Is Adjudication Appropriate for Resolving a Dilapidation Dispute?

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Abstract:

Purpose – This paper investigates the provisions within the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") and/or the supplementary provisions to establish if a statutory right exists for a party to adopt adjudication as an alternative dispute resolution methodology to resolve a dilapidations dispute and thus avoid costly litigation.

Design/Methodology/Approach – An extensive literature review and analysis of the relevant legal cases, statutory legislation and limited literature on the dilapidations and adjudication was undertaken to obtain all relevant information to investigate the question this paper raises.

Findings – This paper contributes to the extant law by demonstrating that repairing, maintaining, painting, etc. obligations within the lease are a "construction operation" under section 105 of the HGCRA and a lease is an agreement for "construction operations" under sections 104 (1) and (5). Thus, creating a construction contract, although primarily not a construction contract. Accordingly, it is therefore open to a party to commence adjudication as an alternative dispute resolution methodology to resolve a dilapidations dispute.

Originality/Value – The question this paper raises is unique in that it is has not previously been tested within the Courts. There is limited literature on the question and no explicit authority that prohibits the use of adjudication for dilapidations disputes. Therefore, the paper introduces both an interesting and very important legal argument that advances and contributes to the extant law by demonstrating that adjudication is applicable to dilapidations disputes.

Keywords: Adjudication, Agreement, Civil Law, Civil Procedure Rules, Construction, Contract, Dilapidations, Dispute, Litigation, Operations, Resolution, Statutory Legislation.

1.0 Introduction

The paper discusses the current dilapidation procedures and the difficulties that arise where a breach of repairing obligations is alleged against a tenants' obligations arising from a lease. In the absence of an agreed resolution procedure, the jurisdiction for resolving dilapidation dispute falls within the Civil Procedure Rules ("CPR") [1]. It is widely accepted that litigation is both extremely costly and time consuming on an overburdened and underfunded judiciary. Accordingly, Alternative Dispute Resolution ("ADR") such as arbitration, adjudication, expert determination, mediation et al, have evolved to lighten the judiciaries workload. Parties in all types of disputes are now encouraged by the judiciary to consider ADR, and the benefits of ADR with litigation being seen as an absolute last resort. Indeed the Pre-action protocol ("PAP") before commencing litigation [2] and the RICS [3] suggest ADR should be adopted with litigation as a last resort.

ADR has a wide range of dispute resolution methodologies to suit different situations, one such area is Adjudication. The Housing Grants Construction and Regeneration Act 1996 ("HGCRA") [4] legislation provides a statutory right to resolve commercial 'construction operation' disputes through adjudication. However, in a 2022 dilapidations dispute, a tenant referred a dilapidations dispute to Adjudication, as an alternative to litigation. The landlords immediately challenged jurisdiction and the Adjudicator ruled that the HGCRA was not appropriate for a dilapidations dispute. This paper seeks to investigate if adjudicators decision is correct or if in the alternative adjudication is an appropriate alternative to litigation to enable a speedier and decisive conclusion to the dilapidation dispute. The question raised within this paper has never been tested before the Courts and raises noval points on law and possibly 'New Law.' It is not until disputes come before the Courts for a legal determination, that questions such as '*Is Adjudication Appropriate for Resolving a Dilapidation Dispute?'* are fully debated and will contribute to the advancement of the law and knowledge surrounding. This paper seeks to set out the debate to resolve the question and/or encourage further debate.

2.0 Dilapidations

The paper approaches the issue by exploring the historic remedy to dilapidations disputes to establish whether adjudication can as a statutory right (absent of any written dispute

resolution procedure within the lease) be adopted by either party to resolve the dilapidations dispute.

Dilapidation is the term used to describe the condition of, or process of a property falling into decay or being in disrepair, where there is a breach of the repairing obligations during or at the end of the lease [3]. The lease is the agreement between the landlord and tenant that sets out the party's obligations including a course of action to force the tenant to undertake construction operations such as repairs, maintenance and redecoration or to financially reimburse the landlord for the disrepair. These are referred to the tenants' repairing obligations.

In Gladstone [5] Diplock, J. held that an agreement in writing (not a standard form of lease) between the Plaintiff and the Defendant for a farm and land for a term of 18 months for the letting thereof for a tenancy was enforceable. Whilst a lease is for a definite and limited duration, and there must always be a reversionary interest expectant upon its determination relating to a freehold estate or part thereof [6], a lease will typically include tenants' obligations to maintains and repair external or internal or indeed both elements of the demised premises. The meaning of repair and disrepair was addressed in Proudfoot [7] that the tenant's obligation is to put and keep the premises in such repair as having regard to the age, character, and locality of the property, that would make it reasonably fit for the occupation of another tenant of the class who would be likely to take it.

A lease is therefore similar to any other legal contract [5] and/or agreement and the remedies available for resolving a dispute will depend upon the specific wording within the lease. Notwithstanding, there remains certain statutory provisions that protect a tenant from a landlord's unreasonable claim where the disrepair requires a minor remedy that would cost a sum of money that is out of all proportion to the physical deterioration/damage and/or reduction in value to the landlord's property.

However, to protect the tenant from an unscrupulous landlord (in a lease agreement or any other such agreement) statutory legislations have evolved. The Leasehold Property Repairs Act 1938 [8] entitles a landlord to reasonable damages for a tenant's breach of a covenant to keep or put in repair albeit, subject to the limiting provisions within s.18(1) [9]. A landlord is not entitled to obtain a gratuitous 'windfall' or indeed payment in lieu of any damages

that is in excess of the true loss [10]. This is founded upon the common law principle that no loss equals no claim. In dilapidations a valid defence to limit the tenant's exposure to costs arises under s.18(1). The Court would look at the actual difference in value between its condition in disrepair and in good repair to establish a cap on the landlords claim.

Accordingly, section 18(1) works on the basis, that where there is a reduction 'diminution' in value of the landlord's property value then the opportunity to claim damages is greatly affected by the section 18(1) cap. The cap limits the amount claimable to the diminution in the reversionary interest. For example, if a property is valued at £100,000 in a state of disrepair and £110,000 in good but the substantial with repair costs of £30,000 to achieve the good repair standard, the maximum the landlord could recover from the tenant under the s.18(1) cap is £10,000. The landlord would have to fund the additional £20,000 from their own finances.

In addition to the actual cost of repairs (subject to 18(1)) a landlord can also recover loss of rent, service charge etc. for the period-of-time from the expiry of the lease until the landlord is able to complete repairs. The landlord cannot unreasonably delay initiating repairs in an attempt to claim an ongoing loss of rent. If the tenant can show that the property would not be relet irrespective of its condition (such as during a recession), then section 18(1) can also provide a cap on the loss of rent claim.

3.0 The Housing Grants, Construction and Regeneration 1996

Sir Michael Latham was jointly commissioned by the Government and the construction industry to review the processes adopted in "The Procurement and the Contractual Arrangements within the UK Construction Industry" [11]. The Latham report "Constructing the Team" was published in 1994 and addressed broad issues, specifically the adversarial attitudes that dominated the UK construction industry whilst drawing similarities with the experiences of the United States and their remedies to resolve construction conflict.

The construction industry, because of its complex procurement process is a notoriously litigious environment. Even small construction contracts will involve numerous contracts between clients, designers, engineers, surveyors, contractors, sub-contractors, and suppliers

etc. It is therefore not unsurprising that Sir Michael has within chapter 9.2 considered the dispute resolution process available pre his 1994 report. Therein, Sir Michael recognises that litigation is both time consuming and expensive and introduces ADR as an alternative to litigation. Sir Michael helpfully discusses some of the ADR methodologies that are available and notably, adjudication is the first methodology that Sir Michael recommends as an appropriate alternative to litigation.

The Latham report at paragraphs 26.1 – 26.5 and in chapter 9, recommends that adjudication should be included within all standard forms of construction contracts except where comparable arrangements already exist. Sir Michael reinforces his findings within chapter 9.4 *that such a system must become the key to settling disputes in the construction industry*. There can be no doubt that the outcome of the Latham report, whilst investigating the litigious construction environment identified a process whereby an agreement for the resolution of construction operations disputes can be adopted to avoid litigation. Otherwise, the parties will find themselves in a dispute about how the dispute should be resolved, which is plainly counter intuitive to the intention of a dispute resolution procedure.

Only two years later, the HGCRA received Royal Assent introducing adjudication as a statutory right within agreements for construction operations. Was that coincidental or a clear recognition by Parliament of the contribution/recommendation made within the Latham Report that adjudication brings to the family of ADR methodologies?

The HGCRA is constructed in very broad terms, specifically referring to 'any agreement' to cover a broad area of property related matters, without limiting its application to any specific contractual format. Importantly, incorporating the parameters within sections 104 – 107, that must be satisfied to ensure adjudication can be adopted, to reach a non-binding agreement (unless agreed otherwise) being defined within sections 108 – 117.

Section 104 of the HGCRA defines the meaning of a 'construction contract' as an 'agreement' with a person for the carrying out of 'construction operations.' Construction operations are clearly defined within section 105(1)(a) very broadly as: - *'construction, alteration, repair, maintenance, extension, cleaning demolition or dismantling of buildings, or structures forming that part of the land (whether permanent or not).'* Sub-sections (a) – (f) provide a broad narrative that encompasses many construction operations. For example,

S.105 (1)(f), includes painting or decorating the internal or external surfaces of any building or structure, and is very broad in its context of what is intended to be captured within the meaning of "construction operations". Thus avoiding disputes on what type of work triggers adjudication. Section 105 provides "where an agreement relates to construction operations **and other matters**. This reference to 'other matters' is extremely important.

Section 107 states that adjudication is only applicable to agreements in writing includes adjudication, with the process set out within sections 108 – 113. Specifically, section 108 provides a party with the right to refer a dispute arising under the contract to adjudication **at any time** and the procedure to ensure compliance with the section 108(1) and it defines the meaning of a dispute, unambiguously as *'any difference'.*

No Written Agreement to Adjudicate

Importantly, where the lease is silent on the dispute resolution procedure, this paper asks if the right to adjudicate can be adopted under section 108(5). If the contract documents do not expressly comply with the requirements of subsections (1) - (4) the supplementary provisions of *'The Scheme for Construction Contracts will apply.'* Therefore, the HGCRA creates a platform for resolving a broad area of disputes 'any matter or any difference' even if there is no expressed agreement in writing to adjudicate, subject to satisfying the overriding principles that the dispute relates to "construction operations".

Accordingly, compliance with the HGCRA does not require "the right to adjudicate" to be an explicit term written into any agreement and therefore introduces the supplementary provisions (sections 114 – 117) to allow a party to rely upon the scheme to begin adjudication. Section 115 sets out the party's rights absent of any written agreement to adjudicate. Thus, a party is entitled to commence the adjudication scheme procedures subject to satisfying the criteria set out in section 104. They must be able to demonstrate that there is a 'construction contract' under sub-paragraphs 104 (a) – (c). Furthermore, the dispute must relate to a 'construction operations' defined within section 105 (a) – (f). Importantly, under section 106 the provisions of the HGCRA do not apply to disputes of a nature relevant to a residential property owner/occupier. The dispute must be in relation to an "agreement" relating to a commercial property or relationship between the parties, which a property lease satisfies.

However, section 106 does not preclude per se, works to a residential property, where a commercial landlord is engaging in construction operations with a contractor for example, to supply and fit a new boiler in a residential house. This is a commercial contract and therefore falls within the HGCRA, and thus section 107 is not as restrictive as it first appears.

The Rt Hon Lord Justice Coulson [12] notably, starts his book with reference to the Latham Report and its contribution to adjudication and ADR generally. As Coulson observes, "the importance of section 105 has diminished over the years, as the standard forms of building contract now incorporate their own forms of adjudication, thus, if a residential occupier signs a contract that incorporates adjudication (for instance, one of the JCT standard forms), then he/she is *prima facie* agreeing to adjudication in the event of a dispute, irrespective of whether a party is a residential occupier within the meaning of the Act" [12].

At para 4.04, Coulson [12] states that an obvious issue arising out of the inter-relationship between any written contract and the provisions of the scheme is the extent to which the latter overrode the former. If, for example, the contract contained some of the payment provisions required by section 109 – 111 of the Act, but omitted others, would the scheme apply in full, regardless of the expressed terms of the contract, or does the scheme apply only to filling the gaps within the contract itself.

This question was raised in the C&B case [13] where the dispute related to clause 30 of the Joint Contracts Tribunal ("JCT") standard form of building contract with contractors' design requiring the parties to elect between two alternative methods for interim payments or otherwise to be made. At first instance, the Court held that the whole of clause 30, and not just the provisions as to how and when the interim payments were to be made fell away and were replaced wholesale by the supplementary provisions within the scheme for construction contracts. This decision was appealed, Sir Murray Stewart-Smith on hearing the appeal was content to assume, without deciding, that the earlier decision had been right or wrong on the point, that ultimately where the extent of the contract did not contain the relevant provisions, it did not fundamentally change the outcome of the dispute. A payment (whatever and however was due) was required. The decision in C&B assists with

understanding the broader application of within the payments section 109 and/or the scheme for construction contracts.

4.0 Dilapidation Dispute Resolution

There is a pre-action protocol 'PAP' prepared by the Property Litigation Association ("PLA") [14] that is specifically aimed at the resolution of dilapidations claims for commercial properties within England and Wales. This applies to claims against a tenant for an alleged breach of an obligation to carry out 'construction operations' of repair, redecoration and maintenance etc, allegedly arising at the end of the lease. The PLA has produced a PAP and also suggests that the RICS guidance [3] should be adopted. The RICS guidance recognises the important role that the PAP contributes to the dispute resolution process and furthermore, recommends ADR as an alternative to litigation, and interestingly neither the PLA or RICS specify which form of ADR is applicable, leaving the options open to the disputing parties.

There is one significant similarity between the PLA, RICS and HGCRA which is that none of the authorities specify which form of ADR is appropriate. An assumption that can be drawn from this is that they are all considered to be an acceptable alternative to litigation. Furthermore, the PAP does not provide a definition of what falls within repair, reinstatement and/or redecoration. Sections 3 & 4 of the PAP simply establishes a framework that the landlord shall adopt when presenting a dilapidations claim to a tenant, within a prescribed format and within a specific timeframe for a valid service of claim.

Section 5 of the PAP sets out the framework that shall be adopted by the tenant when responding to a claim. In respect of the resolution, the PAP objectives (section 2.1.2) enable the parties to **avoid** litigation before proceedings are commenced. More importantly, section 8.1 of the protocol suggests that *"the parties should consider whether* ***some form of alternative dispute resolution procedure*** *would be more suitable than litigation"* [15] (emphasis added) and therefore does not expressly prohibit the use of Adjudication. One consistent theme identified throughout the research is that all the authorities direct parties to ADR and then apparently to leave it open to the parties to agree which form of ADR is adopted.

4.1 Jurisdiction Challenge

The question posed by this paper follows from a recent dilapidations dispute where adjudication was adopted by the tenant, and a jurisdictional challenge was raised by the landlord. There is no doubt that an adjudicator can, and indeed should, investigate any partial or full challenge to his jurisdiction [12]. If, following such an investigation, an adjudicator considers that the challenge was well-founded, he/she must then decline to adjudicate on the dispute [12]. The following narrative sets out the challenge to adjudication.

Grounds for lack of jurisdiction

The respondents (landlord) raised the following grounds in sub paragraphs 1 – 7 (emphasis added) when challenging the adjudicators jurisdiction: -

1) The Referring Party is not correct to rely upon s108 of the HGCRA in support of their contention that these terminal dilapidations claim can be adjudicated.

2) The tenant's obligations in the lease in relation to dilapidations are as follows taken from clause 3(3): -

    a. To repair and keep the property in good and substantial **repair** and condition;
    b. To keep the property in a **clean and tidy** condition and properly cleansed;
    c. To **redecorate** the interior in specified years and in the last 3 months of the term;
    d. To repair cleanse and **maintain** gutters drains water and waste pipes;
    e. To **repair** and **replace** forthwith any fixtures fittings plant or equipment in need of **repair** or **replacement**; and
    f. To yield up the property.

3) These lease obligations are not **"construction operations"** between landlord and tenant.

4) Insofar as the tenant undertakes any works and instructs a contractor to undertake such works that may be a construction operation, but that is not relevant to the landlord's claim against the tenant for failure to comply with its lease obligations.

5) The lease only expired 17 days ago, and the tenant has made no effort to enter into pre-action discussions to settle the claim.

6) "Dowding & Reynold - Dilapidations the Modern Law and Practice" written by KCs at Falcon Chambers (the main textbook on this area of law) does not even mention the suggestion of adjudication pursuant to the HGCRA as a matter for alternative dispute resolution. [16]

7) I attach an interesting article written by Mr Rowlin of Malcom Hollis LLP [15] for the Property Litigation Association in 2009 about potential reforms to the law relating to terminal dilapidations. I have highlighted sections within the article where adjudication is considered possible if adapted to suit how such claims need to be resolved. Those proposals have not been taken forward and it is standard for parties to follow the CPR pre-action protocol. The Referring Party has not taken the steps required under that Protocol following service of the Schedule.

Grounds for establishing jurisdiction

In response to the respondents' grounds (1 – 7) above the tenant submitted (emphasis added) the following arguments (i) – (vi): -

i) Under section 108 (1) of the HGCRA the only qualifying criteria that must be demonstrated is that the (1) the dispute is related to a construction contract and (2) a dispute includes any difference. The landlord claimed disrepair, the tenant rejected that and thus a dispute arose. A lease is an 'agreement' as defined under section 104 and the schedule of dilapidations is an instruction/demand referring to contractual obligations that explicitly requires the tenant to undertake 'construction operations.' In this dispute there was an obligation to undertake 'construction operations' as defined under section 105(1)(a) – (f).

ii) Further, in response to ground 2, the to the various works fall within the definition of 'construction operations' as set out under section 105(1)(a) – (f). There is not just one similarity, but numerous similarities that indicate a lease is an agreement to the pleaded grounds under paragraph 2 above and the lease and section 105 of construction obligations.

iii) The reference to clause 3(3) satisfies section 105 of the HGCRA.

iv) The obligations set out within the written agreement (lease) and the schedule of dilapidations are instructions/obligations in clear terms for the tenant to undertake those construction operations which satisfy section 105. As accepted under clause 3(3) of the tenancy referred to within the respondent's response at ground 2 above. For the purposes of assessing whether the HGCRA applies, it is the landlords claim that the tenant must undertake construction operations. Which if are not completed subject to their validity being established, the landlord is entitled to a financial payment to compensate him for paying another contractor/operative to undertake those construction operations. The fact that it is being done in compliance with a lease is irrelevant because a lease is a written agreement defined under section 104. Therefore, the HGCRA would apply.

v) The landlord's argument that the lease had only expired 17 days prior to the application for adjudication was irrelevant. Notwithstanding, the landlords had started the dilapidations process some 3 months prior to the termination of the lease when they served a terminal schedule of dilapidations. Under the HGCRA, there are supplementary provisions and providing notice is given prior to the request for the appointment of an Adjudicator that is the only notice that is required to trigger the process.

vi) The absence of any reference to adjudication in the Dowding & Reynold [4] is irrelevant because section 104 under the statutory provisions state "any written agreement" which of course a lease satisfies [8]. The article provided by Rowlin [15] raises the issue of the appropriateness for the use of adjudication in dilapidations therefore does not help the respondents argument that there is no right to adjudicate, it

simply raises the question which this paper has sought to take to a full debate/conclusion is that it can subject to complying with the various provisions.

The Adjudicator set out his decision based on the following (emphasis added) : -

a) I **do not accept** that a lease is **an agreement** for the carrying out of **construction operations**, rather, it is an agreement for one party to convey a property to another person for a specified period of time;

b) Section 104 is consistent with the fact that the nature of the repairing obligation under clause 3.3 of the clause is such that a need to undertake repair works will only arise to the extent that the property is not in good and substantial repair. I acknowledge redecorating requirements of clause 3.4, but these impose obligations on the referring party and are not in the nature of an agreement to undertake construction operations;

c) Sections 109 onwards of the HGCRA set out the payment provisions for construction contracts which would suggest that a tenant is entitled to charge the landlord for the repairs that they are obliged to undertake

d) The issue of a schedule of dilapidations is of no assistance to the referring party because that clearly does not constitute an agreement for the carrying out of construction operations, rather it is a schedule identifying alleged breaches of the lease;

e) The pre-action protocol for construction and engineering disputes expressly states that it does not apply to proceedings for the enforcement of Adjudicators decisions under the HGCRA or to proceedings that relate to matters that are the same as had been decided in adjudication;

f) I acknowledge that the interpretation of the lease does not turn on the question of whether experts in the field have previously contemplated that statutory adjudication would apply to dilapidations disputes. However, it is certainly relevant that: -

    a. The possibility of dilapidations disputes being resolved by statutory adjudication is not mentioned in Dowding and Reynolds;

b. The PLA article to which I have been referred mentions a possibility of adjudication being adopted pursuant to the dilapidations protocol but such proposals have never been adopted and even if they had been it would not necessarily result in the application of statutory adjudication under the HGCRA.

Analysis

Of considerable importance to the question this paper seeks to clarify, is that nowhere within the extant literature or statutes is there any expressed objection/rejection to the use of adjudication as an appropriate ADR to resolve a dilapidation dispute.

The tenants' submissions on jurisdiction not unsurprisingly referred to the HGCRA submitting that the lease was a written agreement and satisfied section 104, the works required by the landlord in the schedule of dilapidations satisfied the meaning of construction operations under section 105. The works related to a commercial premises and therefore section 106 restrictions fell away and that section 107 was also satisfied by the lease, because the agreement (lease) stated within various covenants that the tenants were required to for example, redecorate, repair, replace, alter etc. on the expiry of the lease.

S.104(1) HGCRA provides: "*104 Construction contracts.*

(1) In this Part a "construction contract" means an agreement with a person for any of the following—
(a) the carrying out of construction operations;
(b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
(c) providing his own labour, or the labour of others, for the carrying out of construction operations."

Whilst s.105 goes on to provide the definition of "construction operations" for the purposes of s.104(1) HGCRA:

105 Meaning of "construction operations".

(1) In this Part "construction operations" means, subject as follows, operations of any of the following descriptions—

*(a) construction, **alteration, repair, maintenance**, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);*

*(b) construction, **alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls**, roadworks, power-lines, electronic communications apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;*

(c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting ,air- conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;

Has the Adjudicator misunderstood the broad scope of construction contracts for the purposes of s.104(1) and crucially failed to take into account the provisions of s.104(5) which provides:

> *"(5) Where an agreement relates to construction operations **and other matters**, this Part applies to it only so far as it relates to construction operations."* [emphasis in bold added]

That sub-section unarguably anticipates and contradicts the Adjudicator's view. The fact that a contract deals with both construction operations and "other matters" is no bar to the part dealing with construction operations being a "construction contract" for the purposes of s.104(1).

Moreover, the Adjudicator's conclusion as to the scope of "construction contracts" under s.104(1) HGCRA is fundamentally at odds with the view expressed by Coulson LJ in Abbey Healthcare (Mill Hill) [16] where the judge came to the clear view that the scope of what

constituted a construction contract was a broad one: -

> *"... I consider that support for the broader construction of s.104(1) can be derived from two other sources. First, the provision of s.104(5), which is concerned with hybrid contracts (namely, contracts for the carrying out of construction operations and for the carrying out of other operations too), refers to an agreement "related to" construction operations. That is very wide. It does not, as it could have done, repeat the formulation "an agreement for the carrying out of construction operations". That demonstrates that s.104 was intended to cast the net of the 1996 Act as widely as possible, even where there were hybrid contracts…".*

The correct view of secton104(1) is that whilst a construction contract must include provisions "for" the carrying out of construction operations, as defined by section 105 HGCRA, those construction operations need not be the sole purpose (or possibly even the primary purpose) of the contract in question to fall within section 104(1). Whilst there is no direct authority on the question of whether a lease (or certain clauses contained in a lease) can amount to a construction contract, the Courts have been prepared to accept that collateral warranties in respect of construction works (to be carried out by third-parties) can amount to a s.104(1) construction contract. This was one of the key issues considered by the Court [16] where the majority of the Court concluded that a collateral warranty could be a construction contract. Coulson LJ, giving the majority judgment considered there were two routes to that conclusion. The first simply depended upon the wording of the collateral warranty – that was the short answer. The second involved a more considered approach and required the court to determine what the word "for" means in s.104(1). In the context of this paper the secondary problem falls away – as the Lease clearly imposes an unambiguous obligation on the Lessee (tenant) to undertake construction operations within clause 4 of the Lease. The collateral warranty in Abbey Healthcare simply allowed the beneficiary of the warranty to enforce the standards of workmanship in work (previously) carried out to the property. Considering this point in relation to the Adjudicators position, the judgment of Coulson LJ would seem to preclude any further semantic disputes, with the learned Lord Justice stating:

> "*Much may turn on the meaning of the word **"for"** in s.104(1). Dictionary definitions refer to it as a function work to indicate purpose, or to indicate the object of an activity. That purpose of object of the agreement is the carrying out of construction operations, as defined in s.105. In my view there is no room for any further gloss*." (Emphasis added).

Turning to the terms of the terminal repairing obligations under the Lease set out at Clause 4:

> "*4(i) In the years 2014, 2017, 2020 and during the last three months of the Term whether determined by effluxion of time or otherwise to **redecorate the interior** of the Demised Premises **in good and workmanlike manner** and with **appropriate materials of good quality** such redecoration to be executed in such colours and patterns and materials as the Lessor may reasonably require*." [emphasis in bold added]

The approach under section 104(1) is that whilst a construction contract must include provisions "for" the carrying out of construction operations, as defined by s.105, those construction operations need not be the sole purpose (or possibly even the primary purpose) of the contract in question to fall within section 104(1). Hence, opening the door of opportunity to dilapidations disputes.

It was submitted by the tenants surveyor that adopting section 108 and having satisfied the provisions under sections 104 - 107 (see Table 1) there was a right to refer the matter to adjudication because the agreement (lease) did not either expressly record any other dispute resolution procedure as being agreed and more importantly did not expressly prohibit adjudication. It was submitted that irrespective of whether a leading textbook on dilapidation law did or did not refer to adjudication was irrelevant, that is simply a personal opinion of those authors [17] is unsupportive of a conclusion that adjudication cannot be applied. All that is required to achieve/demonstrate compliance is that notice must be served by one party to another under section 108(2)(a) of their intention to refer the dispute to adjudication and to provide a timetable with the object of securing the appointment of the Adjudicator and referral of the dispute to him within 7 days of such notice.

The tenants satisfied all of these elements/requirements of the HGCRA. Notwithstanding, in the alternative the tenants were entitled to rely upon supplementary provisions under section 114 'the scheme for construction contracts' and section 115 service of notices etc. apply where there is not an expressed written agreement to adjudicate.

Payment, s.109 HGCRA and the Scheme

The Adjudicator raised the question of payment obligations in his decision but his focus was on the question of the imposition of the Scheme into the contract (Lease) and that "*…the referring party could arguably be entitled to payment for undertaking repairs arising from its breach of its repairing and redecorating obligations under the lease, which cannot be correct*."

The answer to those concerns can be addressed in part by reference (again) to Abbey Healthcare at paragraphs [52] – [55] of the judgment. The clear reasoning of the Court of Appeal 'CA' was that the minimal one-off payment provision found in the collateral warranty in question was sufficient to bring it within the terms of s.109(2) HGCRA. The CA did not though go onto consider whether the Scheme would then apply, presumably having been satisfied that this was not relevant to the question of whether there was a construction contract. The Court also seems to turn a blind eye to the fact that s.109 HGCRA is really only directed at the entitlement to staged payments.

If one takes Abbey Healthcare at face value, it is possible that the obligations on the Lessee to pay for the terminal dilapidations (subject to s.18(1) cap might mean the question of whether the Scheme applies to the Lease requires no further consideration, as that obligation would be sufficient to satisfy the requirements of s.109(2) HGCRA, which provides: -

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

However, the difficulty with the adjudicators line of argument is that the sum due under the

collateral warranty in Abbey Healthcare was pre-determined. Whereas the value of a terminal dilapidation claim under a Lease will vary with the extent to which the tenant is found to be in breach of its clause 4 obligations and the extent to which s.18(1) will diminish that sum. There is also no fixed date for the payment of that sum (although that difficulty may be addressed by the demand made in the Schedule). As such, the very limited payment obligation in the Abbey Healthcare cannot provide a definitive guide to whether or not the Lease in question would meet the requirements of s.109 HGCRA and then whether the Scheme will be imposed to provide a payment regime that complies with ss.110 / 110A HGCRA (the point seemingly side-stepped by the CA in *Abbey Healthcare*).

If there is nothing within the Lease that would meet the requirements of sections 110 and 110A of the HGCRA for determining the process of billing and payment of the sums claimed or any dispute as to those sums, consequently, the scheme would usually be imposed by default to rectify those deficiencies.

This point was considered by the Court in *Hirst [18] at paragraphs* 113 and 114, albeit in different circumstances, where the judge drew a distinction between the substantive rights to be paid for construction works at the end of the contract and the section110 and section 110A requirements, as reflected in the Scheme, which are imposed "…. *to ensure that there are terms addressing the process of billing and payment so that there are mechanisms for determining the dates for payment; for identifying the parties' positions as to the sums due; and for resolving disputes as to those matters*." As such, it seems that simply meeting the requirements of s.109 cannot be determinative of whether the Scheme will apply or will not apply.

4.2 Resolving the dilapidation dispute

The starting point for resolving any dilapidations claims begins with the consideration of the lease. The lease is an agreement in writing between the parties and reached prior to the commencement of the tenancy. The lease is generally negotiated and prepared on behalf of the parties by their legal representatives/surveyor's input (schedules of condition) etc. If the lease includes an agreed dispute resolution procedure, such as arbitration, then it must be accepted that the parties are clearly bound by that agreement and cannot unilaterally adopt adjudication. Conversely, if the agreement is silent on the dispute procedure, the question

that the parties are entitled to ask, is what options are available to resolve the dispute without the need to result to costly litigation?

If there is no prescribed format and/or indeed no expressed rejection of a particular form of ADR, then it would reasonably follow that it is open to the individual(s) to decide which approach they choose to adopt subject to demonstrating compliance with the requirements and procedures within that ADR or statutory provisions. The HGCRA provides for such circumstances, explicitly including the supplementary provisions under the scheme for construction contracts.

In the case that triggered this paper, the landlord prepared a dilapidations schedule alleging breach of the lease obligations as required by the pre-protocol. Advice was given to the tenant and a response sent to the landlord's surveyor. As a starting point, it was submitted that there was no diminution in the reversionary interest because the tenant had in fact spent £148,000 on improvements to what was originally dilapidated office leaving it in a condition commensurate with a modern air-conditioned office ready for immediate occupation, therefore the section 18(1) cap [9] applied. Predicably, the tenant was somewhat miffed when they received a dilapidations claim for £214,410 inc. VAT.

The landlord's schedule included demands that the air conditioning and the kitchen, (fully fitted with all modern appliances) the suspended ceiling, carpets, including lighting power circuits, computer infrastructure cabling, switches, sockets etc., redecoration works, removal of partitions, reconfiguration of electrical works shall be removed. They were adopting a scorched earth policy, the consequence of which would reduce the capital value and potential rental income. Why? Because this approach is often adopted to force a cash settlement and to obtain what can only be described as a "windfall payment" in replace of completing the construction operations, which is prohibited under the principles of section 18(1). Challenging the Adjudicators decision can be a costly and time-consuming process because it has to be referred to the Courts. This is counter-intuitive to the objective of adjudication being seen as a swift and economical alternative to litigation.

4.3 The 'Duck Test'

Table no. 1 below is a comparison/analysis of the provisions within the HGCRA and the obligations set out within the agreement (lease). It can be seen from this analysis, that where the lease satisfies the HGCRA provisions, and it would naturally and quite reasonably follow that adjudication can be adopted.

HGCRA Provisions	HGCRA Description	Lease (agreement)	Compliance
s.104	Provisions set out construction contract as an agreement to undertake construction operations.	Lease requires tenant to undertake repairs, redecoration, maintenance, cleaning at termination of lease	Yes
s.105	To repair, redecorate, clean, maintain, demolish, extend, replace etc.	Lease covenants to repair, repaint, redecorate, remove, replace etc.	Yes
s.106	Must be a commercial agreement.	Lease is applied to commercial properties.	Yes
s.107	Must be a construction agreement compliant with s.104 definition.	Lease complies with definition.	Yes
s.108	Party can refer dispute to adjudication where there is "any difference".	Schedule of dilapidations is a claim, rejection is a dispute.	Yes
s.109	Payment, landlord can request payment in lieu of repairs, replacement.	Tenant can pay as an alternative to undertaking repairs.	Yes
s.110	Open to the parties to agree.	Open to the parties to agree	Yes
s.111	Withhold payment.	Tenants can dispute payment liability adopting s.18(1).	Yes
s.112	Suspend performance.	Tenant can suspend performance of obligations, claiming relief under s.18(1).	Yes
s.113	Insolvency etc.	Landlord can terminate lease on insolvency.	Yes
Part 2 Supplementary Provisions			
s.115	Absence of a written agreement an adjudication can be adopted for construction operations.	Lease is an agreement to carry out construction operations.	Yes

Table 1: Comparison of similarities between HGCRA and lease obligations

The ‘duck test’ commonly used as a form of abductive reasoning, which technically it is not, but the approach/intent remains the same, if it looks like, swims and quacks like a duck, then it probably is a duck. Having applied the ‘duck test’ in the analysis, and demonstrating 100% compliance with the HGCRA provisions, there are unarguable grounds that any independently reasonably minded observer would recognise that adjudication can be adopted to resolve a dilapidations dispute.

6.0 Conclusion

When challenging an adjudicator’s decision on jurisdiction and indeed the grounds upon, which he ruled that the lease did not satisfy the provisions within the HGCRA, a party must be able to demonstrate that the decision was in fact not a sound, rational or a logical decision conversant with the natural rules of justice and the provisions and the intent within the HGCRA.

A literature review began with the HGCRA and section 104 that states that a construction contract means an “agreement” with a person. Plainly, a lease is an agreement, section 104 does not draw a distinction between a contract, or a lease, it refers “any agreement”. The lease contains clauses/covenants that have been negotiated and agreed requiring the carrying out of construction operations. A schedule of dilapidations is a demand (instruction) to undertake construction operations, in accordance with the agreement (lease) and those obligations will generally include works, such as **repair, maintenance, alterations, reinstatement of construction**, redecoration to elements of a building.

The HGCRA provides a broad description under section 105 of what would satisfy construction operations. The definitions provided under 105(1)(a) – (f) are similar to a lease and would (see Table 1) satisfy the lease obligations where there is a repairing obligation, or as an obligation to alter the building, demolition or dismantling of parts of that building, redecoration and/or works that are necessary to ensure that the building complies with any relevant statutory legislation. Site clearance, scaffolding erection, maintenance and dismantling of scaffolding etc. These are obligations that may be found within a standard dilapidations schedule. If they were not, then there would be no obligation upon the tenant to do any such works and therefore the dispute would not arise in the first instance.

Section 107 provides that provisions are only applicable to agreements in writing the lease is an agreement in writing. Therefore, the lease (written agreement) absent of an explicit ADR process being agreed would satisfy sections 104 – 107 of the HGCRA.

The literature also identified various authorities, professional publications and guidance on dilapidations that recommends ADR, whilst not explicitly stating which methodology is appropriate, do not reject adjudication.

The RICS recognise at paragraph 12.2 *"the Court will usually encourage the parties to use ADR with distinct advantages over litigation, such as speed, privacy, informality, and cost"* [3]. The RICS position is also consistent with the general belief that ADR is a preferrable alternative to litigation under the CPR provisions [1] and is supported by section 8 of the pre-action protocol [2]. Rowlin, [15] helpfully refers to the PLA's protocol where it is accepted that the family of ADR procedures are identified within the protocol. Rowlin also suggests four separate approaches to ADR, one being the adoption of adjudication and explicitly refers to the HGCRA procedures. The Latham report recognises the importance of ADR, specifically adjudication and the benefit it brings to the table for early resolutions. In fact, none of the authorities listed within the references indicate either expressly or by implication that the HGCRA cannot apply to dilapidations. Williams [10], Wilkie [19] Hunter [20], Riches [21] and Arden [22] are silent on adjudication, neither rejecting nor accepting its benefits application to dilapidation dispute.

Coulson as the leading authority on adjudication [12] is firmly of the view that adjudication is an extremely effective and cost-efficient method of dispute resolution which has permanently altered the construction law landscape.

In Chapter 6, Coulson [12] refers to the principal of ad-hoc adjudication arising subject to the parties agreeing, which further introduces the principle that the application of the adjudication is not expressly reserved to and/or required to fully comply with the provisions as set out under section 104 – 113 HGCRA by virtue of the broader supplementary provisions of section 114 - 117. Thus, it appears that the adjudication was intended to be wide ranging.

This analysis of the evidence and literature review has identified the leading authorities on landlord and tenant law. There is a noticeable absence of any reference to an implied or an explicit obligation to resolve the dispute other than by litigation. It would therefore reasonably follow that any party in a dilapidations dispute is not prohibited from referring the dispute to adjudication under section 108 or indeed under the supplementary provisions.

7.0 Findings

Indeed, the question that this paper seeks to answer has never been debated in law and therefore raises a unique and important opportunity to contribute to a new area of law. It is accepted within the CPR, PAP and RICS guidance that litigation should be a last resort and recommends ADR. The extant law on dilapidations does not expressly prohibit the adoption of adjudication as an appropriate alternative to litigation.

The publication of the Latham Report clearly had a profound impact upon the construction industry, importantly raising the concerns over the litigious environment that the construction industry generated. In addition to raising the awareness of the problem, the report sought to propose adjudication as an alternative remedy to litigation that should be adopted into a standard construction contract. Whilst this would not necessarily prevent a dispute arising, it does provide the parties with a speedy and economical resolution.

Indeed, speed is one of the most attractive attributes of adjudication with the process being completed within 28 days unless agreed otherwise. In 1996 the HGCRA received Royal Assent was that coincidental or was that as a direct consequence of the Latham Report at the benefits adjudication brings to the table? Adjudication has been heavily promoted as a direct consequence of Latham's work.

What is evident, is that over the past 27 years or so ADR has come to the forefront of dispute resolution procedures. Adjudication sits comfortably within the family of ADR. Notwithstanding, Parliament anticipated situations arising where there is no "written agreement" and therefore, incorporated the 'supplementary provisions' under the scheme for construction contracts, which introduces the ability for a party, to adopt adjudication to resolve a 'any matter' related to construction operations absent of a written agreement.

Given that adjudication has demonstrated very successfully its ability to resolve numerous construction contracts, swiftly and economically is it reasonable to assume that parties engaged in contracts which may not on the face of it be considered a construction contract in the first instance (such as dilapidations) but on closer examination can be demonstrated to comply with the provisions under the HGCRA that they should able to seek this adjudication to provide a speedy and economical resolution to the dispute.

A reasonable conclusion that be drawn from this paper, the literature review and Table 1 is that a tenant would have a right under section 108 to refer the dilapidations dispute to adjudication. Notwithstanding, even if none of the provisions under sections 104 – 107 were satisfied, the parties can still rely upon the supplementary provisions set out under "the scheme for construction contracts" under section 114 – 117 of the HGCRA. Accordingly, this paper finds.

(1) A lease is a written agreement and can be a construction contract for the purposes of section 104(1) of the HGCRA.
(2) The covenants to repair, redecorate, maintain etc. are construction operations under section 105(1) & (2).
(3) The supplementary scheme would apply.
(4) Adjudication can be adopted for dilapidations disputes until an authority (such as the TCC) state otherwise in a judgment.

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