be upon whether the express terms of an agreement are recorded in writing. But that wrangling, which adjudicators are used to resolving, is not that different from an enquiry to determine the terms of an entirely oral contract.

Adjudicators have been robust in their decision making and where common sense dictates, their decisions will be upheld by the court. Resistance to change is inevitable, but scratch beneath the surface and there seems to be a lot of fuss about nothing where this particular change is concerned.

Ed Lewis is a partner and head of construction at Weightmans

How to deal with demands for payment

CASHFLOW

ALEXANDRA WOOD

Suppliers and subcontractors are employing increasingly aggressive strategies to ensure they get paid.

These include the service of "statutory demands" (formal demands for payment) threatening the presentation of a "winding-up petition" (applications to the Court for the winding-up or "liquidation" of a company on the basis of an unpaid debt).

A petition can mean a firm's bank accounts may be frozen and its reputation in the market damaged if it is advertised. It may have little choice other than to pay the sum demanded, even though it disputes it.

An internal procedure should be put in place to reduce the possibility of a creditor serving a petition in respect of a disputed debt. This should ensure that:

- **Any withholding notices** under the Construction Act are served on time.
- **Evidence of defects** (photographs, notes of site visits and meetings, correspondence) is retained.
- **a member of the legal/management team** (and a deputy) is nominated as the person to whom any statutory demands, petitions and correspondence which demands payment or threatens proceedings should be sent immediately
- **Employees are told that** they must immediately forward all demands to the nominated person.

If you receive a statutory demand:

- **Look at it immediately** A petition can be presented 21 days after the statutory demand is served and the period for letters of demand may be much shorter
- **Identify any reasons why the debt demanded should not be paid** (eg withholding notice served or other valid set-off or cross-claim). Pay any part of the debt which you don't dispute
- **If you dispute the debt, write to the creditor explaining why**, stating that the threat of winding-up proceedings is inappropriate and that they would constitute an "abuse of process". Ask the creditor to undertake that a petition will not be presented
- **If the creditor does not give the undertaking** (and the matter cannot be resolved), apply to the court for an order preventing presentation of a petition.

If a petition is served and you dispute the debt claimed in good faith and on substantial grounds:

- **Immediately write to the creditor** explaining why, stating that winding-up proceedings are inappropriate and constitute an abuse of process. Ask the creditor to undertake that the petition will not be advertised and will be withdrawn
- **Again, if you don't receive the undertaking** (and the matter cannot be resolved), apply to the court for an order restraining advertisement of the petition.

Alexandra Wood is a senior associate in Mayer Brown's restructuring, bankruptcy and insolvency group

Imprisionment could become a corporate reality

SAFETY

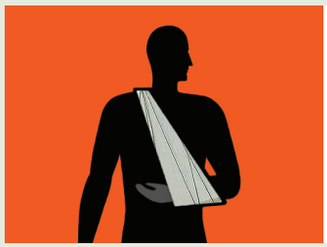
MADELEINE ABAS

Over recent years we have been on a journey towards ensuring everybody in our industry understands the importance of good health and safety. Corporate manslaughter being perhaps the most high profile – causing the boardroom to sit up and take notice.

The Health and Safety (Offences) Act 2008 has now been in force for three months – allowing the courts to send to prison those who fail to take reasonable care to ensure safety in the workplace.

While the impact of this cannot yet be seen, as cases take time to be investigated and put before the courts, for those who need any extra ammunition to encourage their fellow staff or supply chain not to cut corners, this new Act is a useful tool.

It includes those directors and senior managers who consent, connive or through their neglect cause their employer to breach health and safety requirements. Sole traders are also vulnerable.



"The new Act enables magistrates to impose a custodial sentence of up to six months"

MADELEINE ABAS, OSBORN ABAS HUNT

It is not widely understood that other than manslaughter, or for disobeying a prohibition or improvement notices, there were very few circumstances in which someone could previously be sent to prison. Generally the worst the court could do until now was impose a financial penalty.

This new Act enables magistrates to impose a custodial sentence of up to six months and, in the crown court, two years.

The courts are likely to use these new powers with little hesitation, though of course not all prosecutions will result in a prison sentence, and generally fines will probably continue to be the most likely penalty.

In so far as companies are concerned, the Act has introduced another important change. It has essentially removed the previous distinction between a breach of regulations and a breach of the general duties of the 1974 Health and Safety at Work (etc) Act.

The maximum penalty for breaching regulations has increased from £5,000 to £20,000; the unlimited fine in the Crown Court for breaches of the 1974 Act and all regulations remains.

For those who face numerous allegations of breaching regulations, many of which may be purely technical in nature, the total fine imposed may now be very significant indeed.

One implication of these changes is that while the most serious cases will continue to be sent to the crown court for sentence, magistrates should be more inclined to retain jurisdiction of cases than they are at present.

This will keep the legal bill down as barristers' fees and the fees of additional hearings are avoided.

Madeleine Abas is a partner at law firm Osborn Abas Hunt, which specialises in health and safety legislation