sufficiently wide to make it legitimate to give a withholding notice in respect of the adjudicator's award. What section 111 provides is that a party may not ''withhold payment *after the final date for payment* of a sum due under the contract'' (emphasis added). The final date for payment has a technical meaning in terms of section 110(1), which is reflected in this contract in clause 60(1). The context in which the phrase is used is ordinary payments becoming due at intervals during the course of the contract in consequence of the certification procedure. The structure of the contractual timetable is such that payments of that sort may not be withheld after the final date for payment unless a notice has been given. It follows, in my view, that section 111 is intended to apply only to the withholding of payments in respect of which the contract provides for a final date for payment. It was not intended to apply, and does not apply, to payments due in consequence of an adjudicator's decision.

23. If Mr Currie's construction of section 111 were correct, there would be nothing to confine the giving of a post-adjudication notice of intention to withhold the adjudicator's award to cases possessing the peculiarity which this case possesses, namely that there was no opportunity to give such a notice before the adjudication. If he were right that, because the sum awarded by the adjudicator is a sum due under the contract, section 111 permits the giving of a withholding notice in respect of the adjudicator's award, such a notice could be given in any case, whether the point had already been

[18] *The Construction Centre Group Limited* v. *The Highland Council* (23 August 2002).

> argued before the adjudicator or not. There would, on that construction, be nothing in the section to restrict the scope of post-adjudication notices to cases in which the point taken in the notice could not have been, and had not been, taken before the adjudicator. It would, however, in my view be destructive of the effectiveness of the institution of adjudication if a responding party could decline to put forward an available defence in the course of the adjudication, then give a section 111 notice seeking to withhold on that ground the sum awarded by the adjudicator.
> 24. For these reasons I am of opinion that section 111 does not permit the giving of a withholding notice in respect of an adjudicator's award. I do not consider that that gives rise to any injustice.'

Although there is no specific mention in section 111 of the form the notice should take, the conclusion reached in the *Hestia Fireside* case[19] was that an effective notice needs to be issued in writing. The other interesting point in this case is that a section 111 is a notice in response to a particular payment application and certificate. A notice which is issued other than in response to a particular payment is not valid:

> '13. There remains the pursuers' argument under the 1996 Act. Two matters of statutory interpretation were raised. The first was whether, as the pursuers contend, an effective notice within the meaning of section 111 requires to be in writing. Mr d'Inverno in the end effectively conceded that it did. Although the words ''in writing'' are not expressly used, I am satisfied that it unmistakably appears that writing in some form is required. This is so, in my view, having regard not only to the language of section 111 itself, including the use of the indefinite article (''an effective notice'', ''a notice'') and the requirement to ''specify'' particular matters, but also to the language of section 115 and, in particular, section 115(6) which contemplates that a notice under Part II will be in some form of writing. A telephone message, even one referring to a particular letter of earlier date, will not suffice.
> 14. The second matter raised was whether a notice effective for the purposes of section 111 could be a communication in writing sent earlier than the making of the relevant Application. Mr d'Inverno pointed out that, while section 111(2) provided that any notice must be given not later than a particular time, it did not provide that it required to be given after any particular time, i.e. there was no terminus a quo. The letter of 17 August, albeit sent prior to the invoice of 27 November, was (or was arguably) a notice of intention to withhold payment within the meaning of section 111. I am unable to accept that argument. The purpose of section 111 is to provide a statutory mechanism on compliance with which, but only on compliance with which, a party otherwise due to make a payment may withhold such payment. It clearly, in my view, envisages a notice given under it being a considered response to the application for payment, in which response it is specified how much of the sum applied for it is proposed to withhold and the ground or grounds for withholding any amount. Such a response cannot, in my view, effectually be made prior to the application itself being made. It may, of course, be that the matter of withholding payment of any sum which might in the future be applied for has previously been raised. In such circumstances a notice in writing given after receipt of the application but which referred to or incorporated some earlier written communication might suffice for the purpose – though I reserve my opinion on that matter. But such an earlier written communication, whether alone or referred to subsequently in an oral communication, cannot, in my view, suffice. This is, as a matter of statutory interpretation, in my view, unmistakably the case.'

There have also been a number of cases where paying parties have issued withholding notices after an adjudicator's decision has been made, in an attempt to resist enforcement. These we deal with in Chapter 12.

[19] *Strathmore Building Services Limited* v. *Colin Scott Greig t/a Hestia Fireside Design* (18 May 2000).

Section 111(2)

(2) To be effective such a notice must specify–
 (a) the amount proposed to be withheld and the ground for withholding payment, or
 (b) if there is more than one ground, each ground and the amount attributable to it,
 and must be given not later than the prescribed period before the final date for payment.

For the notice to withhold payment to be effective it must specify the amount to be withheld and the grounds on which it is to be withheld. This is no more onerous than the requirement in many of the pre-Act sub-contract documents. This would also cover withholding a sum in respect of liquidated and ascertained damages under a main contract.

If there is more than one ground an effective notice must state each ground and the amount attributable to that ground. The notice where there are many grounds may become complex. If the intention is to set off sums from other contracts there would need to be an effective notice in respect of the other contract and the contract which is to bear the set-off.

The notice must not be given later than the prescribed period before the final date for payment. This gives a further facet to the period between the due date and the final payment date. The due date is set in section 109. The parties set the agreed (or default) period and the final payment date. Within five days of the due date section 110 requires a notice showing what the payment will be. If any part of the payment is to be withheld a further notice must be issued within an agreed number of days prior to the date for final payment.

Section 111(3)

(3) The parties are free to agree what that prescribed period is to be.
 In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts.

The period before that final date for payment by which the notice of withholding money is to be issued is a matter of agreement between the parties. If the payer fails to issue the notice within that period the right to withhold monies against the particular payment is lost. There is nothing to prevent that notice being re-issued or given for the next payment due providing it is within the prescribed period. It is likely that this notice will be the 'trigger' for the offended party to give notice of adjudication. The notice of adjudication need not however be given immediately but can be given at any time. It would appear from the nature of many adjudications that parties are still trying to resolve their disputes during the contract without recourse to adjudication as very many references that are made when the parties have been unable to resolve the final account also allege underpayment in respect of interim applications or certificates.

Where the parties have failed to agree a period, the provisions of the Scheme provide the default position. All of the periods set by the Scheme are in days. For a definition of days see section 116.

Section 111(4)

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

The payee who receives an effective notice may have a number of courses of action. He may accept the notice and withholding of the payment. He may seek to modify the notice by negotiation to secure withdrawal in its entirety or to a sum and grounds for which he does accept liability. He may issue the requisite notice that there is a dispute and that he requires adjudication of that dispute.

This sub-section deals with the position where the withholding of payment has been referred to an adjudicator for a decision. If the adjudicator decides that in part or whole the sum must be paid, payment must be made within seven days of the adjudicator's decision or by the date for final payment whichever is the later. Unless the period between the due date and the final date for payment is longer than the adjudication cycle in section 108, it is unlikely that the final date for payment provision will ever apply.

Section 112: Right to suspend performance for non-payment

There is no common law right to suspend the works for late or non-payment:

> 'Apart from suing for interim payments, or requiring arbitration where that is provided for, the remedy—and apparently the only remedy—which the contractor is recognised as having at common law is rescission if a sufficiently serious breach has occurred. If he chooses not to rescind, his own obligations continue. He is bound to go on with the work. All the available English and Commonwealth text books on building contracts state the law consistently with this view...'[20]

> 'It is well established that if one party is in serious breach, the other can treat the contract as altogether at an end; but there is not yet any established doctrine of English law that the other party may suspend performance, keeping the contract alive.'[21]

The Act now provides this right on a statutory basis.

Section 112(1)

> (1) Where a sum due under a construction contract is not paid in full by the final date for payment and no effective notice to withhold payment has been given, the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of his obligations under the contract to the party by whom payment ought to have been made (''the party in default'').

The suspension provisions of the Act were initially thought to be a cause of great concern, there being nothing to prevent a party suspending performance at a critical stage of the works. In practice however this provision does not seem to have been used to a great extent or, if it has, it does not seem to have created any great difficulty as yet in that there have been no instances, to the authors' knowledge, of disputes relating to this provision having reached the courts.

Some contracts have contained contractual provisions which give a right to suspend performance when payment is not made in accordance with the contract. The Act now provides a statutory right in all construction contracts to suspend performance where payment is not made in full by the final date for payment and there is no effective notice of withholding payment. This right cannot be lost through any provision in the contract[22]. The

[20] *Canterbury Pipelines* v. *Christ Church Drainage* [1979] 2 NZLR 347.
[21] *Eurotunnel* v. *TML* [1992] CILL 754.
[22] See *Johnson* v. *Moreton* [1980] AC 37 p. 3–13.

right to suspend is without prejudice to any other rights or remedies available to the offended party. It is therefore conceivable that the suspension will be accompanied by some proceedings to collect the debt due.

In many contracts a certificate of the architect or engineer is condition precedent to any sum being due:

> 'In other words, it was a condition precedent to the contractor's entitlement to payment of a specified sum under clause 30(1) that the architect should have issued an interim certificate stating that such specified sum was due to the contractor from the employer.'[23]

In such contracts the absence of a certificate means that no sum is due and there are no grounds on which to suspend the works. The failure of a party to produce a certificate which was contractually due would be grounds on which to commence adjudication to seek the sum that should have been certified, but not to suspend performance. Similarly if a certificate has been issued and it represents a substantial undervaluation of the works, this would not be grounds for suspension of the works but would form the basis of a dispute that could be adjudicated.

Section 112(2)

> (2) The right may not be exercised without first giving to the party in default at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.

The seven days' notice is a condition precedent to the right to suspend the works. The notice must state the ground or grounds on which it is intended to suspend the works. These grounds by virtue of sub-section (1) above can only be the failure to make the payment at all or the payment of a lesser sum than is due. Before the Act applied, this would have presented a problem under a sub-contract because there was no mechanism to establish with certainty what sum was due. Whilst the sub-contract would have provided the method by which a payment should be calculated, in practice many sub-contractors would not know what they were to receive until they were actually paid. It is also unlikely they would have any concept of how the sum was calculated. Sub-section 110(2) of this Act resolves that problem.

Section 112(3)

> (3) The right to suspend performance ceases when the party in default makes payment in full of the amount due.

As soon as the payment is made in full the right of suspension ceases and work must be commenced again. Conceivably there could be a stop/start situation throughout the contract. This warrants careful consideration concerning the extent to which resources are re-allocated or plant and equipment demobilised.

[23] *Lubenham Fidelities & Investments Co Ltd* v. *South Pembrokeshire District Council and Another; South Pembrokeshire District Council* v. *Lubenham Fidelities & Investments Co Ltd and Wigley Fox Partnership* (1986) 33 BLR 39 and 6 Con LR 15.

Section 112(4)

(4) Any period during which performance is suspended in pursuance of the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.
Where the contractual time limit is set by reference to a date rather than a period, the date shall be adjusted accordingly.

The period of suspension is ignored in calculating the time for performance of the contract. It is simply a matter that time does not count against a party who rightfully suspends.
If a party suspends the works and this in turn affects the performance of another party, that other party is also protected for the period of suspension. This is quite a likely occurrence when one considers the extent of sub-contracting in the industry and the interdependence of one trade on another.

The contract may set a period for completion or a definite date by which completion should occur. Where completion is set by a date, the date is adjusted to take account of the period of suspension. This is an automatic right and need not form part of the extension of time provisions in any contract.

There is no provision in the Act to cover the loss and expense or damages caused by a suspension of the works. Where there was a suspension provision in the pre-Act forms of sub-contract this was also the case. This is however not fatal to any claim. The Act covers the position on time almost on the basis that time stands still for the period of suspension. There is no liability on the suspending party. The loss and expense or damage arises from an event that is a breach of contract – failure to pay the sum due. Therefore the damages caused by the suspension would be claimable at common law by the suspending party, and the party in breach of the payment provisions of the contract suffers the consequences of that breach.

Section 113: Prohibition of conditional payment provisions

This section prohibits conditional payment provisions. It should be noted that this refers to conditional payment provisions and not simply to what are known as pay when paid clauses.

Section 113(1)

(1) A provision making payment under a construction contract 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.

The definition of a conditional payment provision is 'a payment under a construction contract conditional on the payer receiving payment from the third person'. These are known in the industry as pay when paid or pay if paid clauses. This provision in the Act may not be effective against pay when certified clauses. (For a debate on this point see *Durabella* v. *Jarvis*[24].) Any clause covered by section 113 in a contract is ineffective unless there is insolvency in the payment chain.

[24] *Durabella Limited* v. *J. Jarvis & Sons Limited* (19 September 2001).

A main contractor need not pay his sub-contractors where such a clause exists and the employer has become insolvent. This provision is to satisfy the *pari passu* rule (with equal step, equally without preference) in insolvency and not to create a new breed of preferential creditors. The eventuality of a third person who is to make the payment being dependent on other persons who have become insolvent is also dealt with here. In the payment cycles now imposed by sections 110 and 111, the importance of when the insolvency occurs will determine who in the chain is entitled to be paid before the pay when paid clause becomes effective. The key point is receipt of the payment. Therefore if the main contractor has received his payment by the time the employer becomes insolvent, the payment down the chain to the sub-contractors (and indeed the sub-sub-contractors) will have to be made and the main contractor cannot hide behind the pay when paid provision.

Section 113(2)–(5)

(2) For the purposes of this section a company becomes insolvent–
- (a) on the making of an administration order against it under Part II of the Insolvency Act 1986,
- (b) on the appointment of an administrative receiver or a receiver or manager of its property under Chapter I of Part III of that Act, or the appointment of a receiver under Chapter II of that Part,
- (c) on the passing of a resolution for voluntary winding-up without a declaration of solvency under section 89 of that Act, or
- (d) on the making of a winding-up order under Part IV or V of that Act.

(3) For the purposes of this section a partnership becomes insolvent–
- (a) on the making of a winding-up order against it under any provision of the Insolvency Act 1986 as applied by an order under section 420 of that Act, or
- (b) when sequestration is awarded on the estate of the partnership under section 12 of the Bankruptcy (Scotland) Act 1985 or the partnership grants a trust deed for its creditors.

(4) For the purposes of this section an individual becomes insolvent–
- (a) on the making of a bankruptcy order against him under Part IX of the Insolvency Act 1986, or
- (b) on the sequestration of his estate under the Bankruptcy (Scotland) Act 1985 or when he grants a trust deed for his creditors.

(5) A company, partnership or individual shall also be treated as insolvent on the occurrence of any event corresponding to those specified in subsection (2), (3) or (4) under the law of Northern Ireland or of a country outside the United Kingdom.

Sub-sections 113(2) to (4) inclusive give the definition of what constitutes insolvency (or bankruptcy in the case of an individual). These are largely drawn from the Insolvency Act 1986 for England and Wales. Sub-section 113(5) includes appropriate references to cover the position in Northern Ireland and Scotland.

Section 113(6)

(6) Where a provision is rendered ineffective by subsection (1), the parties are free to agree other terms for payment.
In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.

The parties are free to agree terms of payment where a pay when paid clause is rendered ineffective by the Act. Therefore where a contract is signed which includes a conditional

payment clause outlawed by the Act, a new method of effecting payment can be agreed. This must necessarily comply with the provisions of section 110. If no such agreement is reached the provisions of the Scheme apply as the default position.