Case No: HT – 2015- 000284

Neutral Citation Number: [2015] EWHC 2433 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14th August 2015

Before:

MR JUSTICE AKENHEAD

- -

Between:

HENIA INVESTMENTS INC	**Claimant**
- and -	
BECK INTERIORS LIMITED	**Defendant**

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- -

Piers Stansfield QC (instructed by **Macfarlanes LLP**) for the **Claimant**
Paul Darling QC and Brenna Conroy (instructed by **Rosenblatt Solicitors**) for the **Defendant**

Hearing date: 10 August 2015

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JUDGMENT

Mr Justice Akenhead:

Introduction

1. In these Part 8 proceedings, the Claimant, Henia Investments Inc (the "Employer") seeks declarations relating to its building contract ("the Contract") with Beck Interiors Ltd ("the Contractor") primarily in relation to an Application for an interim payment issued by the Contractor on 28 April 2015. The proceedings raise a number of important interpretation issues about the payment provisions of the JCT Standard Building Contract without Quantities 2011 as amended, and of the Housing Grants, Construction and Regeneration Act 1996 as amended ("HGCRA") as well as the operation of the liquidated damages provisions of the Contract in the context of the extension of time processes.

The Facts and the Background

2. For the purposes of these proceedings, the basic facts are not in issue. The Contract was for extensive fitting out (as well as some new construction) works ("the Works") to be carried out by the Contractor at 45-47, Cheval Place, London, SW7. The original Contract Sum was just under £4m. The Works were, subject to any extension of time entitlement, to be completed by 5 September 2014. Interim payment due dates were 29 November 2013 and thereafter the same date in each month (or the nearest "Business Day" in that month). The Contract Administrator ("CA") and Quantity Surveyor under the Contract was Turner & Townsend

3. The Works were delayed and indeed (I was told) they are currently expected to be completed later this month, which would be over 11 months later than originally agreed. There has been no final determination as to whether the Contractor is entitled to any extension of time. On 5 September 2014, the CA issued a Non-Completion Certificate purportedly pursuant to Clause 2.31 of the Contract Conditions to the effect that the Works had not been completed in accordance with the Contract requirements, listing various works said not to have been completed. There followed some communications from the Contractor which are said to have been sufficient to trigger the need for the CA to operate the extension of time process; it is common ground that I do not have to decide any issue relating to this.

4. On 28 April 2015 under cover of an e-mail, the Contractor submitted to the CA its "Interim Application for Payment No: 18" identifying the "Balance applied for this period" of £2,943,098.95 against a gross value of £6,518,953.63. The Application included over 100 pages of back-up which indicated that the Works were "Valued to 30/04/15". 34 less 8 weeks' worth of "preliminaries" were applied for in respect of "EOT [Extension of Time] yet to be applied". On 6 May 2015, the CA issued its Interim (money) Certificate No 18 in the gross sum of £3,988,108.69 showing a net sum payable of £226,248.95.

5. No Interim Application for Payment was issued by the Contractor in May 2015 but on 4 June 2015 at 00.03 hrs the CA issued its Interim Certificate No 19 in the gross sum of £4,007,586.56 showing a net sum payable of £18,893.53.

6. On 17 June 2015, the Employer issued to the Contractor a "Pay Less Notice" purportedly pursuant to Clauses 4.12.5 and 4.13.1 of the Contract Conditions saying that there was "£0" due to the Contractor, this being based on the previous valuation and Certificate No 19 (£18,893.53) and its entitlement to liquidated damages for 40 weeks delay at the weekly rate of £15,000 (£373,751.05, over and above £226,248.95 previously withheld against earlier certificates). By this time, a first set of court proceedings had been issued by the Employer (HT-2015-000234). Terms were agreed between the parties as set out in a Consent Order dated 10 July 2015.

7. On 29 June 2015, the Contractor purported to give a contractual notice of its intention to suspend performance of its contractual obligations, although (I am told) it did not ultimately do so. On the same day, it gave Notice of its Intention to refer to adjudication a dispute which covers the same issues which the Court is now asked to consider. The adjudicator issued his decision on 3 August 2015 which was overall in the Employer's favour albeit on one issue he was in favour of the Contractor.

8. Meanwhile these Part 8 proceedings were issued by the Employer on 25 July 2015. It is to the substantial credit of both parties' legal teams that the parties were ready to have the issues argued only 16 days later before this Court.

The Contract

9. The Contractor's fundamental obligation is by Article 1 of the Contract to "carry out and complete the Works in accordance with the Contract Documents". The Employer's primary obligation is by Article 2 to "pay the Contractor at the times and in the manner specified in the Conditions [the Contract Sum] or such other sums as shall become payable under this Contract". Article 7 of the Contract provides for adjudication whilst Article 9 provides for the English courts to have jurisdiction over all disputes between the parties. Article 10 provides for the JCT provisions as amended to apply.

10. Clause 1 of the Contract Conditions defines "Business Day" as "any day which is not a Saturday, a Sunday or a Public Holiday" and "Completion Date" as "the Date for Completion…in the Contract Particulars or such other date as is fixed…under clause 2.28…". That date was 5 September 2014 subject to any extension of time due.

11. The time related provisions are primarily set out in Clause 2 of the Contract Conditions:

> "2.4 On the Date of Possession [11 November 2013] possession of the site …shall be given to the Contractor who shall thereupon begin the construction of the Works…and regularly and diligently proceed with and complete the same on or before the relevant Completion Date…
>
> 2.27.1 If, and whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed the Contractor shall forthwith give notice to the…Contract Administrator of the material circumstances, including the cause or causes of the delay, and shall identify in the notice any event which in his opinion is a Relevant Event.

.2 In respect of each event identified in the notice the Contractor shall, if practicable in such notice or otherwise in writing as soon as possible thereafter, give particulars of its expected effects, including an estimate of any expected delay in the completion of the Works or any Section beyond the relevant Completion Date.

.3 The Contractor shall forthwith notify the…Contract Administrator of any material change in the estimated delay or in any other particulars and supply such further information as the…Contract Administrator may at any time reasonably require.

2.28 .1 If, in the…Contract Administrator's opinion, on receiving a notice and particulars under clause 2.27:

.1 any of the events which are stated to be a cause of delay is a Relevant Event; and

.2 completion of the Works or of any Section is likely to be delayed thereby beyond the relevant Completion Date and provided the Contractor has complied with his obligations under clause 2.28.6,

then, save where these Conditions expressly provide otherwise, the…Contract Administrator shall give an extension of time by fixing such later date as the Completion Date for the Works or Section as he then estimates to be fair and reasonable.

.2 Whether or not an extension is given, the…Contract Administrator shall notify the Contractor of his decision in respect of any notice under clause 2.27 as soon as is reasonably practicable and in any event within 12 weeks of receipt of the required particulars. Where the period from receipt to the Completion Date is less than 12 weeks, he shall endeavour to do so prior to the Completion Date.

2.31 If the Contractor fails to complete the Works or a Section by the relevant Completion Date, the…Contract Administrator shall issue a certificate to that effect (a 'Non-Completion Certificate'). If a new Completion Date is fixed after the issue of such a certificate, such fixing shall cancel that certificate and the…Contract Administrator shall where necessary issue a further certificate."

2.32.1 Provided:

.1 the…Contract Administrator has issued a Non-Completion Certificate for the Works or a Section; and

.2 the Employer has notified the Contractor before the date of the Final Certificate that he may require payment of, or may withhold or deduct, liquidated damages,

the Employer may, not later than 5 days before the final date for payment of the amount payable under clause 4.15, give notice to the Contractor in the terms set out in clause 2.32.2.

.2 a notice from the Employer under clause 2.32.1 shall state that for the period between the Completion Date and the date of practical completion of the Works or that Section:

.1 he requires the Contractor to pay liquidated damages at the rate stated in the Contract Particulars, or lesser rate stated in the notice, in which event the Employer may recover the same as a debt; and/or

.2 that he will withhold or deduct liquidated damages at the rate stated in the Contract Particulars, or at such lesser stated rate, from sums due to the Contractor.

.3 if…Contract Administrator fixes a later Completion Date for the Works…

the Employer shall pay or repay to the Contractor any amounts recovered, allowed or paid under clause 2.32 for the period up to that later Completion Date."

12. The payment related terms (as amended) are:

"4.9.1 For the period up to practical completion of the Works, the due dates for interim payments by the Employer shall be the monthly dates specified in the Contract Particulars up to either the date of practical completion or the specified date within one month thereafter…

4.9.2 Subject to any agreement between the Parties as to stage payments, the sum due as an interim payment shall be the Gross Valuation under clause 4.16 less the aggregate of [certain sums set out in sub-clauses 1 to 4].

4.10.1 The…Contract Administrator shall not later than 5 days after each due date issue an Interim Certificate, stating the sum that he considers to be or have been due at the due date to the Contractor in respect of the interim payment, calculated in accordance with clause 4.9.2, and the basis on which that sum has been calculated.

4.11.1 In relation to any interim payment the Contractor may not less than 7 days before the due date make an application to the Quantity Surveyor (an 'Interim Application'), stating the sum that the Contractor considers will become due to him at the relevant due date in accordance with clause 4.9.2 and the basis on which that sum has been calculated.

4.11.2 If an Interim Certificate is not issued in accordance with clause 4.10.1, then:

.1 where the Contractor has made an Interim Application in accordance with clause 4.11.1, that application is for the purposes of these Conditions an Interim Payment Notice; or

.2 where the Contractor has not made an Interim Application, he may at any time after the 5 day period referred to in clause 4.10.1 give an Interim Payment Notice to the Quantity Surveyor, stating the sum that the Contractor considers to be or

have been due to him at the relevant due date in accordance with clause 4.9.2 and the basis on which that sum has been calculated.

4.12 .1 Subject to clause 4.12.4, the final date for payment of an interim payment shall be 28 days from its due date.

.2 Subject to any Pay Less Notice given by the Employer under clause 4.12.5, the sum to be paid by the Employer on or before the final date for payment shall be the sum stated as due in the Interim Certificate.

.3 If the Interim Certificate is not issued in accordance with clause 4.10.1, but an Interim Payment Notice has been given under clause 4.11, the sum to be paid by the Employer shall, subject to any Pay Less Notice under clause 4.12.5, be the sum stated as due in the Interim Payment Notice….

.5 If the Employer intends to pay less than the sum stated as due from him in the Interim Certificate or Interim Payment Notice, as the case may be, he shall not later than 3 days before the final date for payment give the Contractor notice of that intention in accordance with clause 4.13.1 (a 'Pay Less Notice'). Where a Pay Less Notice is given, the payment to be made on or before the final date for payment shall not be less than the amount stated as due in the notice.

4.13.1 A Pay Less Notice:

.1 (where it is to be given by the Employer) shall specify both the sum that he considers to be due to the Contractor at the date the notice is given and the basis on which that sum has been calculated, and may be given on behalf of the Employer by the…Contract Administrator, Quantity Surveyor or Employer's representative or by any other person who the Employer notifies the Contractor as being authorised to do so;…

4.13.3 Any right of the Employer to deduct or set off any amount (whether arising under any provision of this Contract or under any rule of law or equity) shall be exercisable against any monies due or to become due to the Contractor, whether or not such monies include or consist of any Retention.

4.16 The Gross Valuation shall be the total of the amounts referred to in clauses 4.16.1 and 4.16.2 less the total of the amounts referred to in clause 4.16.3, applied up to and including a date not more than 7 days before the due date of an interim payment."

Clause 4.16.1 sets out the total values which are to be included in the Gross Valuation, which are subject to Retention. These include the work properly executed by the Contractor and site materials. Clause 4.16.2 provides for the addition of certain sums that are not subject to Retention. Clause 4.16.3 provides for certain deductions to be made where appropriate.

The Issues in the Current Proceedings

13. These are in essence agreed to be as follows:

1. Was the Contractor's Application No 18 issued on 28 April 2015 an effective or valid Interim Payment Notice in respect of the 29 May 2015 payment due date?

2. Was the Employer's notice dated 17 June 2015 an effective or valid Pay Less Notice?

3. Would a failure on the part of the CA to make a decision in respect of a contractually compliant application for extension of time render the CA's Non-Completion Certificate invalid or otherwise prevent the Employer from deducting and/or claiming liquidated damages?

Essentially, the Employer says that the answers are "no", "yes" and "no" and the Contractor says "yes", "no" and "yes", respectively.

Issue 1 – Application No 18

14. There is no doubt that the relatively and seemingly complex payment provisions in Clause 4 are intended to reflect the terms of the HGCRA (as amended by the Local Democracy, Economic Development and Construction Act 2009), in particular Sections 110, 110A and 111. These statutory requirements have led to unnecessarily complex provisions, not least those dealing with the consequences of failures to comply with the timing provisions. The statutory provisions, which are not excludable by the terms of contracts, need to be looked at in the context of the purposes of the HGCRA as amended which include not only the need to encourage cash flow to contractor parties to construction contracts but also the need to establish an agenda for (speedy) adjudication arising out of disputes between the parties in relation to interim payment entitlements. There is no doubt that the failure on the part of the CA to issue an Interim Certificate on time, which leads to the sum due for that period being effectively deemed to be that which was applied for by the Contractor, has spawned a large amount of litigation both on adjudication enforcement claims as well as in Part 8 proceedings. This case is another example.

15. It is important to consider in this case and on this Contract the "time line" for "payment due dates", Interim Applications, Interim Payment Notices, Interim Certificates, Pay Less Notices and final dates for payment:

(a) The payment due dates under Clause 4.9.1 were agreed to be 29 November 2013 and thereafter the same date in each month or the nearest non-public holiday or non-weekend day in the following months. 29 April and 29 May 2015 were regular weekdays.

(b) The Contractor may but does not have to submit an "Interim Application" (stating what will become due to it at that due date) at least 7 days before that due date. Thus, by way of example, it could serve its Interim Applications on or before 22 April or 22 May 2015 in relation to the April or May due dates.

(c) Next an Interim Certificate must be issued no later than 5 days after each due date. That would be no later than 5 May (allowing for the May Day public holiday) and 3 June 2015 for the April and May due dates respectively.

(d) The final dates for payment would be 28 days counting from the due dates, namely 27 May and 26 June 2015 being 28 days after the due dates in question.

(e) Any Pay Less Notice would need to be served no later than three days before those final payment dates, namely by 23 May (allowing for Whitsun public holiday) and before 23 June 2015.

16. On the basis of the timelines for the April and May 2015 payment due dates, the parties or their representatives have not followed with any precision the contractual requirements:

(a) The Contractor's Application for the 18th interim payment in respect of the 18th payment due date (29 April 2015), if that was what it was intended to be, was late by 6 days.

(b) Both Interim Certificates Nos. 18 and 19 were issued late, No. 18 by one day and No. 19 by 3 minutes in the middle of the night.

These failures or omissions, if they can so be classified, have given rise to the issue about payment and rights to deduct.

17. There is some very real importance in being able to ascertain whether a document filed by the Contractor is an Interim Application under Clause 4.11.1: it stands as an Interim Payment Notice (Clause 4.11.2.1) if no Interim Certificate is issued in accordance with Clause 4.10.1 (for instance, issued more than 5 days after the payment due date), and the "sum to be paid by the Employer shall, subject to any Pay Less Notice under clause 4.12.5, be the sum stated as due" in that Interim Application (Clause 4.12.3). That could be way over what the CA would otherwise have certified or what is actually due to the Contractor. Although fraud would probably unravel a fraudulently prepared Interim Application, no fraud is alleged here and there is often room for sometimes widely differing assessments of value and proportions of work completed. Although it is not apt to talk in terms of conditions precedent, I consider that the document relied upon as an Interim Application under Clause 4.11.1 must be in substance, form and intent an Interim Application stating the sum considered by the Contractor as due at the relevant due date and it must be free from ambiguity. In this context, the Interim Application should be considered in the same light as a certificate. If there are to be potentially serious consequences flowing from it being an Interim Application, it must be clear that it is what it purports to be so that the parties know what to do about it and when.

18. In construing or understanding whether a particular document is intended to be a particular Interim Application, one needs also to have regard to the wording of Clause 4.11.1 and there are these features:

(a) The Interim Application can be put in at any time more than 7 days before the payment due date. In theory, a contractor could submit all its Interim Applications on Day 1 of the Contract, seeking to anticipate what work values will be achieved for each payment due date. That might give rise to financial difficulties if it falls behind or even gets ahead of itself and it could take no account of variations or delays which entitle it to related loss and expense. In practice, whilst theoretically possible, it is most unlikely that sensible contractors would do this.

(b) The Interim Application has to state "the sum that the Contractor considers will become due to him at the relevant due date in accordance with clause 4.9.2". The use of the future tense here must permit the Contractor to allow for work which it anticipates it will do between the date of the Interim Application and the payment due date; thus, if it anticipates that it will do a further 500m² of plasterwork over that period, that can be applied for. It is also clear from this wording that the Interim Application should relate to the Gross Valuation basis referred to in Clause 4.9.2 which is cross-referred to in Clause 4.11.1.

(c) It must also be clear that the Contractor must state what it considers due "at the relevant due date". The relevant due dates are spelt out in the Contract and the material ones in this case were 29 April and 29 May 2015. Whilst it is not absolutely necessary that the specific due date is expressed in the Interim Certificate, it must be clear and unambiguous that an application relating to a specific due date is being made.

19. That being so, one should seek to interpret whether the Interim Application of 28 April 2015 was and can be taken to be intended to be the relevant Interim Application for the relevant due date of 29 May. If it was, it becomes essential to determine Issue 2 and if not, then the Interim Application has no particular contractual relevance in the context of this case. My analysis of this is as follows:

(a) There was a relevant due date on 29 April 2015; that would have been the 18th relevant due date under the Contract. The use of the words "Interim Application for Payment No: 18" points to an intention that it was to relate to the 18th application for the 29 April payment due date.

(b) There is nothing, expressly, on this Interim Application which points to it relating to the 29 May 2015 payment due date; the deployment of the 30 April 2015 as the date up to which work was being valued is at best ambiguous; 30 April 2015 is not a relevant due date at all under the Contract. If this Interim Application was intended to be taken as relating to the 29 May 2015 due date, the use of the 30 April 2015 date demonstrates if anything that either the Contractor was anticipating doing absolutely no work of value between 30 April and 29 May 2015 or that it was foregoing any interim entitlement to whatever work it was anticipating doing over those 29 days; both these scenarios are unlikely.

(c) The only argument on analysis supporting the submission that the 28 April 2015 Interim Application was intended to be the Interim Application for the 29 May 2015 due date is that, because it was out of time for the 29 April 2015 due date, it must be taken as relating to the later due date as being the next in time; indeed that is what the adjudicator based his decision on in relation to this issue. In my judgment, at best the 28 April 2015 document is as consistent with error or misunderstanding as to what was required or even misguided hope that the 28 April 2015 application would be treated as an effective application for the April payment due date on the part of the Contractor as it is with it being intended to be an Interim Application for the 29 May 2015 due date.

(d) One could easily reach a different view if the application or the Contractor had said at the time that it was acknowledged that the 29 April date had been

missed and the Interim Application was intended to relate to the 29 May due date. No such statement was made.

There was at the very least substantial room for confusion; it is, perhaps, unsurprising that the CA issued Certificate No. 18 within 5 days (allowing for the May Day holiday) after the 30 April 2015 valuation date referred to in Interim Application No. 18.

20. I have formed the clear view that the Interim Application No.18 can not be considered as an Interim Application in relation to the 29 May 2015 payment due date. It was not and can not readily be demonstrated to be an Interim Application stating the sum that the Contractor consider would become due to it at that "relevant due date", as envisaged by Clause 4.11.1 of the Contract Conditions. At best, it was some sort of hybrid document. Certainly it is not in substance, form and intent an Interim Application in relation to the payment due date or 29 May 2015; it can not be said to be free from substantial ambiguity in this regard.

21. It follows that the answer to Issue 1 is “No”.

Issue 2

22. This issue relates to whether the Notice dated 17 June 2015 was an effective or valid Pay Less Notice. In one sense, this issue is superfluous because, if the Interim Application No. 18 document does not relate to the 29 May 2015 payment due date, it cannot stand as an Interim Payment Notice for the purposes of Clauses 4.11.2 and 4.12.3. There will then be a simple failure on the part of the CA to issue Interim Certificate No. 19 on time and a breakdown in the certification machinery. That would not stop or prevent the Contractor from seeking adjudication if and when a dispute arose as to what should have been certified at the time.

23. The issue primarily revolves around whether or not the Pay Less Notice which can be served by the Employer can effectively challenge the valuation certified by the CA or where applicable an Interim Payment Notice as opposed to merely setting up arguable cross claims or other deductions expressly envisaged by the Contract.

24. The parties to this form of contract agree that the CA is required to certify what it “considers to be or have been due at the due date to the Contractor in respect of the interim payment" (Clause 4.10.1). Although, as here, the CA is almost invariably engaged by the Employer, the amount which is certified is left to the independent evaluation of that amount by the CA; that independent function is underpinned by, for instance, one of the grounds of contract termination by the Contractor in Clause 8.9 being where the Employer “interferes with or obstructs the issue of any certificate due under this Contract”. The Contract makes detailed provision for interim valuations, certificates and payment and the CA and the Quantity Surveyor are given the relevant roles in this regard. Irrespective of whether the Contractor makes Interim Applications or other Interim Payment Notices, this valuation and certification machinery is contractually expected to be operated. Coupled with this, the Interim Application and Interim Payment Notice regime referred to in Clauses 4.11 and 4.12 can, by agreement, lead to the "sum stated as due in the Interim Payment Notice" being "the sum to be paid by Employer" (Clause 4.12.3); this arises expressly where the Interim

Certificate in question has not been issued in accordance with Clause 4.10.1, for instance where it has not been issued within time.

25. Two things are, as a matter of commercial common sense, at least mutually foreseeable by both contracting parties. The first is that the Employer might wish to disagree with the Interim Application or Interim Payment Notices submitted by the Contractor and secondly that both parties might disagree with what the CA has certified. When one considers the payment provisions, particularly in Clause 4.12, one can immediately see that the parties have qualified the Employer's obligation to pay as being "subject to any Pay Less Notice"; that expression is to be found both in Clause 12.2 (where a certificate has been properly issued) and in Clause 12.3 (where a certificate has not been issued properly if at all, the Interim Payment Notice determines the sum to be paid).

26. The Definitions clause identifies that the meaning of the term "Pay Less Notice" is to be found in Clauses 4.12.5 and 4.13.1. Clause 4.12.5 talks about the Employer if it "intends to pay less than the sum stated as due in the Interim Certificate or Interim Payment Notice" serving the Pay Less Notice. In Clause 4.13.1, the Pay Less Notice must specify both "the sum that [the Employer] considers to be due to the Contractor at the date the notice is given and the basis on which the sum has been calculated". There is nothing in this wording which suggests that the Employer can not legitimately challenge either the amount certified by the CA or the amount claimed within the Interim Payment Notice. There is nothing commercially illogical in the Employer being permitted to do so, this being most obvious in the case of a challenge to the Interim Payment Notice regime generated by the Contractor. Reading Clause 14.13.1 with Clause 4.13.3 (as amended), it is clear that the Pay Less Notice can include for and allow deductions and other set-offs in respect of which the Employer is entitled to make or claim.

27. It therefore follows as a matter of simple contractual construction that the Pay Less Notice generally and in this case could properly challenge either the CA's certification or any Interim Payment Notice.

28. However, although there is no real suggestion that the Contract does not reflect the HGCRA (as amended), it is argued by Counsel for the Contractor that if one construes these provisions to reflect the amended Act a different and opposite answer emerges. Sections 110 and 111 of the un-amended Act were as follows:

> "110(1) Every construction contract shall—
>
> (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
>
> (b) provide for a final date for payment in relation to any sum which becomes due.
>
> The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.
>
> (2) Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if—
>
> (a) the other party had carried out his obligations under the contract, and

(b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,

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

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

111(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.

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

(2) To be effective such a notice must specify—

(a) the amount proposed to be withheld and the ground for withholding payment, or

(b) if there is more than one ground, each ground and the amount attributable to it,

and must be given not later than the prescribed period before the final date for payment…"

29. This regime envisaged in effect two notices, the first under Section 110 being a payment notice which spelt out what was due disregarding any abatement or set-off and the second being the withholding notice under Section 111 relating to sums to be withheld. There was some appellate authority on this, **Rupert Morgan Building Services (LLC) Ltd v Jervis** [2003] EWCA 1563, based on the un-amended HGCRA, but on analysis this was only authority for the proposition that in the absence of a withholding notice an Employer could not resist enforcement of an adjudicator's decision requiring payment of a certified sum, albeit that the Employer could obtain relief from an adjudicator or the final resolution tribunal for the subject matter of what would have been covered by any withholding notice which could have been legitimately served.

30. The amended Act adds various new sections:

"110A (1) A construction contract shall, in relation to every payment provided for by the contract—

(a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or…

(2) A notice complies with this subsection if it specifies—

(a) in a case where the notice is given by the payer—

(i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and

(ii) the basis on which that sum is calculated;

(b) in a case where the notice is given by a specified person—

(i) the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and

(ii) the basis on which that sum is calculated…

(5) If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme for Construction Contracts apply…

111(1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.

(2) For the purposes of this section, the "notified sum" in relation to any payment provided for by a construction contract means—

(a) in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(b) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(c) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2), the amount specified in that notice.

(3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.

(4) A notice under subsection (3) must specify—

(a) the sum that the payer considers to be due on the date the notice is served, and

(b) the basis on which that sum is calculated.

It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.

(5) A notice under subsection (3)—

(a) must be given not later than the prescribed period before the final date for payment, and

(b) in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.

(6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).

(7) In subsection (5), "prescribed period" means—

(a) such period as the parties may agree, or

(b) in the absence of such agreement, the period provided by the Scheme for Construction Contracts…"

Section 110A replaced the old Section 110 (2) and (3) and Section 111 was a substitution for the earlier Section 111.

31. In my judgment, the payment regime in the Contract is not materially at odds with or inconsistent with the amended HGCRA:

> (a) It provides "an adequate mechanism for determining what payments become due under the contract, and when, and…for a final date for payment in relation to any sum which becomes due" within the meaning of Section 110, through Clauses 4.9 and 4.12.1.
>
> (b) It provides for notification to be given by a "specified person" not later than 5 days after the payment due date of the sum that the specified person considers to be or to have been due at the payment due date in respect of the payment" (Clause 4.10.1), for the purposes of Section 110A (1) and (2).
>
> (c) Clauses 4.12 and 4.13 are consistent with Section 111 because this machinery for the provision of a "notified sum" by way of the certification and Interim Payment Notice arrangements and the Pay Less Notice provisions reflect statutory provisions for "a notice of the payer's intention to pay less than the notified sum". The wording of Clauses 4.12.3, 4.12.4 and 4.12.5 are verbally reflective of the statutory language.

32. It follows that, since the HGCRA as amended is consistent with and effectively reflected in and by the Contract payment provisions, the Pay Less Notice can not only raise deductions specifically permitted by the Contract and legitimate set-offs but also deploy the Employer's own valuation of the Works. In this case, all the Employer did was to challenge the Contractor's most recent application for payment (Interim Application No. 18) by way of putting forward the CA's most recent evaluation (albeit that the Certificate in question, Certificate No. 19 was issued late); there is no suggestion that the Employer was acting in anything other than a bona fide way. The Pay Less Notice of 17 June 2015 (clearly served within time for the 29 May payment due date and the final payment date 28 days later) would have provided an adequate agenda for an adjudication as to the true value of the Works and the validity of the alleged entitlement to liquidated damages for delay.

33. The answer therefore to Issue 2 is "Yes".

Issue 3

34. Although this was a wholly live issue at the time when these proceedings were issued, it is accepted that my decision on it would not be determinative, given that the adjudicator decided that no application for extension of time has been made by the Contractor and therefore liquidated damages running from the original Completion Date would stand at least for the time being. My determination of this issue is therefore *obiter*, as it must proceed on the assumptions that the Contractor did submit an effective and particularised notice of delay compliant with Clause 2.27 and that the CA failed to reach a decision on such notice in accordance with Clause 2.28.2.

35. It is, rightly, common ground that *prima facie* such a failure by the CA would not put time at large and would not in itself be an act of prevention which caused delay.

36. There is no authority in the form of decided cases on the issue. The editors of Keating on Construction Contracts (9th ed) say this at Paragraph 10-018:

> "(f) Breach of condition precedent by employer
>
> The contract may provide that some condition precedent must be fulfilled before the employer can claim liquidated damages. Thus in the Standard Form of Building contract, the architect's certificate under Clause 2.32.1 is such a condition precedent. Similarly, where a contract imposes a duty on the architect to extend the time and he fails to perform that duty in accordance with the contract the employer is unable to claim liquidated damages."

No authority is quoted for the proposition in the last sentence.

37. The language of the principal liquidated damages provision, Clause 2.32, is not cast in a way that suggests that the obligation on the part of the CA to operate the extension of time provisions is a condition precedent to an entitlement to deduct liquidated damages. Indeed Clause 2.32.1 does expressly purport to impose two other conditions precedent, namely the need for the CA to have issued a Non-Completion Certificate for the Works and for the Employer to have notified the Contractor before the date of the Final Certificate that he may require payment of, or may withhold or deduct, liquidated damages. It seems odd that, if there was to be a condition precedent that no liquidated damages should be payable or allowable unless the extension of time clauses have been operated properly, it was not spelt out as such. This however could be explained commercially by the fact that there can be serious arguments between the Contractor and the CA (as there were here) not only as to whether delays have occurred by reason of which extensions of time can be granted but also as so as to whether the Contractor has properly complied with the notification and particularisation requirements called for in Clause 2.27. One needs also to bear in mind that the extension of time application may range from being a wholly good to a hopeless one or it may relate to the whole of the delay or only a very small part; put another way, there may turn out to be no or only a limited entitlement to extension of time, thus justifying all or most of the Employer's liquidated damages entitlement.

38. One also has to bear in mind that the Contractor is not left without a remedy both in the short term through adjudication and in the long-term final dispute resolution processes; it can challenge the refusal to grant an extension and/or the deduction of liquidated damages and, in the case of adjudication, secure relief if it can convince the adjudicator that it is right and that the Employer and the CA are wrong in whole or in part.

39. One can of course argue that it is unfair on the Contractor to have liquidated damages deducted at a time when the CA has failed to deliver the process of considering extension of time claims. The two answers to that are the ready availability of short and long-term remedies and the fact that there are numerous potential defaults on the part of both Employer and Contractor which can give rise to serious financial consequences to the other and merely because unfairness can happen in the short term does not necessarily or obviously lead to the need to construe clauses as conditions precedent to the ability of one party to secure such financial advantage in that short term.

40. I have formed the view therefore that a failure on the part of the CA to operate the extension of time provisions does not debar the Employer from deducting liquidated damages where the expressed conditions precedent in Clause 2.32.1.1 2.32.1.2 have

been complied with. I am not convinced that the editors of Keating intended to suggest that in absolute terms any failure on the part of the CA to operate the extension of time provisions prevents a claim for liquidated damages; it may well be that, if the effective operation of extension of time provisions is clearly a condition precedent, the editors are right; the paragraph in Keating is after all headed as relating to breach of condition precedent.

41. The answer to Issue 3 is "No".

Decision

42. As indicated above, I answer the issues as follows:

> 1. Was the Contractor's Application No 18 issued on 28 April 2015 as an effective or valid Interim Payment Notice in respect of the 29 May 2015 payment due date? No.
>
> 2. Was the Employer's notice dated 17 June 2015 an effective or valid Pay Less Notice? Yes.
>
> 3. Would a failure on the part of the CA to make a decision in respect of a contractually compliant application for extension of time render the CA's Non-Completion Certificate invalid or otherwise prevent the Employer from deducting and/or claiming liquidated damages? No.

43. I will leave the parties to agree the wording of appropriate declarations.