Case No: HT-10-56

Neutral Citation Number: [2010] EWHC 720 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 13/04/2010

Before :

THE HON MR JUSTICE EDWARDS-STUART

- -

Between :

Yuanda (UK) Co Ltd **Cla**

- and -

WW Gear Construction Ltd **Defe**

- -

- -

Alexander Hickey (instructed by **Fenwick Elliott Ltd**) for the **Claimant**

Gideon Scott Holland (instructed by **C J Hough & Co**) for the **Defendant**

Hearing dates: 18/03/2010

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Judgment

Mr Justice Edwards-Stuart:

Introduction

1.
In this claim brought under Part 8 of the CPR the Claimant, Yuanda (UK) Co Ltd ("Yuanda"), seeks various declarations to the effect that certain clauses in the contract between itself and the Defendant, WW Gear Construction Ltd ("Gear"), are void or invalid for various reasons and, in particular, that the adjudication provisions in the contract should be replaced by the adjudication provisions in the Scheme for Construction Contracts.

2.
In addition, Yuanda contends that the provision for a rate of interest of 0.5% above base on late payment of debts is void by reason of the Late Payment of Commercial Debts (Interest) Act 1998, and that section 3(1) of the Unfair Contract Terms Act 1997 applies to this contract because it dealt on Gear's written standard terms of business.

3.

The project concerns the construction of a very substantial luxury hotel in the old GLC building by Westminster Bridge. The contract between Yuanda and Gear was for the provision of glazed curtain walling to the building and it formed part of a number of similar trade contracts for the construction of the hotel. It seems that there were some 30 odd trade contractors.

The relevant facts

4.
Evidence on behalf of Gear, which is a company incorporated in the Republic of Cyprus, was provided in the form of two witness statements from a Mr Simon Haider. He is a Surveyor employed by a company called GC Project Management Ltd, which acted as project manager for Gear on this project. His evidence shows that Gear prepared a standard package of contract documents that were to be issued to each trade contractor. The package was based on the JCT Trade Contract with a substantial number of amendments which were set out in a separate Schedule of Amendments.

5.
Mr Haider’s evidence was that Gear’s solicitors prepared these documents so that he could use them as the starting point in his negotiations with the various trade contractors. He said that in virtually every case the negotiations resulted in changes to the prepared set of amendments. In the case of Yuanda, the contract documentation was sent out by Mr Haider under cover of a letter dated 27 February 2007, Yuanda having submitted its revised quotation at the end of June 2006. Although Mr Haider asked for the signed contract documents to be returned by 7 March 2007, this did not happen. Instead, there was a meeting between Yuanda and Mr Haider on 22 March 2007 at which the parties went through the proposed contract documentation and discussed various changes.

6.
A list of 32 items was produced following the meeting of 22 March 2007 which were annotated as being agreed, under review or as not being capable of agreement by Gear. Some were of no consequence or simply reflected figures already agreed, such as the price, which had to be inserted in the relevant part of the contractual documentation. Others involved concessions by Gear following the discussions at the meeting. Three of these deserve mention. Item 3 involved the removal of the requirement to take out professional indemnity insurance on the grounds that Yuanda already had its own insurance in place. Item 11 concerned what was described as "the L&E grace period": the trade contractor could not claim loss and expense for delay unless the period of delay was at least 4 months. At the meeting this period was reduced from 4 months to 2 months in Yuanda's favour.

7.
Item 15 concerned delay to the date of commencement of the works. The contract documentation prepared by Gear’s solicitors provided that the date of commencement could be deferred by up to 6 months at the employer's option without giving the trade contractor any remedy. Yuanda negotiated this period down to one of 3 months.

8.
I suspect that none of these concessions was of huge commercial importance, but neither were they insignificant. Similar concessions may or may not have been negotiated with other trade contractors.

9.
Two of the amendments to the standard form prepared by Gear’s solicitors, which were not discussed or altered as a result of the meeting on 22 March 2007, are the subject of these proceedings. Although they were not altered in the case of Yuanda, it is Mr Haider’s evidence that some other trade

contractors did raise one or other of these points - amongst others - during pre-contract negotiations and succeeded in either removing the amendment altogether or negotiating a more favourable alternative.

10.
The first relevant amendment was to clause 4.11.2 of the JCT standard form. The standard wording provided that interest on late payments by the employer would be paid at the rate of 5% over Base Rate. In the Schedule of Amendments this was changed to 0.5%. Two trade contractors objected to this and managed to negotiate more favourable rates, to 2% and (the original) 5%, respectively.

11.
The other relevant amendment concerned the adjudication provisions of the contract. The relevant clauses of the JCT standard form were deleted and a new clause was to be substituted as follows:

"Clause 9A The adjudication procedure will be the TeCSA Adjudication Rules (amended to require nomination by the RICS and joining of the members of the professional team in a multi-party dispute situation).

Notwithstanding the provisions of the above procedure and regardless of the eventual decision in the adjudication or in any subsequent litigation the Trade Contractor agrees that should he make a reference to Adjudication under the terms of this contract then he will be fully responsible for meeting and paying both his own and the Employer’s legal and professional costs in relation to the Adjudication."

12.
At least one trade contractor, if not several, managed to negotiate the removal of this amendment so that the original provisions for adjudication in the standard form wording were reinstated.

13.
The person who negotiated this contract on behalf of Yuanda was Mr Francis Lee. In his witness statement he says that he has worked in the curtain walling industry for 25 years. It seems that he was not aware at the time of negotiating the contract of the amendments relating to either adjudication or interest on late payments. He says that during the course of the works significant differences between Yuanda and Gear became apparent which have potentially adverse financial consequences for Yuanda. For these reasons in June 2009 he engaged a Mr Simon Cheesman, as Commercial Director, to sort out these problems for Yuanda. When Mr Cheesman looked at the contract he spotted clause 9A and immediately appreciated its implications. He also noticed the low rate of interest that had been inserted in clause 4.11.2. He drew both of these to Mr Lee’s attention in July 2009. Mr Lee says that he is sure that neither of these topics was raised at any time during the negotiations with Gear.

14.
Yuanda is the English subsidiary of a substantial Chinese group and was incorporated in 2002 with a view to establishing a viable business in the UK. This was by far its largest contract. Mr Lee has explained in his witness statement that most of the other directors of Yuanda at the time were Chinese and did not speak or read English. Accordingly, he experienced some difficulties and delays in explaining to his colleagues the effects of the various provisions of the contract. He says that this problem must have been obvious to Gear, and so Gear ought, he says, to have emphasised "any serious or important issues in the clearest terms".

15.
What is clear is that, although Mr Lee was provided with the draft contract documentation at the end of February 2007 and attended a meeting on 22 March 2007 to discuss the terms of the contract, either he did not notice the provisions relating to adjudication and interest on late payments or he did notice them, but cannot now recall doing so because he was probably not particularly concerned about them.

16.
One significant feature of the work that was to be carried out by Yuanda was that most of the components of the curtain walling were, as expressly specified in Yuanda's quotation, to be made in China and, sometimes, specifically by Pilkington (Shanghai China) Ltd. It was therefore contemplated by the parties that these components would be shipped from China to England prior to incorporation in the works.

The issues

17.
The issues that arise on this hearing are as follows:

(1)
When entering into the Trade Contract did Yuanda deal on Gear's written standard terms of business?

(2)
If so, is this an international supply contract within the meaning of section 26 of UCTA 1977?

(3)
If this is not such a contract, is clause 9A unreasonable within the meaning of UCTA 1977? (This includes the question whether the terms were sufficiently drawn to Yuanda's attention).

(4)
Is the first part of clause 9A, or any part of it, void for uncertainty?

(5)
Does clause 9A comply with the requirements of section 108 of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA), either wholly or in part?

(6)
If clause 9A does not comply, with what should it be replaced?

(7)
Does clause 4.11.2 provide a substantial remedy for late payment within the meaning of the Late Payment of Commercial Debts (Interest) Act 1998 or should the statutory rate be substituted for it?

18.
For the purposes of these issues I am asked to assume that Yuanda entered into sub-contracts with its Chinese parent, or other companies in China, for the manufacture and supply to the UK of some of the components of the curtain walling system. I have already mentioned that Gear is a company incorporated in Cyprus. The evidence, which on this point is not altogether satisfactory, suggests that Gear has no, or no regular place of business in the UK, although for all practical purposes it appears to carry on business in the UK through its agent, GC Project Management.

The Unfair Contract Terms Act 1977 ("UCTA")

19.
Section 3 of UCTA applies as between contracting parties where one of them deals as a consumer or on "the other's written standard terms of business". This claim raises the question of what is meant by written standard terms of business.

20.
In Hadley Design Associates v Westminster[2003] EWHC 1617 (TCC), HH Judge Richard Seymour QC said, at [78]:

"The concept underlying the provisions of [UCTA]section 3, in my judgment, is that there should exist a stock of written, no doubt usually, at any rate, printed, contract conditions which was simply drawn from as a matter of routine and intended to be adopted or imposed without consideration or negotiation specific to the individual case in which they were to be used. That seems to me to be the force of the words "written" and "standard" in the expression "written standard terms of business". In other words, it is not enough to bring a case within [UCTA]section 3 that a party has established terms of business which it prefers to adopt, as, for example, a form of draft contract maintained on a computer, or established requirements as to what contracts into which it entered should contain, as, for example, provision for arbitration in the event of disputes. Something more is needed, and on principle that something more, in my judgment, is that the relevant terms should exist in written form prior to the possibility of the making of the relevant agreement arising, thus being "written", and they should be intended to be adopted more or less automatically in all transactions of a particular type without any significant opportunity for negotiation, thus being "standard"."

21.
With these observations I agree. The conditions have to be standard in that they are terms which the company in question uses for all, or nearly all, of its contracts of a particular type without alteration (apart from blanks which have to be completed showing the price, name of the other contracting party and so on). One encounters such terms on a regular basis - whether when buying goods over the internet or by mail order or when buying a ticket for travel by air or rail.

22.
In my view, it is the essence of such terms that they are not varied from transaction to transaction. If they were, they would no longer be "standard". However, there is a class of transactions where the standard terms are incorporated by reference as one part of a larger package of terms. For example, the standard terms so incorporated may relate only to delivery and acceptance of goods and have nothing to do with other aspects of the contract, such as the fitness for purpose of the goods or their suitability for a particular purpose. In such cases it is probably a matter of degree whether one contracting party is or is not dealing on its written standard terms: see, for example, Ferryways NV v Associated British Ports [2008] 1 Lloyd's Rep 639 (a decision of Teare J, approving the approach of HH Judge Seymour QC in Hadley Design).

23.
However, that problem does not arise here because Mr Alexander Hickey, who appeared for Yuanda, made it clear that his case was that the written standard terms in this case consisted of the JCT form of Trade Contract together with the Schedule of Amendments that had been prepared by Gear's solicitors. For the purpose of considering this question I will assume, without deciding, that a set of standard terms and conditions that are intended to apply to one project only can nevertheless constitute a contracting party's written standard terms of business.

24.

Gear relied on a decision of HH Judge Thayne Forbes QC (as he then was) in Salvage Association v CAP Financial Services Ltd[1995] FSR 654, in which he listed a number of facts that it might be appropriate to take into account when deciding whether or not one party dealt with the other on the latter's "written standard terms of business". He said, at pages 671–672:

'The terms of the second contract were based on and closely followed CAP's standard conditions of business and the use of those standard conditions as the starting point for negotiating and agreeing the precise terms of the second contract was an obvious and sensible way to approach the matter. In my opinion, the fact that a set of CAP's standard conditions of business was used for this purpose does not necessarily mean that SA "dealt" on CAP's "written standard terms of business". In such circumstances, whether it continues to be correct to describe the terms of the contract eventually agreed by the parties as the standard terms of business of the party who originally put them forward will be a question of fact and degree to be decided in all the circumstances of the particular case. Without attempting to give an exhaustive list of the type of facts which I think would be appropriate to take into account in arriving at such a decision, I consider that the following would be included:

(i) the degree to which the "standard terms" are considered by the other party as part of the process of agreeing the terms of the contract;

(ii) the degree to which the "standard terms" are imposed on the other party by the party putting them forward;

(iii) the relative bargaining power of the parties;

(iv) the degree to which the party putting forward the "standard terms" is prepared to entertain negotiations with regard to the terms of the contract generally and the "standard terms" in particular;

(v) the extent and nature of any agreed alterations to the "standard terms" made as a result of the negotiations between the parties;

(vi) the extent and duration of the negotiations."

25.
In St Albans City and District Council v International Computers Ltd[1996] 4 All ER 481, Nourse LJ said this, at 491:

"So far as material, s 3 of the 1977 Act provides:

'(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term—(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach … except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.'

So far as material, s 12 provides:

'(1) A party to a contract "deals as consumer" in relation to another party if — (a) he neither makes the contract in the course of a business nor holds himself out as doing so …'

By s 14 'business' is defined to include a profession and the activities of any government department or local or public authority. The requirement of reasonableness is dealt with in s 11.

The first question is whether, as between the plaintiffs and the defendant, the plaintiffs dealt as consumer or on the defendant's written standard terms of business within s 3(1). In the light of s 12(1)(a) and the definition of 'business' in s 14, it is accepted on behalf of the plaintiffs that they did not deal as consumer. So the question is reduced to this. Did the plaintiffs 'deal' on the defendant's written standard terms of business?

Mr Dehn submitted that the question must be answered in the negative, on the ground that you cannot be said to deal on another's standard terms of business if, as was here the case, you negotiate with him over those terms before you enter into the contract. In my view that is an impossible construction for two reasons: first, because as a matter of plain English 'deals' means 'makes a deal', irrespective of any negotiations that may have preceded it; secondly, because s 12(1)(a) equates the expression 'deals as consumer' with 'makes the contract'. Thus it is clear that in order that one of the contracting parties may deal on the other's written standard terms of business within s 3(1) it is only necessary for him to enter into the contract on those terms.

Mr Dehn sought to derive support for his submission from observations of Judge Thayne Forbes QC in Salvage Association v CAP Financial Services Ltd[1995] FSR 654 at 671–672. In my view, those observations do not assist the defendant. In that case the judge had to consider, in relation to two contracts, whether certain terms satisfied the description 'written standard terms of business' and also whether there had been a 'dealing' on those terms. In relation to the first contract he said (at 671):

'I am satisfied that the terms in question were ones which had been written and produced in advance by CAP as a suitable set of contract terms for use in many of its future contracts of which the first contract with [the Salvage Association] happened to be one. It is true that Mr Jones felt free to and did negotiate and agree certain important matters and details relating to the first contract at the meeting of February 27, 1987. However, although he had read and briefly considered CAP's conditions of business, he did not attempt any negotiation with regard to those conditions, nor did he or Mr Ellis consider that it was appropriate or necessary to do so. The CAP standard conditions were terms that he and Mr Ellis willingly accepted as incorporated into the first contract in their predetermined form. In those circumstances, it seems to me that those terms still satisfy the description “written standard terms of business” and, so far as concerns the first contract, the actions of Mr Jones and Mr Ellis constituted “dealing” on the part of [the Salvage Association] with CAP on its written standard terms of business within the meaning of section 3 of the [Unfair Contract Terms Act 1977].'

It is true that the judge found that the Salvage Association did not negotiate with CAP over the latter's standard terms and that he held that, in entering into the contract, the Salvage Association dealt with CAP on those terms within s 3. I do not, however, read his observations as indicating a view that the 'dealing' depended on the absence of negotiations. I think that even if there had been negotiations over the standard conditions his view would have been the same.

Scott Baker J dealt with this question as one of fact, finding that the defendant's general conditions remained effectively untouched in the negotiations and that the plaintiffs accordingly dealt on the defendant's written standard terms for the purposes of s 3(1) (see [1995] FSR 686 at 706). I respectfully agree with him.”

26.
I agree that factors (i), (ii) and (iv) of those identified in the Salvage Association case may be relevant in deciding whether or not a particular set of terms may constitute a party’s standard terms of business, at least when they are proffered, but I do not consider that the existence of negotiations is

itself a relevant consideration: the St Albans case held that it was not. In my view, the only important factor of those listed in the Salvage Association case is (v). If there is any significant difference between the terms proffered and the terms of the contract actually made, then the contract will not have been made on one party's written standard terms of business.

27.
Whilst I would be prepared to accept in principle that some alterations to the proffered standard terms may be so insignificant as to make it possible to hold that the party has dealt on the others written standard terms of business (as was the case in Horace Holman Group Ltd v Sherwood International Group Ltd (2000) WL491372), I am quite satisfied that that is not the case here. The alterations negotiated by Yuanda were material, from a contractual point of view, and cannot be dismissed as de minimis.

28.
In my judgment, therefore, this is plainly not a case where Yuanda dealt on Gear's written standard terms of business. There are at least two reasons for this, both of which are fatal to Yuanda's case. First, Yuanda itself negotiated some material alterations to the proffered "standard" terms and this means that it did not deal on the "standard" terms. As the decision in St Albans City and District Council v International Computers Ltd[1996] 4 All ER 481 makes clear, the reference to dealing in section 3 of UCTA is to the making of the contract, not to its negotiation.

29.
Second, the evidence shows that few, if any, of the 30 odd trade contractors entered into contracts which were on the same terms. Nearly all of them, during the pre-contract negotiations, appear to have secured alterations to the Schedule of Amendments originally put forward by Gear. This in itself shows that Gear did not have standard terms on which it dealt. The court is concerned with the terms on which the contract is actually made, not the terms that were proffered by one party to the other as the basis for the proposed contract. Whilst the latter may have been standard, so far as Gear was concerned, the former were not.

30.
For these reasons I conclude that Yuanda did not deal on Gear's written standard terms of business for the purposes of section 3 of UCTA.

Were the terms sufficiently drawn to the attention of Yuanda?

31.
In the light of my conclusions about the application of section 3, this may be academic. However, I will deal with the point shortly.

32.
The JCT form of Trade Contract runs to well over 100 pages, mostly consisting of closely typed text. It does not make easy reading. The Schedule of Amendments to the Form of Contract prepared by Gear's solicitors ran to just over 40 pages. It showed very clearly which clauses of the standard form were to be amended and in what terms. It would not be difficult for someone reasonably familiar with forms of contract such as these to go through the Schedule of Amendments and identify the significant changes. For example, against clause 4.11.2 the last amendment read as follows:

"Fifteenth line; "delete five per cent (5%)" and add "half a percent (0.5%)"."

33.

Whilst I accept that it might have taken some care to spot this, it was there to be seen by any careful reader of the Schedule of Amendments. It was no more and no less prominent than any other of the proposed amendments. This was not a case of some onerous term being tucked away in small print at the end of a long document.

34.
I therefore reject unhesitatingly Mr Lee's suggestion that Gear should have done anything more than it did to bring the proposed amendments to the attention of Yuanda. By this I do not intend any criticism of Mr Lee. I do not know under what constraints and pressures he was working and he may simply not have had the time to study the proposed contract in sufficient detail to pick up points like the change in the rate of interest in clause 4.11.2. However, that would be a matter internal to Yuanda. It cannot be a reason for imposing some additional, or indeed any, duty of disclosure on Gear.

Is Yuanda's Trade Contract an international supply contract?

35.
Again, this question does not arise in the light of my finding about the application of section 3 of UCTA. However, since arguments were addressed to me I shall deal with the point briefly.

36.
Although the evidence is somewhat scanty, I consider that section 26(3)(b) of UCTA is probably satisfied in that Yuanda's place of business is England and Gear's place of business is probably in Cyprus. However, I would have preferred to have more precise evidence as to the nature and function of Gear's office in Cyprus and the extent to which it does business in England through GC Project Management Ltd.

37.
Given the terms of Yuanda's quotation to which I have already referred, it is quite clear that substantial elements of the curtain walling system which Yuanda contracted to supply and install at Westminster Bridge were required by the contract to be manufactured in China. It is therefore self evident that some of the goods that were to be supplied under the Trade Contract were to be carried at some time in the future from the territory of one state to the territory of another. Thus the requirement of section 26(4)(a) of UCTA was also satisfied.

Does the second part of Clause 9A conflict with section 108 of HGCRA?

38.
For reasons that will become apparent, I will consider the second part of clause 9A first. Mr Hickey submitted that a clause which imposes on Yuanda the entirety of the parties' financial costs of the adjudication (ie. its own and Gear's legal and professional fees) is a very real fetter on Yuanda's ability to refer a dispute to adjudication. The lack of reciprocity serves to demonstrate that its purpose is to impose a fetter on Yuanda to adjudicate, but not on Gear. Hence, he submits, clause 9A does not comply with HGCRA.

39.
Mr Gideon Scott Holland, who appeared for Gear, relied on a decision by HH Judge Mackay in Bridgeway Construction Ltd v Tolent Construction Ltd(2000) CILL1662. In that case there was a provision in the contract that the party serving a notice to adjudicate should bear all of the costs and expenses incurred by both parties in relation to the adjudication, including but not limited to all legal and experts fees, together with the adjudicator's fees and expenses. The claimants in that case argued

that the relevant clauses were void because they tended to inhibit the contracting parties from pursuing their lawful remedies by way of adjudication. HH Judge Mackay disagreed. He said this, at 1663:

“I have come to the view that there should be no interference with this contract. I do not consider that the terms are either void or – and it was not used in this particular case but I say so to resolve any doubt – voidable. It seems to me that main contractors and subcontractors are entitled to develop contracts to implement Acts of Parliament. There are good grounds for saying that a system for costs is important and relevant. The mere fact that in this particular case the claimants are disgruntled, perhaps understandably so, about their costs situation, does not entitle me to say, “Well, these clauses are a bit unfair. Let’s change them.” . . .

In this particular case we are concerned only with costs relating to adjudication, which is not the subject matter of any Act of Parliament, and in fact the alterations [to the clauses in question] are not alterations to any Act of Parliament but merely to the CIC Model Procedure.”

40.
In the commentary to this case the editors of the journal noted that “this case provides a good example where through the use of contract drafting a party has drafted compliant adjudication provisions which must clearly discourage a party from exercising its right to refer disputes to adjudication”. I have to say that I find this comment, and the judge’s reasoning in that case, difficult to understand.

41.
It is well established that the intention of Parliament in enacting HGCRA was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of the adjudicator to be enforced, pending the final determination of disputes by arbitration, litigation or agreement: see Dyson J, as he then was, in Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93. Section 108(3) of HGCRA provides that “the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings . . .”. Paragraph 23(2) of the Scheme for Construction Contracts provides expressly that the parties are to comply with the decision of the adjudicator.

42.
HGCRA and the Scheme are silent on the question of costs. Nowhere in the Scheme is the adjudicator given the power to order one party to the adjudication to pay the costs of the other. In Northern Developments (Cumbria) Ltd v J&J Nichol [2000] BLR 158, HH Judge Bowsher QC concluded that an adjudicator had no jurisdiction to decide that one party’s costs of the adjudication should be paid by the other (although he held that the parties could confer such jurisdiction by their conduct or by consent). In reaching this conclusion he considered the earlier decision of John Cothliff Ltd v Allen Build (North West) Ltd (1999) CIO 1530, a decision of HH Judge Marshall Evans QC, sitting as a judge of the High Court, who held that the adjudicator in that case did have power to award the costs of the adjudication. As HH Judge Bowsher QC observed, the report of that decision reproduces only extracts from the judgment and so Judge Bowsher was a little cautious in considering just what it was that the judge decided. However, he was of the view, in apparent disagreement with HH Judge Marshall Evans, that an adjudicator did not have any jurisdiction to award costs (unless it was specifically conferred on him by the parties, as may have been done in that case). I agree with HH Judge Bowsher QC: I consider that an adjudicator has no power to award costs unless the power is specifically conferred on him by the parties, whether by the terms of the contract or by an ad hoc submission.

43.
I can see no reason why a contractual provision that confers on an adjudicator a power to make an award as to how the parties' costs should be borne should be in conflict with the Act or the Scheme. The parties would then be required to comply with any order for costs that the adjudicator made. But suppose that the adjudication provisions in a contract contained a term which provided that the employer did not have to comply with a decision of an adjudicator awarding a sum of money to the contractor save to the extent by which the amount of the award exceeded the employer's legal and professional costs of the adjudication. I would have thought that it could not be seriously contended that such a provision complied with HGCRA. It would be in express conflict with the requirement that the parties were to comply with the decisions of adjudicators.

44.
Whilst such a provision is not the same as one that requires the contractor to bear the employers legal and professional costs of any referral to adjudication, the result in practice will not be very different. If the contractor seeks to enforce the award by making an application for summary judgment, he will be met by a counterclaim from the employer for the amount of his legal and professional costs of the adjudication. This would, in practice, deprive the contractor of his remedy save to the extent that the amount of the award exceeded the amount of the employer's legal and professional costs.

45.
Whilst it could be said that, strictly speaking, the employer would be required to comply with the adjudicator's decision and pay the sum awarded to the contractor, and then recover his costs of the adjudication from the contractor under the contract, the practical effect of a provision that the contractor must pay the legal and professional costs of the employer would still be that the contractor would be deprived of his remedy (up to the amount of the employer's costs). On this ground alone, I would hold that the provision in the second part clause 9A is directly contrary to the purpose of the Act.

46.
It was submitted by Mr Scott Holland that under the Scheme a party always has to bear its own costs of a referral to adjudication because there is no power in the adjudicator to make any order in respect of the parties' own costs and, consequently, there was already in practice a fetter on a party's right to refer a small dispute to adjudication. I consider that there is only limited force in this argument because, of course, a party does not have to employ solicitors when referring a claim to adjudication (although it is permitted to do so: see paragraph 16 of the Scheme). If the amount is relatively small, and liability seems clear, there is no reason why a party cannot represent itself.

47.
By contrast, if a party knows that it will have to pay the other party's costs of any referral to adjudication, irrespective of the outcome, then it will not be worth making a referral unless the sum it expects to recover will significantly exceed the likely costs of the other party. An added difficulty here is that a referring party, whilst able to obtain an estimate of its own costs from its solicitors, is never in a position to obtain any indication in advance of the likely costs of the other party. Worse still, the responding party would have no incentive to keep its costs within reasonable bounds so long as the referring party is bound to pay them come what may. In response to this point, Mr Scott Holland suggested that there would have to be an implied term that the responding party would only be able to recover its reasonable costs. He may be right. However, as any contract lawyer knows, it is seldom possible to predict with certainty whether a court will imply any particular term into a contract

(unless it is one of the terms implied by operation of law into contracts of a particular type). So even if this possibility exists, it is not one upon which a referring party could safely rely.

48.
One answer to the problem, from the referring party's point of view, would be to defer the referral of a dispute to adjudication until the amount at stake was sufficiently large to make a referral worthwhile notwithstanding the fact that it will have to pay the responding party's costs in any event. However, I consider that this option would immediately fall foul of a referring party's entitlement in section 108 to refer a dispute to adjudication at any time because there would be no effective remedy until the amount in dispute had become sufficiently large.

49.
In my judgment the comment by the authors of CILL that I have quoted above in relation to the Tolent case misses the point. If the effect of the contract drafting is to "clearly discourage a party from exercising its right to refer disputes to adjudication", then it must be for consideration whether a provision so drafted is contrary to the requirements of HGCRA.

50.
Clause 9A of the Trade Contract in this case also includes the requirement to permit the joinder of a member of the professional team where there is a multi-party dispute. Leaving aside, for the moment, the question of what is meant by a multi-party dispute (a point which I consider below), it is clear that if valid effect can be given to this provision, it will make the costs burden on the contractor when referring a dispute to adjudication even more oppressive because the employer's costs will include those caused by the presence of another party to the adjudication. The clause does not limit the obligation on the contractor to pay only those costs of the employer that are referable to his participation in the dispute.

51.
For these reasons, I consider that clause 9A would in practice limit Yuanda's freedom to refer a dispute to adjudication at any time and, in some circumstances – such as in a dispute involving a relatively small amount of money – to deprive it of a remedy altogether. I must therefore respectfully disagree with the conclusion reached by HH Judge Mackay in the Tolent case, at least on the basis of the wording of clause 9A in this particular contract.

52.
I should add, in fairness to HH Judge Mackay, that his decision was given at a time when the process of adjudication had fairly recently arrived on the dispute resolution landscape and experience of the process in practice was limited. However, since then there have been many adjudications where the subject matter has been complex and the parties have been represented by experienced solicitors and counsel at, no doubt, very considerable expense. This may not have been something that was anticipated by HH Judge Mackay.

53.
I should mention one other matter for the sake of completeness. I am, of course, aware, that the Second Consultation of the DTI recommended that the so-called Tolent clauses should be outlawed and that this recommendation has already been implemented in the sense that effect will be given to it by section 141 of the Local Democracy, Economic Development and Construction Act 2009, although when this will come into force is a matter of conjecture. I do not regard this development as relevant to the point that I have to decide. The question for me is whether or not clause 9A conflicts

with the requirements of section 108 of HGCRA, not whether Tolent clauses generally are either unfair or undesirable – the latter are matters for Parliament.

54.
For the reasons set out in this section of the judgment, I consider that clause 9A is in conflict with the requirements of section 108 of HGCRA and the Scheme. The next question is: what should replace it?

What is to replace Clause 9A?

55.
Section 108 of HGCRA - in subsections (1)-(4) - contains the requirements that must be included in every construction contract in relation to adjudication. Subsection (5) provides that "If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply". The Scheme is divided into two parts: Part I is entitled "Adjudication" and Part II is entitled "Payment". From this my immediate impression is that the reference to "the adjudication provisions of the Scheme" in section 108(5) refers to the provisions of Part I of the Scheme, and not to the provisions of Part II of the Scheme. I should mention also that section 108 of the Act is immediately preceded by the heading "Adjudication" and sections 109-113 are preceded by the heading "Payment".

56.
Sections 109-113 of HGCRA set out the machinery for payment that the Act requires to be built in to every construction contract. Sections 109 and 113 each provide that in the absence of agreement about the matters covered by those sections "the relevant provisions of the Scheme for Construction Contracts apply". Section 110(3) similarly provides that "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". So one sees at once that there is a difference in the words of incorporation in sections 109, 110 and 113, on the one hand, and the words of incorporation in section 108, on the other. The latter appear to require the incorporation of the adjudication provisions of the Scheme in their entirety in substitution for the non-compliant provision or provisions in the contract. By contrast, the words of incorporation in sections 109, 110 and 113 appear to permit the incorporation of the relevant provisions of the Scheme in place of the non-compliant provisions in the contract.

57.
In the absence of authority, therefore, it seems to me pretty clear that, as a matter of construction, if the adjudication provisions in the contract – in this case clause 9A – are non-compliant, then those provisions are replaced in their entirety by the provisions in Part I of the Scheme.

58.
I now turn to the authorities. There are several cases which have discussed the issue of the extent to which the Scheme applies. The following is a helpful summary of the relevant decisions, which I have taken almost verbatim from Mr Hickey's skeleton argument:

(a)
C&B Concept v Isobars[2001] CILL 1781 (1st instance); [2002] 1 BLR 93. The Recorder decided the whole payment provisions fell and were replaced by Scheme. On appeal the Court of Appeal felt it was not necessary to decide whether that point was correct because the appeal could be decided without it, but was content to assume the Recorder was right.

(b)
Ballast plc v The Burrell Company [2001] BLR 529 – Court of Session. A Scottish case in which an adjudicator decided he was unable to reach a decision. The Court of Session said the decision was a nullity and it was unacceptable for the adjudicator to refuse to decide the dispute. Lord Reid indicated in the course of his judgment that he considered adjudication might be governed in part by the contractual terms and in part by statute since the Scheme may fill gaps where there was non-compliance with s108(1)(2)(4).

(c)
John Mowlem v Hydratight [2002] 17 Const LJ 358. In this case HHJ Toulmin CMG QC concluded that the clauses 90.1 to 90.4 of Option Y(UK) 2 of the NEC2 standard form did not comply with parts of section 108. The Judge concluded at paragraph 31 of his judgment:

'I have considered whether, if some parts of the subcontract comply with the Act, they can be retained and the Act can be used in substitution for or to fill in those parts of the subcontract which are contrary to the Act. But the words of the Act are clear. Either a party complies in its own terms and conditions with the requirements of sections 108(1) to (4) of the Act or the provisions of the Scheme apply.'

(d)
Hills Electrical &Mechanical v Dawn Construction Ltd[2004] SLT 477. In this Scottish case the court was concerned with payment terms. It was held the Scheme only applied to the extent that there were gaps in the express terms

(e)
Aveat Heating v Jerram Falkus Construction [2007] EWHC 131. HHJ Havery QC followed the approach of Mowlem, and decided that where the adjudication provisions were non-compliant they were replaced wholesale by the Scheme, and indicated that the contractual provisions must be void. The Judge expressly disapproved the text of Keating 8th edition paragraph 17.014 (all but the first sentence) and approved the footnote to it, namely:

"the extent to which the contractual mechanism does not comply with the Act is irrelevant. If it does not comply the whole contractual mechanism is tainted and falls by the wayside to be replaced by the provisions of the Scheme".

(f)
Banner Holdings v Colchester Borough Council [2010] EWHC 139 (TCC), per Coulson J at paragraphs 42 and 43, where Coulson J said that there appeared to be a conflict of authorities although it was unnecessary to decide the point before saying

"I would offer the tentative view that, at least in relation to the adjudication provisions in s108, the wording of section 108(5) suggests that the whole Scheme replaces the express terms, regardless of how many (or how few) of those express terms fail to comply with the Act. More generally, I do not believe that it should be for the court to have to piece together a compliant set of provisions from two different sources. That would not make for certainty."

(g)
See also Construction Adjudication (Coulson) paragraphs 3.01-3.10, and 3.97 (the analogy with UCTA).

59.

Mr Hickey submits that if clause 9A is non-compliant, the whole of it is ousted and is replaced by the Part I of the Scheme. He says, disarmingly, that it would be welcome for the TCC to give a ruling which clarifies this, in the light of the competing decisions.

60.
I propose to disregard for the purposes of my analysis the decision in Ballast plc v The Burrell Company because I find the relevant passage in the judgment of Lord Reid , at paragraph [28], somewhat opaque. This is not a criticism of his judgment, it is simply to note that the relevant observations were nothing more than passing comments in the context of his consideration of the question of whether the adjudication procedure was one created by statute or by contract.

61.
Where non-compliance with the adjudication provisions arises, that is to say non-compliance with section 108 of HGCRA, the position seems to me to be reasonably clear. The words of the section should be taken to mean what they say, namely that if the contract does not comply – in any respect – with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme apply. As we have already seen, the adjudication provisions in the Scheme are those contained in Part I. So if there is any non-compliance, the adjudication provisions in Part I of the Scheme are brought in – lock, stock and barrel.

62.
Those cases cited in paragraph 58 above which deal with the adjudication provisions in section 108 are all one way. They support the conclusion that I have reached. Accordingly, so far as non-compliance with section 108 of HGCRA is concerned, the position should now be regarded as settled.

63.
I turn now to the cases that deal with the payment and related notice provisions in the contract. The decisions in C&B Concept v Isobars and Hills Electrical & Mechanical v Dawn Construction Ltd concerned the payment provisions in the contract, not the adjudication provisions. In the first, Mr Recorder Moxon-Browne QC, sitting in the TCC, acceded to a submission that since the parties had failed to elect between alternatives A and B in relation to the machinery for making interim or stage payments, the whole of the provisions in the contract relating to interim payments, including those relating to notices and the like, fell away and were to be replaced by the Scheme. Unfortunately, the report in the CILL of the judgment at first instance quotes extracts from the judgment only and these do not cover this particular point. Since the Court of Appeal decided the case on another ground, they were content to assume that the Recorder's decision on this point was correct without deciding it. Unfortunately, it is not possible to gather very much more from this judgment beyond the bare facts that I have already outlined.

64.
The decision in Hills Electrical & Mechanical v Dawn Construction Ltd goes the other way in that the Scheme was not applied in its entirety, but only to fill gaps in the express terms of the contract. It is notable that in the extract from the judgment cited at paragraph 35 of Mr Scott Holland's skeleton argument the wording of section 108(5) is not mentioned. In the context of payment provisions, I would not disagree with one word of the reasoning in that case. So my provisional view, for what it is worth, is that this is the correct approach in cases where there is non-compliance with the payment and related notice provisions. However, much will depend on the facts of the case and I can see that there may be situations where the provisions of Part II of the Scheme would have to be substituted for the non-compliant contractual provisions in their entirety because no other solution might be feasible.

However, since I do not have to decide this point on the facts of this case, I do not consider it appropriate to say anything further.

65.
For the reasons that I have given, therefore, clause 9A must go in its entirety and be replaced by the provisions of Part I of the Scheme.

Does the first part of Clause 9A lack of certainty or clarity and does it conflict with section 108 of HGCRA?

66.
In the light of the conclusions that I have reached in the preceding section of this judgment, this point no longer arises. However, since I have heard full argument on it and since a similar point may crop up in another case, it might be helpful to express my views briefly.

67.
It is Yuanda's pleaded case that the requirement in Clause 9A, namely that the TeCSA Rules should be amended to "require joining of the members of the professional team in a multi-party dispute situation", lacks contractual certainty of meaning and/or is inoperable and/or incapable of being performed. Yuanda contends also, in its pleaded case, that the clause requires the adjudication of more than one dispute, would operate so as to frustrate the statutory requirement for the referral of the dispute to the adjudicator within 7 days and would restrict Yuanda's entitlement to refer a dispute to adjudication at any time.

68.
However, in Yuanda's skeleton argument the first point was put a little differently. Paragraph 21 of Mr Hickey's skeleton said that "Clause 9A does not enable Yuanda to [refer a dispute to adjudication at any time with the aim of obtaining a decision within 28 days] by reason of the inherent uncertainty and lack of clarity as to how the adjudication process will work".

69.
I have to confess that at first I was somewhat impressed with the submission that Clause 9A was uncertain and might be difficult, if not impossible, to operate in practice. However, on reflection, and fortified by the well-known principle that the court should give effect to contractual terms wherever it can properly do so, I have concluded that this is not the case.

70.
It has been decided that the Scheme permits only one dispute to be referred to adjudication at any one time: see David and Teresa Bothma (in partnership) T/A DAB Builders v Mayhaven Healthcare Limited[2007] EWCA Civ 527. However, the meaning of the expression "dispute" is itself a little unclear: it has been held that it is a wide enough to cover whatever claims are in dispute at the time when the referring party starts the adjudication process (see Fastrack Contractors v Morrison [2000] BLR 168).

71.
But whatever the extent of the matters in disagreement that can constitute one dispute, I cannot see how a dispute relating to liability as between a contractor and the employer can ever be regarded as the same as a dispute relating to liability as between a member of the professional team and the employer. For example, there may be a dispute between the contractor and the employer as to whether a particular defect is a defect resulting from poor (or non-compliant) workmanship, or from

poor design and/or specification. Since such a dispute could also engage the architect or engineer responsible for the design or specification in question, it would be in the interests of the employer to have the issue of whether the defect was one of design or workmanship resolved not only between himself and the contractor but also between himself and the architect or engineer.

72.
Thus far there is no difficulty. But if the employer wished to go further, by having the issue of the architect’s or the engineer's liability for the defective design or specification resolved at the same time as the dispute raised by the contractor, that would clearly involve a separate dispute. The contractor has no interest in whether or not the architect or engineer is liable: he merely wants to establish that the defect is one of design, not workmanship. Of course, there may be some cases where establishing that the defect is one of design will have the consequence that the architect or engineer is liable without more, but it will not always be so. The design may prove to be defective, but that may be for reasons beyond the architect or engineer's control, or for other reasons such that there may have been no breach of the relevant duty.

73.
Clause 9A refers to "a multi-party dispute situation", it does not refer to the existence of more than one dispute, as Mr Scott Holland pointed out. There can, in my view, be a "multi-party dispute situation" where the employer wishes to ensure that a member of the professional team is bound by the decision of the adjudicator in a claim brought by the contractor - such as in the case of a dispute as to whether a defect is one of design or workmanship. A finding that the defect was one of design would be a necessary, but not always a sufficient, condition of establishing the liability of the architect or engineer responsible for that design.

74.
Accordingly, I consider that proper effect can be given to clause 9A by limiting its application to the joinder of members of the professional team to an adjudication started by the contractor against the employer, or vice versa, where there is an issue that needs to be resolved as against the member of the professional team as well as against the contractor but without extending the referral to the separate potential dispute about the liability of the member of the professional team in question.

75.
This raises the question of whether the TeCSA Rules can be simply and readily amended to accommodate a multi-party dispute of the type I have described. Mr Scott Holland suggested that there could be inserted appropriate words into paragraph 3 of the Rules. That paragraph reads as follows:

“3. These Rules shall apply upon any Party giving written notice to any other Party requiring adjudication, and identifying in general terms the dispute in respect of which adjudication is required."

A "Party" is defined as meaning any party to the contract. Mr Scott Holland suggests that this paragraph could be amended as follows:

“3. These Rules shall apply upon any Partygiving written notice to any other Party [or, in the event of a multi-party dispute, to any Party and the relevant member of the professional team] requiring adjudication, and identifying in general terms the dispute in respect of which adjudication is required."

76.
This is all very well so far as it goes, but it would not cater for the situation where the referring party was the contractor who may well have no interest in joining a member of the professional team. I consider that a further provision would have to be added to paragraph 3 in order to permit the responding party to serve the notice forthwith on any member of the professional team that it wished to involve in the adjudication. The subsequent paragraphs of the Rules would then to be amended so as to include the member of the professional team so joined within the definition of Party in those paragraphs, and the expression "Responding Party" used elsewhere in the Rules would have to include that member of the professional team.

77.
In my judgment, therefore, these fairly modest amendments to the TeCSA Rules would provide the necessary machinery to join a member of the professional team to a dispute between the employer and the trade contractor.

78.
For these reasons, I reject the submissions made on behalf of Yuanda that the first part of clause 9A is or might be in conflict with the requirements of section 108 of HGCRA on the grounds that it is unworkable, or that it is void for uncertainty, or that it conflicts with the requirements of section 108 on any the other grounds mentioned in paragraph 67 above.

Clause 4.11.2 and the appropriate rate of interest

79.
Yuanda relies on section 8(1) of the Late Payment of Commercial Debts (Interest) Act 1998, arguing that the rate of interest provided by clause 4.11.2, as amended in the Schedule of Amendments, is not a substantial remedy within the meaning of the Act and so the provision is therefore void. As a result, Yuanda claims to be entitled to interest at the statutory rate. That rate is one fixed from time to time by the Secretary of State, and the current rate is 8% over base rate.

80.
Section 1(1) of the Act provides that:

“It is an implied term in a contract to which this Act applies that any qualifying debt created by the contract carries simple interest subject to and in accordance with this Part."

Contracts to which the Act applies are contracts for the supply of goods or services where the purchaser and the supplier are each acting in the course of a business, and a "qualifying debt" is a debt created by virtue of an obligation under a contract to pay the whole or any part of the contract price. An interim payment under a construction contract is made a "qualifying debt" by section 11 of the Act.

81.
Section 8(1) of the Act makes void any contract terms to the extent that they "purport to exclude the right to statutory interest in relation to the debt, unless there is a substantial contractual remedy for late payment of the debt". Conversely, section 8(2) provides that where the parties agree a contractual remedy for the late payment of the debt that is a substantial remedy, statutory interest is not carried by the debt. Section 8(4) specifically deals with clauses that confer a right to interest on late payment and provides that any such terms are void to the extent that they purport to "(a) confer a contractual right to interest that is not a substantial remedy for late payment of the debt".

82.
Under section 9(1) of the Act a contractual remedy for the late payment of a debt shall be regarded as a substantial remedy unless:

“(a) the remedy is insufficient either for the purpose of compensating the supplier for late payment or for deterring late payment; and

(b) it would not be fair or reasonable to allow the remedy to be relied on to oust or (as the case may be) to vary the right to statutory interest that would otherwise apply in relation to the debt.”

83.
In determining whether a remedy is a substantial remedy, section 9(2) provides that regard shall be had to “all the relevant circumstances at the time the terms in question are agreed”. When considering whether or not it would be fair or reasonable to allow the remedy to be relied on, regard is to be had, amongst other things, to the following matters:

“(a) the benefits of commercial certainty;

(b) the strength of the bargaining positions of the parties relative to each other;

(c) whether the term was imposed by one party to the detriment of the other (whether by the use of standard terms or otherwise); and

(d) whether the supplier received an inducement to agree to the term".

84.
By way of background, the Act was brought into force in November 1998 and the Statutory Instrument which set the statutory rate (SI 1998/2765) was approved during the same month. At that time the bank base or dealing rate was 6.75%. The average rate for the previous 12 months was around 7%. Very roughly, therefore, the statutory rate at the time of its introduction represented a rate that was just over double the base rate. To the extent that it is relevant, at the date when the present contract was made, base rate was 5.5%.

85.
This was described by Mr Hickey for Yuanda as a "short point". It seems to me to be nothing of the sort: the provisions of the Act are not exactly straightforward and there is a dearth of guidance as to how they should be applied in practice, both in the Act itself and in the authorities. Surprisingly, this statute has received very little by way of judicial attention so far as I can tell.

86.
Section 5 of the Act provides for "remission" of the statutory interest where "by reason of any conduct of the supplier”, the interests of justice require it.In Ruttle Plant Hire Ltd v Secretary of State Environment Food & Rural Affairs[2009] EWCA Civ 97, Jacob LJ said that the statutory rate of interest is not a relevant factor in the exercise of the court’s discretion under section 5. That, he said, was limited to the conduct of the supplier and the interests of justice.

87.
When construing this Act it seems to me that there are several factors that should be borne in mind:

(1)
Interest rates can vary significantly: I do not suppose that any member of Parliament would have foreseen in 1998 that a decade later the bank base rate would have fallen almost to zero.

(2)
The Act does not automatically substitute the statutory rate for any lower rate of interest for late payment provided in the contract: it does so only if the contractual rate does not afford a "substantial remedy".

(3)
The statutory rate could be described as penal in that, when it was set, it produced a rate of interest that was more than double the base rate.

(4)
Historically, in commercial cases the courts have awarded interest on awards of damages at rates of between 1% and 3% over base, more commonly the former rather than the latter where there is no specific evidence as to the cost to the claimant in question of borrowing money. I accept, of course, that there is a difference in principle between awarding interest on a sum that was disputed, usually both as to liability and as to amount, and awarding interest on a debt in respect of which there might often be no room for reasonable dispute. Nevertheless, I regard it as legitimate to take note of what the courts have traditionally regarded as the fair remedy for being kept out of one's money.

88.
Bearing these considerations in mind, I consider that it was not the intention of Parliament to treat a contractual rate of interest for late payment as not meeting the "substantial remedy" test simply because it is materially lower than the statutory rate. Putting it crudely, it seems to me that the imposition of the statutory rate is the penalty that a contracting party pays for failing to provide in its contracts a fair remedy for late payment to suppliers (Eady J referred to counsel's description of it as "punitive" in Banham Marshalls v Lincolnshire CC [2007] EWHC 402).

89.
Turning to the statutory criteria in section 9(3), my views are as follows:

(1)
As to the benefits of commercial certainty, these would seem to favour supporting the contractually agreed rate in every case. However, that cannot have been Parliament's intention. I interpret this criterion to mean that where the rate is not obviously unreasonable and appears to have been the product of genuine consensual agreement, it should not be set aside lightly.

(2)
So far as the relative strength of the bargaining positions of the parties, I would have thought that there was not much to choose between Yuanda and Gear. If anything, it may be that as time went on Yuanda's bargaining position would have improved since it would become increasingly difficult for Gear to find another curtain walling trade contractor within the required time frame.

(3)
I deal below with the question of whether the term was imposed by one party to the detriment of the other (whether by the use of standard terms or otherwise).

(4)
This is not a case where Yuanda received an inducement to agree to the term.

90.
In the light of these criteria, it is of interest that the rate provided in the standard printed form of JCT Trade Contract was 5% over base, which might suggest that this was thought by those responsible for

drafting the contract to be a fair rate of interest for late payment in the context of the construction industry. Given this, when taken together with the other considerations that I have already mentioned, I can see no reason why 5% over base should not be regarded as a substantial remedy within the meaning of the Act, even though it is 3% less than the statutory rate.

91.
It may even be that a case could be made for saying that 3-4% would provide a substantial remedy for late payment, particularly if the rate had been specifically discussed and agreed between the parties (I have already noted that in this project one trade contractor negotiated a rate of 2% over base). Be that as it may, that is not something that I have to decide since I am concerned only with Yuanda's rate, which was much lower - at 0.5% over base. As I have already indicated, that rate of interest was not the subject of any discussion during the pre-contract negotiations. What appears to have happened in this case was that the rate was effectively imposed on Yuanda, although it had the opportunity to protest about it had it noticed the provision and wished to do so. To this extent, therefore, the third criterion is marginally in favour of Yuanda.

92.
Taking into account all the factors that I have mentioned, it is clear to me that 0.5% over base rate as a rate of interest for late payment cannot be regarded as a substantial remedy within the meaning of the Act in the absence of special circumstances relating to the parties and the making of the contract. There are no such circumstances here. I must now consider whether there is any reason why it would be fair or reasonable to allow Gear to rely on it to oust the statutory rate. I can see none: I do not think that it would be either fair or reasonable to allow Gear to take advantage of the fact that during the pre-contract negotiations Yuanda failed to spot the amendment in the rate of interest in clause 4.11.2.

93.
A separate aspect that arises in relation to clause 4.11.2 is whether in any particular circumstances the interest rate, or the period for which it should run, should be remitted in whole or in part. I can deal with this quite shortly. It seems to me that the question of remission cannot arise until there is actually a qualifying debt which has remained unpaid. Until this has happened and the circumstances are known, I cannot see how the court can be in a position to decide what the interests of justice may require having regard to the conduct of the supplier. I cannot see how this can be an exercise which can be done prospectively. Section 5 of the Act was considered by Eady J in Banham Marshalls v Lincolnshire CC [2007] EWHC 402.

94.
Accordingly, on this issue my conclusion is that clause 4.11.2 is void insofar as it provides a contractual rate of interest of 0.5%, with the result that the statutory rate is to be substituted for it. In deciding this I am not intending to impose any fetter on any adjudicator or arbitrator who may hereafter have to determine whether or not in the case of any particular unpaid qualifying debt there should be some remission of either the statutory rate or the period under section 5 of the Act. In my judgment, those questions can be decided only when they arise in relation to a particular debt and when all the relevant circumstances are known.

95.
Before parting with this section of the judgment, I would like to mention the fact that I derived assistance from two interesting articles about the Act. First, John Barber’s article “Late Payment of Commercial Debts (Interest) Act 1998 – No Laughing Matter” (2007) 23 Const L J 331 and, second,

HH Judge Anthony Thornton QC's paper "Compound Interest and Financing Claims: the Sempra Metals Revolution" (2008) published by SCL, to which I was referred by Yuanda.

Conclusions

96.
For the reasons that I have given, Yuanda is entitled to declarations to the effect that:

(1) Clause 9A conflicts with section 108 of HGCRA and must be replaced by the provisions of Part I of the Scheme; and

(2) The rate of interest of 0.5% provided for by clause 4.11.2 is not a substantial remedy within the meaning of the Late Payment of Commercial Debts (Interest) Act 1998 and must be replaced by the statutory rate of 8% over base rate.

97.
For the reasons that I have also given, Gear is, in principle, entitled to a declaration that section 3 of UCTA is not applicable.

98.
To the extent that it remains relevant, I consider that the first part of clause 9A is not void for uncertainty or inoperable.

99.
I will hear the parties on the precise form of the relief and on all questions of costs.