Neutral Citation Number: [2016] EWCA Civ 990

Case No: A1/2016/0506

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Queen's Bench Division, Technology and Construction Court
Mr Justice Stuart-Smith
HT2015000412

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2016

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE JACKSON
and
LORD JUSTICE VOS

- -

Between :

Balfour Beatty Regional Construction Limited	**Defendant/ Appellant**
- and -	
Grove Developments Limited	**Claimant/ Respondent**

- -
- -

Steven Walker QC & Camille Slow (instructed by **Pinsent Masons LLP**) for the **Defendant/Appellant**
Alexander Nissen QC & William Webb (instructed by **Macfarlanes LLP**) for the **Claimant/Respondent**

Hearing date : Wednesday 27th July 2016

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Approved Judgment

Lord Justice Jackson :

1. This judgment is in eight parts, namely:

Part 1 – Introduction

2. This is an appeal by a building contractor against a decision that there is no entitlement to interim payments in the period after the contractual date for practical completion. The principal issues are (i) how some rather unusual amendments to the standard form building contract should be construed and (ii) how section 109 of the

Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act") applies in the circumstances of this case.

3. The contractor, Mansell Construction Services Limited, had a name change during the course of the building works and became Balfour Beatty Regional Construction Limited. I shall refer to the contractor at all stages as "BB". I shall refer to the employer, Grove Developments Limited, as "Grove".

4. Sections 109 and 110 of the 1996 Act provide as follows:

> "**109. – Entitlement to stage payments.**
>
> (1) A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless –
>
> (a) it is specified in the contract that the duration of the work is to be less than 45 days, or
>
> (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.
>
> (2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.
>
> (3) In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.
>
> (4) References in the following sections to a payment provided for by the contract include a payment by virtue of this section.
>
> **110.- Dates for payment.**
>
> (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.
>
> …

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

5. The Scheme for Construction Contracts (England and Wales) Regulations 1998 set out the Scheme for Construction Contracts ("the Scheme") which applies to construction contracts, in so far as the provisions of those contracts do not comply with the requirements of the 1996 Act.

6. Paragraphs 1 to 7 of the Scheme set out rules for monthly interim payments to the contractor. These provisions are incorporated in any construction contract which does not comply with Sections 109 and 110 of the 1996 Act.

7. After these introductory remarks, I must now turn to the facts.

Part 2 – The Facts

8. In 2013 Grove engaged BB to design and construct a hotel and serviced apartments at Greenwich Peninsular in south east London. The contract was the JCT standard form Design and Build Contract 2011, subject to a number of bespoke amendments. It was dated 11th July 2013. The contract sum (subject to adjustment in accordance with the contract provisions) was £121,059,632.00.

9. Clause 4 of the Conditions of Contract included the following:

> "**Issue and amount of Interim Payments**
>
> **4.7**
>
> .1 Interim Payments shall be made by the Employer to the Contractor in accordance with section 4 and whichever of Alternative A (Stage Payments) or Alternative B (Periodic Payments) is stated in the Contract Particulars to apply.
>
> .2 The sum due as an Interim Payment shall be an amount equal to the Gross Valuation under clause 4.13 where Alternative A applies, or clause 4.14 where Alternative B applies, in either case less the aggregate of:
>
> > .1 any amount which may be deducted and retained by the Employer as provided in clauses 4.16 and 4.18 ('the Retention')
> >
> > .2 the cumulative total of the amounts of any advance payment that have then become due for reimbursement to the Employer in accordance with the terms stated in the Contract Particulars for clause 4.6; and
> >
> > .3 the amounts paid in previous Interim Payments.

Contractor's Interim Applications and due dates

4.8

.1 In relation to each Interim Payment, the Contractor shall make an application to the Employer (an 'Interim Application') in accordance with the following provisions of this clause 4.8, stating the sum that the Contractor considers to be due to him and the basis on which that sum has been calculated.

.2 Where Alternative A applies, an Interim Application shall be made as at completion of each stage specified in or by the Contract Particulars for Alternative A. Following the application in respect of the last stage, such applications shall be made at intervals of 2 months (unless otherwise agreed), the last such application being made upon the expiry of the Rectification Period or, if later, the issue of the Notice of Completion of Making Good (or, where there are Sections, the last such period or notice). The due date for payment (the 'due date') in each case shall be the later of the date of completion of the stage (or, when applicable, the 2 monthly date) and the date of receipt by the Employer of the Interim Application.

.3 Where Alternative B applies, for the period up to practical completion of the Works, Interim Applications shall be made as at the monthly dates specified in the Contract Particulars for Alternative B up to the date of practical completion or the specified date within one month thereafter. Subsequent Interim Applications shall be made at intervals of 2 months (unless otherwise agreed), the last such application being made upon the expiry of the Rectification Period or, if later, the issue of the Notice of Completion of Making Good (or, where there are Sections, the last such period or notice). The due date in each case shall be the later of the specified date and the date of receipt by the Employer of the Interim Application.

.4 Interim Applications may be made ~~before~~, on or after completion of the relevant stage or the monthly date and shall be accompanied by such further information as may be specified in the Employer's Requirements and Contractor's Proposals.

Interim Payments – final date and amount

4.9

.1 The final date for payment of an Interim Payment shall be 28 days ~~14 days~~ from its due date.

.2 Not later than 5 days after the due date the Employer shall give a notice (a 'Payment Notice') to the Contractor in

accordance with clause 4.10.1 and, subject to any Pay Less Notice given by the Employer under clause 4.9.4, the amount of the Interim Payment to be made by the Employer on or before the final date for payment shall be the sum stated as due in the Payment Notice.

.3 If the Payment Notice is not given in accordance with clause 4.9.2, the amount of the Interim Payment to be made by the Employer shall, subject to any Pay Less Notice under clause 4.9.4, be the sum stated as due in the Interim Application.

.4 If the Employer intends to pay less than the sum stated as due from him in the Payment Notice or Interim Application, as the case may be, he shall not later than 3 ~~5~~ days before the final date for payment give the Contractor notice of that intention in accordance with clause 4.10.2 (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~~ Pay Less Notice.

.5 If the Employer fails to pay a sum, or any part of it, due to the Contractor under these Conditions by the final date for its payment, the Employer shall, in addition to any unpaid amount that should properly have been paid, pay the Contractor simple interest on that amount at the Interest Rate for the period from the final date for payment until payment is made. Interest under this clause 4.9.5 shall be a debt due to the Contractor from the Employer.

.6 Acceptance of a payment of interest under clause 4.9.5 shall not in any circumstances be construed as a waiver of the Contractor's right to proper payment of the principal amount due, to suspend performance under clause 4.11 or to terminate his employment under section 8.

Payment Notices, Pay Less Notice and general provisions

4.10

.1 Each Payment Notice under this Contract shall specify the sum that the Party giving the notice considers to be or have been due at the due date in respect of the relevant payment and the basis on which that sum has been calculated.

.2 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;

> .2 (where it is to be given by the Contractor) shall specify both the sum that he considers to be due to the Employer at the date the notice is given and the basis on which that sum has been calculated.
>
> .3 A Payment Notice or a Pay Less Notice to be given by the Employer may be given on his behalf by the Employer's Agent or by any other person who the Employer notifies the Contractor as being authorised to do so.
>
> .4 In relation to the requirements for the giving of notices under section 4 and the submission of a Final Statement, it is immaterial that the amount then considered to be due may be zero.
>
> .5 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.
>
> ~~.5 Notwithstanding his fiduciary interest in the Retention as stated in clause 4.16, the Employer is entitled to exercise any rights under this Contract of withholding or deduction from sums due or to become due to the Contractor, whether or not any Retention is included in any such sum under clause 4.18.~~"

…

Final Statement and final payment

4.12.

.1 Following practical completion of the Works the Contractor shall submit the Final Statement to the Employer and supply him with such supporting documents as he may reasonably require.

.2 The Final Statement shall set out the adjustments to the Contract Sum to be made in accordance with clause 4.2 and shall state:

> .1 the Contract Sum, as so adjusted; and
>
> .2 the sum of amounts already paid by the Employer to the Contractor,

and the final payment shall be the difference (if any) between the two sums, which shall be shown as a balance due to the

Contractor from the Employer or to the Employer from the Contractor, as the case may be. The Final Statement shall state the basis on which that amount has been calculated, including details of all such adjustments.

…

.5 The due date for the final payment shall be the date one month after whichever of the following occurs last:

> .1 the end of the Rectification Period in respect of the Works or (where there are Sections) the last such period to expire;
>
> .2 the date stated in the Notice of Completion of Making Good under clause 2.36 or (where there are Sections) in the last such notice to be issued; or
>
> .3 the date of submission to the other Party of the Final Statement or, if issued first, the Employer's Final Statement ("the relevant statement").
>
> …

Ascertainment – Alternative A

4.13 The Gross Valuation shall be the total of the amounts referred to in clauses 4.13.1 and 4.13.2 less the total of the amounts referred to in clause 4.13.3, calculated as at completion of the relevant stage.

.1 The following which are subject to Retention shall be included:

> .1 the cumulative value at the relevant stage;
>
> .2 the value of any Changes or other work referred to in clause 5.2 that are relevant to the Interim Payment (whether agreed pursuant to clause 5.2 or valued under the Valuation Rules) but excluding any amounts referred to in clause 4.13.2-4;
>
> 3. the value of any Listed Items, when their value is to be included under clause 4.15;
>
> .4 the amount of any adjustment under Fluctuations Option C (if applicable);
>
> .5 where Fluctuations Option C is applicable and where in accordance with the Formula Rules amounts in the Value of Work are to be allocated to lift installations, structural steelwork installations or

catering equipment installations, the total value of Site Materials of those descriptions, provided that their value shall only be included if they are adequately protected against weather and other casualties and they are not on the Works prematurely; and

.6 the amount of any adjustment by Confirmed Acceptance of an Acceleration Quotation.

.2 The following which are not subject to Retention shall be included:

.1 any amounts to be included in Interim Payments in accordance with clause 4.3 by the Employer as a result of payments made or costs incurred by the Contractor under clause 2.5.2, 2.20, 3.12, 6.10.2 or 6.10.3 or paragraph B2.1.2 or C3.1 of Schedule 3;

.2 any amounts payable under clause 4.11.2;

.3 any amounts ascertained under clause 4.20;

.4 any amounts in respect of any restoration, replacement or repair of loss or damage and removal and disposal of debris under paragraph B3.5 and C4.5.2 of Schedule 3 or clause 6.11.5.2; and

.5 any amount payable to the Contractor under Fluctuations Option A or B, if applicable.

.3 The following shall be deducted:

.1 any amounts deductible under clause 2.35 or 3.6; and

.2 any amount allowable by the Contractor to the Employer under clause 6.10.2 or under Fluctuations Option A or B, if applicable.

Ascertainment – Alternative B

4.14 The Gross Valuation shall be the total of the amounts referred to in clauses 4.14.1 and 4.14.2 less the total of the amounts referred to in clause 4.14.3, calculated as at the date for making an Interim Application under clause 4.8.3.

.1 The total values of the following which are subject to Retention shall be included:

.1 work properly executed including any design work carried out by the Contractor and work so executed for which a value has been agreed pursuant to clause 5.2

> or which has been valued under the Valuation Rules, together, where applicable, with any adjustment of that value under the Fluctuations Option C or by Confirmed Acceptance of an Acceleration Quotation, but excluding any amounts referred to in clause 4.14.2-4;
>
> . 2 Site Materials provided that their value shall only be included if they are adequately protected against weather and other casualties and they are not on the Works prematurely; and
>
> .3 Listed Items (if any), when their value is to be included under clause 4.15.
>
> .2 The following which are not subject to Retention shall be included:
>
> > .1 any amounts to be included in Interim Payments in accordance with clause 4.3 by the Employer as a result of payments made or costs incurred by the Contractor under clause 2.5.2, 2.20, 3.12, 6.10.2 or 6.10.3 or paragraph B2.1.2 or C3.1 of Schedule 3;
> >
> > .2 any amounts payable under clause 4.11.2;
> >
> > .3 any amounts ascertained under clause 4.20;
> >
> > .4 any amounts in respect of any restoration, replacement or repair of loss or damage and removal and disposal of debris under paragraph B3.5 or C4.5.2 of Schedule 3 or clause 6.11.5.2; and
> >
> > .5 any amount payable to the Contractor under Fluctuations Option A or B, if applicable.
>
> .3 The following shall be deducted:
>
> > .1 any amounts deductible under clause 2.35 or 3.6; and
> >
> > .2 any amount allowable by the Contractor to the Employer under clause 6.10.2 or under Fluctuations Option A or B, if applicable."

The crossings out and underlinings in the above clauses indicate the amendments which the parties had made to the standard conditions.

10. The contract specified 22nd July 2015 as the date for practical completion. In relation to interim payments, in the contract particulars Alternative A was selected and Alternative B was crossed out. In the gap for a list of stages under the heading of Alternative A, the parties wrote:

"TO BE AGREED WITHIN 2 WEEKS FROM DATE OF CONTRACT."

11. Unfortunately the parties were unable to agree a list of stages for incorporation into Alternative A, either within the agreed two week period or at all. Instead, after a delay of six weeks, they agreed that Grove should make interim payments to BB in accordance with a schedule headed

"Greenwich Hotels and Apartments

Interim Valuation/Payment Dates 2013 – 2015

Valuation Application on Third Thursday of the month"

12. That schedule reads as follows:

"

Valuation no.	Val month	Mansell Application Submission Date to Grove	Valuation Date	Grove Certificate Issued (3 working days)	Payment made by Grove by (30 days from Val date)
	JUL				
	AUG				
1	SEPT	19/09/2013	20/09/2013	25/09/2013	20/10/2013
2	OCT	17/10/2013	18/10/2013	23/10/2013	22/11/2013
3	NOV	14/11/2013	15/11/2013	20/11/2013	20/12/2013
4	DEC	19/12/2013	19/12/2013	24/12/2013	23/01/2014
5	JAN	23/01/2014	24/01/2014	29/01/2014	25/02/2014
6	FEB	20/02/2014	21/02/2014	26/02/2014	28/03/2014
7	MAR	20/03/2014	21/03/2014	26/03/2014	25/04/2014
8	APR	17/04/2014	18/04/2014	23/04/2014	23/05/2014
9	MAY	22/05/2014	23/05/2014	28/05/2014	27/06/2014
10	JUN	19/06/2014	20/06/2014	25/06/2014	25/07/2014
11	JUL	17/07/2014	18/07/2014	23/07/2014	22/08/2014
12	AUG	21/08/2014	22/08/2014	27/08/2014	28/09/2014
13	SEPT	18/09/2014	19/09/2014	24/09/2014	24/10/2014
14	OCT	16/10/2014	17/10/2014	22/10/2014	21/11/2014
15	NOV	20/11/2014	21/11/2014	26/11/2014	26/12/2014
16	DEC	18/12/2014	19/12/2014	24/12/2014	23/01/2015

17	JAN	22/01/2015	23/01/2015	28/01/2015	27/02/2015
18	FEB	19/02/2015	20/02/2015	25/02/2015	27/03/2015
19	MAR	19/03/2015	20/03/2015	25/03/2015	24/04/2015
20	APR	16/04/2015	17/04/2015	22/04/2015	22/05/2015
21	MAY	21/05/2015	22/05/2015	27/05/2015	26/06/2015
22	JUN	18/06/2015	19/06/2015	24/06/2015	24/07/2015
23	JUL	16/07/2015	17/07/2015	22/07/2015	21/08/2015

"

13. Mr Bakh Tumber, commercial manager of BB, sent that schedule to Michael Keane at Grove by email on 30th September 2013. He wrote in the covering email:

> "Michael
>
> Please find attached agreed schedule of valuation / payment dates for this project."

14. For convenience I shall refer to the email of 30th September as "the Tumber email". I shall refer to the attached schedule as the "the Tumber schedule". It can be seen that the Tumber schedule has six columns. I shall refer to the column on the left hand side as "column 1", the next column as "column 2" and so forth.

15. Work duly proceeded under the contract. Delays occurred, for which BB obtained a two month extension of time. Whether BB is entitled to any further extension of time is a matter of dispute between the parties. BB achieved practical completion of the hotel during December 2015. BB achieved practical completion of the apartments, and thus of the whole project, on 26th July 2016.

16. Between September 2013 and July 2015 the interim payments for BB's work proceeded smoothly. The respective quantity surveyors for Grove and BB faithfully adhered to the timetable set out in the Tumber schedule. They carried out the valuation exercise each month in accordance with the provisions of clause 4.14.

17. By May 2015 it was clear that the project was going to overrun substantially beyond the contractual completion date of 22nd July 2015. Accordingly, the quantity surveyors on both sides gave thought to the question of interim payments after the last date shown on the Tumber schedule. Both parties expected that interim payments would continue, but they were in disagreement about the appropriate dates for applications, valuations and payments.

18. On 21st August 2015 BB issued application for payment number 24. On 28th August 2015 Grove's agent issued a payment notice in respect of that application. On 15th September Grove issued a Pay Less notice in respect of application 24. This showed that Grove would deduct £2 million, because there was a dispute about whether BB should give credit for an extra-contractual payment of £2 million previously made by Grove. The Pay Less notice showed the payment date as 25th September. On 18th

September Grove paid £439,503, which was the sum shown as due on the Pay Less notice after deducting the £2 million.

19. BB took strong exception to Grove's calculation of dates. They also took the view that by reason of Grove's miscalculations the Pay Less notice was ineffective. Accordingly on 30th September 2015 BB sent a formal letter to Grove demanding payment of the £2 million, which Grove had withheld in reliance on the Pay Less notice. On page 2 of that letter BB wrote:

> "Despite efforts on both sides, no agreement has been reached in relation to the Interim payment process beyond July 2015. For the avoidance of any doubt, our previous offers to agree the Interim payment process beyond July 2015 are now withdrawn and are no longer capable of acceptance."

20. During October and November 2015 the parties continued to correspond and serve notices on the assumption that interim payments were due, but they never reached agreement about the applicable dates. Grove made no further payments to BB during that period. This was for two reasons. First, Grove maintained that their Pay Less notice of 15th September was valid and entitled them to withhold the disputed £2 million. Secondly, they maintained that liquidated and ascertained damages for delay exceeded and extinguished any payments due to BB in respect of work done.

21. On 9th December 2015, after taking independent advice, Grove asserted that BB had no continuing entitlement to receive payments.

22. BB disputed the proposition that they had no further entitlement to interim payments. Accordingly, in order to resolve that dispute, Grove commenced the present proceedings.

Part 3 – The present proceedings

23. By a claim form issued pursuant to CPR Part 8 in the Technology and Construction Court on 10th December 2015, Grove claimed a declaration to the effect that BB had no entitlement to interim payments in respect of work done after July 2015. Grove also sought other relief which is no longer relevant.

24. The action proceeded swiftly. It came on for trial on 20th January 2016 (just six weeks after issue of the claim form) before Mr Justice Stuart-Smith. The judge delivered his reserved judgment on 3rd February 2016. He found in favour of Grove and issued the following declaration:

> "The Defendant has no contractual right to make Interim Application no.24 (or any subsequent application) and has no right to be paid in respect thereof."

The judge also granted a second declaration concerning the validity of Grove's Pay Less notice, but that is not relevant for present purposes.

25. I would summarise the judge's reasoning and conclusions as follows:

i) The Tumber schedule acted as a specific amendment to the contract. It meant that the parties abandoned Alternative A and agreed instead that there would be 23 interim payments in accordance with the dates set out in the schedule.

ii) The contract as amended by the Tumber schedule did not make any express provision for further interim payments after valuation 23.

iii) There was no implied term providing for interim payments after valuation 23.

iv) The contract as amended by the Tumber schedule satisfied the requirements of sections 109 and 110 of the 1996 Act. Therefore the Scheme did not apply.

v) The parties' correspondence and conduct during the summer and autumn of 2015 was not such as to give rise to a fresh agreement for interim payments. This was because the parties never reached agreement on the essential terms for such interim payments.

vi) Grove were not estopped from contending that BB had no continuing entitlement to interim payments after valuation 23.

26. BB were aggrieved by the judge's decision. Accordingly they appealed to the Court of Appeal.

Part 4 – The appeal to the Court of Appeal

27. By an appellant's notice issued on 9th February 2016, BB appealed against the judge's decision on three grounds, which I would summarise as follows:

i) The contract as amended by the Tumber schedule expressly or impliedly provided for continuing interim payments to be made between August 2015 and the date of practical completion.

ii) Alternatively, if there was no express or implied entitlement to continuing interim payments, the contract as amended by the Tumber schedule, did not comply with the requirements of section 109 of the 1996 Act. Therefore the Scheme applied and conferred a statutory right to monthly interim payments between August 2015 and practical completion.

iii) If Grounds (i) and (ii) fail, then the parties' correspondence and conduct in the summer and autumn of 2015 gave rise to a fresh contract for monthly interim payments.

28. The appeal came on for hearing right at the end of the summer term, on 27th July 2016. Mr Steven Walker QC leading Ms Camille Slow appeared for BB. Mr Walker argued grounds (i) and (iii). Ms Slow argued ground (ii). Mr Alexander Nissen QC, leading Mr William Webb, appeared for Grove. Mr Nissen argued the respondent's case on all three grounds.

29. Having set the scene, I must now turn to the first ground of appeal. This raises the question whether BB had any contractual entitlement to interim payments after valuation 23.

Part 5 – Did BB have any contractual entitlement to interim payments after valuation 23?

30. When the parties entered into their contract they intended that Grove should make stage payments to BB under Alternative A, as defined in clause 4.7 of the conditions. In other words a list of milestones in the progress of the works would be drawn up; as and when BB reached one of the milestones, Grove would make a stage payment. The quantity surveyors would calculate the amount of the stage payment by applying the rules set out in clause 4.13.

31. In the event, the parties never did agree a list of work stages or milestones. Instead they agreed the Tumber schedule. It is common ground that they thereby abandoned Alternative A and the mechanism for quantifying interim payments set out in clause 4.13.

32. Mr Walker contends that what the parties did amounted to an agreement that Grove would make interim payments in accordance with Alternative B (as defined in clause 4.7) or some variant of Alternative B. Mr Nissen resists that contention, pointing out that the dates in the Tumber schedule are inconsistent with clauses 4.8 to 4.9.

33. A quick comparison of clauses 4.8 to 4.9 with the Tumber schedule reveals that during the period September 2013 to July 2014 the parties were working to a completely different timetable from that mandated by Alternative B. Mr Walker states that the likely explanation for the discrepancies is that the parties did not have the contract in front of them when they drew up the Tumber schedule. That must be right. The parties were not giving effect to the detailed provisions of clauses 4.8 to 4.9. They were drawing up what seemed to be a reasonable timetable for applications, valuations and payments up to the anticipated date of practical completion.

34. The discrepancies between the Tumber schedule and the contract conditions did not cause any difficulty during 2013 – 2014. BB submitted their applications on the dates shown in column 3. Grove issued payment notices on the dates shown in column 5 and made payments on the dates shown in column 6. The respective quantity surveyors quantified the payments due in accordance with clause 4.14, not clause 4.13 (as envisaged originally).

35. Problems did not emerge until 2015. After valuation 23 there was no document to tell the parties when valuations should be made, when payment notices and Pay Less notices should be served or when payments should be made. Extrapolation from the Tumber schedule suggested one possible timetable. Application of clauses 4.8 to 4.9 suggested an alternative possible timetable. It is hardly surprising that this situation led to confusion and disagreement about who should do what and when.

36. In my view, it is not possible to say that in September 2013 the parties simply agreed to adopt Alternative B. What they agreed was a hybrid arrangement which had

elements of Alternative B (in particular valuation under clause 4.14) and a timetable of their own invention. That timetable ended on 22nd July 2015, the contractual date for practical completion.

37. The parties made no agreement as to whether or how they would deal with interim payments after July 2015. Mr Walker has valiantly argued that clearly the parties intended monthly interim payments to continue. The dates of valuations, payment notices and payments were a matter of detail which could if necessary be resolved by adjudication or some similar mechanism. I cannot accept that. Identification of the dates for valuation, payment notices, Pay Less notices and payments were an essential feature. If Grove served notices out of time, the consequences would be Draconian (as BB asserted in their letter dated 30th September 2015). Both parties needed to know with certainty what were the applicable dates.

38. Mr Walker submits that to interpret the contract in this way creates a commercial nonsense. The parties cannot have intended that, if practical completion were delayed, BB would have to wait for payment until the final payment date under clause 4.12. Therefore the court must construe the contract as amended by the Tumber schedule as providing a continuing entitlement to interim payments after July 2015.

39. I reject this submission for three reasons. First, the express words used make it clear that the parties were only agreeing a regime of interim payments up to the contractual date for practical completion. See the Tumber email, which referred to the "agreed schedule of valuation / payment dates for this project". Neither the email nor the schedule made any provision for interim payments after July 2015. Secondly, it is impossible to deduce from the hybrid arrangement what would be the dates for valuations, payment notices, Pay Less notices and payments after July 2015. These were essential matters for the reasons previously stated. Thirdly, this is a classic case of one party making a bad bargain. The court will not, indeed cannot, use the canons of construction to rescue one party from the consequences of what that party has clearly agreed. There is no ambiguity in the present case which enables the court to reinterpret the parties' contract in accordance with "commercial common sense", which Mr Walker seeks to invoke.

40. Mr Walker places reliance on the judgment of Lord Neuberger (with whom Lord Sumption and Lord Hughes agreed) in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 at [15] to [23]. I do not think that those principles assist BB. The language of the contract as amended by the Tumber schedule is clear. It provides only for interim payments up to valuation 23. As Lord Neuberger said at [19]:

> "The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language."

41. Paragraph 20 of Lord Neuberger's judgment is also apposite:

> "Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent

> term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

42. Commercial common sense can only come to the rescue of a contracting party if it is clear in all the circumstances what the parties intended, or would have intended, to happen in the circumstances which subsequently arose. In this case it is quite unclear whether the parties intended to extrapolate valuation and payment dates post-July 2015 from the Tumber schedule or from clauses 4.8 to 4.9. Indeed Mr Walker has not put forward either in his skeleton argument or in his oral submissions what the sequence of dates would be if the contract is construed as he says it should be construed.

43. As a fallback BB argue that if they fail on the express terms, then there must be an implied term providing for interim payments beyond July 2015.

44. In *BP Refinery (Westernport) Pty Limited v Shire of Hastings* (1977) 180 CLR 266 at 282-3 Lord Simon stated the general principles as follows:

> "for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

45. The leading authority of implication of terms is now, of course, *Marks and Spencer v BNP Parabis Securities Services Trust* [2015] UKSC 72; [2016] AC 742. Lord Neuberger (with whom Lord Sumption and Lord Hodge agreed) accepted Lord Simon's statement of principle, but at [21] added the following six comments:

> "First, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties

> would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care" to quote from *Lewison, The Interpretation of Contracts* 5th ed (2011), p 300, para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

46. In my view the present case falls far short of satisfying the requirements for implication of the proposed term. In particular, it is not obvious what the proposed term would say or what would be the critical dates for serving notices. Furthermore, the proposed term is not necessary to secure business efficacy. Nor can it be said that the contract would lack commercial or practical coherence without such a term.

47. Let me now draw the threads together. The contract as amended by the Tumber schedule provided for interim payments to stop at the contractual date for practical completion. There is neither an express term nor any implied term which enables BB to receive interim payments after valuation 23. BB will receive full payment for their work in due course, but they will have to wait until the final payment date as defined in clause 4.12 of the contract conditions.

48. In the result, therefore, I agree with the judge on this issue and reject the first ground of appeal. My answer to the question posed in this part of the judgment is no.

49. I must now consider whether the 1996 Act and the Scheme enable BB to recover interim payments after July 2015.

Part 6 – Do the 1996 Act and the Scheme enable BB to recover interim payments after July 2015?

50. I have set out the relevant provisions of the 1996 Act in Part 1 above. If the parties' contract did not comply with sections 109 and 110 of the 1996 Act, then paragraphs 2-7 of the Scheme would apply.

51. Ms Slow submits that the word "any" in section 109(1) of the 1996 Act means "all". Therefore the relevant provisions of the Scheme will apply if a construction contract fails to provide a regime of interim payments covering the whole of the work which the contractor performs.

52. Ms Slow prays in aid the decision of Eve J in *Clarke-Jervoise v Scutt* [1920] 1 Ch 382. That case concerned a tenancy agreement in which the tenant agreed not to plough "any grass land". Eve J construed that phrase broadly as meaning all land covered in grass either at the date of the demise or subsequently. He therefore treated the word "any" as meaning "all".

53. I readily understand, and respectfully agree with, the decision in that case. But the judge arrived at his conclusion specifically by reference to the context in which the word "any" appeared: see page 388. He was not saying that in every context "any" means "all".

54. I now return to section 109(1) of the 1996 Act. In that context I do not think that "any work" means "every single piece of work". In my view the subsection is a more general one saying that work done under construction contracts shall (except in very short projects) be subject to a regime of interim payments.

55. Section 109(2) gives the parties considerable latitude as to the system of interim payments which they may agree. They can decide for themselves the frequency of interim payments and the amounts to be paid. For example, the parties may agree that interim payments shall be less than the full value of work done. Indeed parties normally do agree that, so that the Employer holds retention monies, usually releasing half at practical completion and the other half when all defects have been made good.

56. We heard some interesting arguments as to whether contracting parties could frustrate Parliament's intention by agreeing a pitifully inadequate scheme of interim payments. Mr Nissen relied upon the following passage in the 10th Edition of *Keating on Construction Contracts*:

> "**18-106 Stage Payments**. Section 109 of the Act states that a party to a construction contract is generally entitled to payment by instalments, stage payments or other periodic payments for any work under the contract. The reference to "stage payments" would seem to permit payment by reference to the achievement of particular elements of the work. Further, there is no requirement as to when such payments are to be made; any arrangement which satisfies the definition will be sufficient. Thus a contract prescribing one periodic payment, even of an insignificant amount, would, it would seem, meet the requirements."

57. If the parties are going to exclude the operation of the Scheme, they must draw up a system of interim payments in good faith. I doubt that a cynical device to exclude the operation of the Scheme by prescribing one interim payment "of an insignificant amount" would suffice. But for present purposes, it is not necessary to decide whether that passage in *Keating* is correct. Suffice it to say that section 109(2) gives the contracting parties a wide measure of freedom as to the nature of the regime which they may agree.

58. In the present case the parties agreed a regime of twenty three interim payments stretching right up to the date specified for practical completion. I am quite satisfied that the contract, as amended by the Tumber schedule, satisfies the requirements of section 109.

59. Clause 4.14 of the contract provided an adequate mechanism for quantifying interim payments. Therefore the parties' contract, although unusual, satisfied the requirements of section 110.

60. In those circumstances the Scheme does not apply. BB cannot rely upon the 1996 Act and the Scheme to recover interim payments after July 2015. My answer to the question posed in this part of the judgment is no. I therefore reject the second ground of appeal.

61. I must turn finally to the question whether the parties reached a separate agreement for interim payments after valuation 23.

Part 7 – Did the parties reach a separate agreement for interim payments after valuation 23?

62. The judge has recited very fully the correspondence passing between the parties in the period May to December 2015. See paragraphs 16 to 21 and 39 of his judgment. I will not repeat that recitation.

63. The short answer to the third ground of appeal is this. The parties never agreed the terms upon which interim payments would be made. They did not agree the dates for valuations, notices and payments. Both parties treated those matters as essential elements of any contract. BB themselves put this point forcefully in their letter to Grove dated 30th September 2015, from which I have quoted in Part 2 above.

64. Mr Walker argued that Grove waived the need to agree on dates by issuing payment notice 24. I do not agree. Grove maintained their position in relation to dates and contractual terms. Grove issued the payment notice and made a payment to protect themselves against the risk of losing their right to withhold £2 million, if it turned out that their interpretation of the contract was wrong. In the event, BB still maintained that Grove had forfeited the right to withhold £2 million.

65. In agreement with the judge, I find it quite impossible to derive any fresh agreement between the parties from their conduct or their correspondence between May and December 2015.

66. Accordingly my answer to the question posed in this part of the judgment is no. I reject the third ground of appeal.

Part 8 – Conclusion

67. For the reasons set out in Parts 5, 6 and 7 above, I would reject all three grounds of appeal. If either of my Lords agree with me, this appeal will be dismissed.

Lord Justice Vos:

68. I shall not repeat the facts and background so clearly explained by Lord Justice Jackson. I only wish to deal myself with the first ground of appeal covered by Jackson LJ in Part 5 of his judgment, namely the attack on the judge's construction of the contract, as amended on 30th September 2013 (which I shall call the "Contract"). I shall also say something briefly about section 109 of the Housing Grants Constructions and Regeneration Act 1996 ("the 1996 Act").

Was the Contract ambiguous?

69. In order to decide if the meaning of the Contract is clear, it is necessary in this case to consider two primary questions: first, the effect that the agreement of the Schedule of 30th September 2013 (the "Tumber Schedule") had on the applicability of the terms in the JCT form (the "JCT form"), and secondly the meaning and effect of the Tumber Schedule itself.

70. I will start with the effect on the applicability of the terms in the JCT form. When the parties made their original contract, they had the option of agreeing to "Alternative A: Stage Payments" or "Alternative B: Periodic Payments". They chose Alternative A agreeing that the stage payments would be agreed "within 2 weeks from date of contract". It was common ground that clauses 4.8.2 and 4.13 of the JCT form were specifically applicable to Alternative A, and that clauses 4.8.3 and 4.14 were specifically applicable to Alternative B, so that by their original choice the parties had excluded the operation of clause 4.8.3 and 4.14. The first question is, therefore, whether when the parties agreed the Tumber Schedule, the effect of that agreement was to bring those clauses back into operation (and/or also, I suppose, to exclude the operation of clauses 4.8.2 and 4.13 that are specifically applicable to Alternative A). For a number of reasons, I have concluded that that must have been the result of the amendment that was agreed in the Tumber Schedule.

71. First, in the language of the JCT form, the Tumber Schedule is only referable to the agreement of "Periodic Payments" rather than "Stage Payments". I need not go into too much detail, but the columns in the Tumber Schedule are all referable to elements of what is provided for by clause 4.8.3 and 4.14. Alternative B provides in the period up to Practical Completion for "Interim Applications [to] be made at monthly dates specified in the Contract" (clause 4.8.3), and column 3 of the Schedule provides such monthly dates. Alternative B provides for monthly valuation dates as being the "specified date" which is the same as the date of the interim application (clause 4.8.3

and 4.14), whilst the Tumber Schedule provides for valuation dates that were in all but one case the day following the date for the interim application. The JCT form provides for the issue by the employer of a "Payment Notice" not later than 5 days after the "due date" (the later of the specified date and date the employer receives the interim application) (clauses 4.8.3 and 4.9.2), whilst the Tumber Schedule provides for Grove to provide an employer's certificate 3 working days after the valuation date (which comes to the same thing because of the intervention of a week-end in every case). Finally, the JCT form (as originally varied by the parties) provided for payment of the interim payment 28 days from its due date (clause 4.9.1), whilst the Tumber Schedule provided for a payment date 30 days from the specified valuation date. The Tumber Schedule does not specify or contemplate "stages" as envisaged by Alternative A and clauses 4.8.2 and 4.13.

72. Secondly, the valuation of each periodic payment envisaged by the Tumber Schedule had to be undertaken according to some known process. Neither party has suggested that any such process was available to the parties, save that contained in clause 4.14. There was no evidence that any of the 3 adjudications invoked clause 4.14, but it seems very likely that, had they involved an argument about the basis of the valuation, they would have done so. Certainly, the process envisaged by the Tumber Schedule cannot fit within the provisions of clause 4.13.

73. Thirdly, throughout the course of the Contract, it is clear that the parties operated the process envisaged by the parts of the JCT form that were applicable to both Alternatives A and B. The best example is the service of "Pay Less notices" envisaged by clause 4.10. The parties spent much time arguing about one of these notices and the consequence of it having been served late. They can only have done so on the basis that they understood that the JCT form applied to the process they were engaged upon.

74. It, therefore, seems to me that the inevitable consequence of the agreement of the Tumber Schedule was that the parties must be taken to have reversed the express decision taken in the original contract to elect for the applicability of Alternative A. By agreeing the Tumber Schedule, they opted to revert to the applicability of Alternative B and the re-introduction of clauses 4.8.3 and 4.14.

75. It is then necessary to ascertain the proper meaning of the Tumber Schedule itself. Grove submits that it is a free standing complete document that provides for each and every interim payment that is to be made under the Contract. BB submits that it cannot be so construed, partly because of the reintroduction of clauses 4.8.3 and 4.14, but also because that is not what it says on its face. I take the view that BB's submissions are to be preferred, for the following reasons.

76. First, the Tumber Schedule is silent as to whether the interim payments listed are the only interim payments envisaged. Secondly, the Tumber Schedule is headed "Interim Valuation/Payment Dates 2013-2015", which does not indicate whether or not there might be further interim payments due or to be agreed after 2015. I accept that the completion date was 22nd July 2015, but parties to any construction contract must be taken to know that the contract period may well be exceeded. Thirdly, the Tumber Schedule is headed "Valuation Application on Third Thursday of the month", as is reflected in the dates in the 3rd column headed "… Application Submission Date to Grove". The last date is understandably immediately before the agreed date for

completion, but the rubric about the third Thursday of the month would be quite unnecessary if the listed interim payment application dates were intended to be exhaustive. Moreover, there is no reason to suppose that interim payments were not envisaged after practical completion as would be normal and as was provided for by clause 4.8.3. Finally, on this point, I would mention, but not take into account since it is not strictly admissible, that it was clear from their conduct after the event that the parties both thought that interim payments remained due after those listed in the Tumber Schedule until Grove obtained legal advice to contrary effect.

77. Where then do these conclusions leave the proper construction of the Contract? In my judgment, they demonstrate that the Contract was indeed ambiguous. The parties obviously intended to reintroduce clauses 4.8.3 and 4.14, but varied the precise dates included in the JCT form for all interim payments listed in the Tumber Schedule. The Tumber Schedule is silent as to any future interim payments if practical completion were not reached on 22nd July 2015 (as in fact occurred). It could be that the Contract meant that the parties should revert to the strict wording of Alternative B and the JCT Form for interim payments after 22nd July 2015, and it could be that it meant that interim payments should continue after interim payment 23 on equivalent dates thereafter triggered on the third Thursday of every month by BB's application submission to Grove. It could be that the parties are to be taken as having agreed nothing after interim payment 23, save that they would later agree what process and what dates would apply to subsequent interim payments. But in my judgment, the Tumber Schedule is not clear enough to be construed as meaning, when taken together with the JCT form, that the parties must have intended that there would be no interim payments after interim payment 23.

78. In addition to the reasons I have already given, I take the view that clear words would be required for such a construction of the Tumber Schedule. In reality, such a construction would mean that BB would not be paid large sums for 2 or 3 years after the last interim payment. That is an uncommercial construction. There is no suggestion from the admissible factual matrix that the financing and security risks had been intended to pass in that way to BB after the expected completion date. Grove's submissions on incentives to complete on time are all pure speculation when the JCT form has detailed provisions that have that effect.

79. I accept, of course, as Jackson LJ has mentioned, that the Tumber Schedule was sent to Grove's representative by BB under cover of an email that recited "[p]lease find attached agreed schedule of valuation/payment dates for this project". But I do not think too much weight can be placed on this document that was apparently sent **after** the Tumber Schedule had been agreed. Moreover, the dates in the Tumber Schedule were the only ones actually specified "for the project", so those words cannot outweigh the proper meaning of the Tumber Schedule read together with the JCT form in the way I have suggested and taken against the background of the appropriate factual matrix.

80. In these circumstances, I cannot accept the judge's conclusion that the proper construction of the Tumber Schedule means that only 23 interim payments were to be made under the Contract. For the reasons I have given, I take the view that the Contract is ambiguous.

If the Contract is ambiguous, what is its proper construction?

81. The choice, I think, is between the process reverting to Alternative B for interim payments after 22nd July 2015, or interim payments continuing on equivalent dates triggered on the third Thursday of every month by BB's application submission to Grove, or there being a lacuna in the Contract as properly construed.

82. In my judgment, the key to this part of the case is not to be found in either section 109 of the 1996 Act or in a resort to an implied term, both of which have been relied upon by the parties. The key is to be found in the reintroduction of the parts of the JCT form that are applicable to Alternative B. There is no doubt, in my view, that the Tumber Schedule must be taken to have varied the JCT form including clauses 4.8.3 and 4.14 so as to substitute the specified dates for the specified date, the valuation date, the due date and the final payment date envisaged by the JCT form. In my judgment, the only sensible construction of what the parties agreed is to construe the Contract as if the Word "etcetera" were included at the end of the Tumber Schedule.

83. It makes no sense to imagine that the parties could have intended to revert to the dates specified in clauses 4.8.3 and 4.14, since they had taken so much time and trouble to agree a different regime. It makes no sense either to think that the parties would have intended the Scheme under the Scheme for Construction Contracts (England and Wales) Regulations 1998 to apply. It is, I think, obvious, that the parties only agreed 23 specific payments because that was the number of monthly payments that took them up to the date on which completion was expected. For all the reasons I have given, they must be taken to have intended those monthly interim payments to continue, and I see no reason to suppose they intended to revert to a regime of dates that they had expressly departed from in agreeing the Tumber Schedule. For my part, therefore, I would construe the Contract as meaning that interim payments would continue on equivalent monthly dates up to actual practical completion. It is permissible to have regard to business common sense in construing a Contract that is ambiguous and I would regard that common sense as pointing clearly to the construction I have reached.

84. A further question arises as to what the Contract provides for interim payments after practical completion. That does not arise in this case thus far. One may hope that parties will be able to agree a suitable regime. All I would say is that it is less obvious that the Contract must be construed as meaning that monthly interim payments were intended to continue in the same way after practical completion, when clause 4.8.3 provides for bi-monthly payments and when the Tumber Schedule ends at expected completion.

85. Since I do not think that, on a proper construction of the Contract, there was actually a lacuna, section 109 of the 1996 Act will not be applicable. As to the construction of section 109, I can, however, say that I am inclined to agree with Jackson LJ. I do not, therefore, think that it would have come to BB's aid had I not construed the contract as I have.

86. I have reached these conclusions without feeling the need to repeat the well-known principles of statutory construction most recently summarised by Lord Neuberger in *Arnold v. Britton* [2015] AC 1619. But I should say, perhaps, that I have had regard to these principles and do not think they are contravened by my construction. This is

a case somewhat akin to *Aberdeen City Council v. Stewart Milne Group Limited* [2012] SC (UKSC) 240 referred to by Lord Neuberger at paragraph 22 in *Arnold*, where Lord Hope said (also at paragraph 22) that the context showed that the intention of the parties was as he found it to be, and that it could be assumed that that was what the parties would have said if they had been asked about it at the time. The fact that it made good commercial sense was simply a makeweight. In that case, as in this, the words of the contract itself told the reader what must have been intended. Here the parties must have intended interim payments to continue on the same basis up to practical completion. No undue violence is required to the words the parties actually used to reach that construction.

87. I would allow this appeal.

Lord Justice Longmore:

88. To my mind the key to the question of construction is that the parties made no agreement about interim payments beyond the contents of the schedule. It is idle to speculate whether that was because they thought it was unnecessary or because they deliberately refrained from opening up the possibility that the performance would be delayed beyond the contractual completion date or because they thought they could safely leave the topic to be sorted out by lawyers at a subsequent date if necessary or because they did not think about it all.

89. I have therefore come to the conclusion that Jackson LJ is right when he says that no agreement was reached (or can be implied) as to what was to happen after the 23rd interim payment had been made. As he has pointed out there are just too many imponderables that are left in the air.

90. The judgment of Vos LJ makes a valiant attempt to fill in the imponderables by deciding that the parties "opted to revert" to the applicability of Alternative B. I cannot, with respect, agree; the parties had expressly agreed that Alternative B was not to be adopted. It is true that they found they could not reach agreement on Alternative A but that does not mean that they "opted to revert" to Alternative B which they had expressly agreed not to adopt in the first place. In my judgment, they made a new agreement and that new agreement covered the matters set out in the Tumber schedule and no more.

91. The effect of the construction preferred by Vos LJ is (as he is happy to acknowledge) to treat the schedule as if at the end it had added the rubric "etcetera". That effectively adds an important word which is additional to the agreement made by the parties and is, to my mind, an impermissible construction.

92. For these short reasons I agree with Jackson LJ on the point of construction (as on all other matters) and concur with him in dismissing this appeal.