Neutral Citation Number: [2017] EWCA Civ 1735

Case No: A1/2016/2893

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Queen's Bench Division, Technology & Construction Court
Mr Justice Edwards-Stuart
HT-2016-000089 & HT-2016-000096

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/11/2017

Before :

LORD JUSTICE JACKSON
LORD JUSTICE LINDBLOM
and
LADY JUSTICE THIRLWALL

- -

Between :

Adam Architecture Limited	**Claimant / Appellant**
- and -	
Halsbury Homes Limited	**Defendant / Respondent**

- -
- -

Justin Mort QC (instructed by **BLM**) for the **Appellant**
David Sears QC (instructed by **Myers Fletcher & Gordon Solicitors**) for the **Respondent**

Hearing date: Wednesday 11th October 2017

- -

Approved Judgment

Lord Justice Jackson :

1. This judgment is in seven parts, namely:

Part 1 – Introduction

2. This is an appeal by a firm of architects in litigation concerning its entitlement to recover fees following termination of its engagement. The principal issue in this appeal is whether Section 111 of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act") applies only to interim payments or whether it also applies to payments due following completion of the works or termination of the contract.

3. Section 111 applies to every construction contract within the scope of the 1996 Act. Therefore the question of statutory interpretation at the heart of this appeal is of wide importance to the construction industry.

4. The firm of architects which is seeking to recover outstanding fees is Adam Architecture Limited. That firm is claimant in proceedings under Part 7 of the Civil Procedure Rules ("CPR") to enforce an adjudicator's award, defendant in related proceedings brought by the employer under Part 8 of the CPR, and appellant in this court. I shall refer to it as "Adam".

5. The employer is Halsbury Homes Limited. That company is defendant in the Part 7 proceedings, claimant in the Part 8 proceedings and respondent in this court. I shall refer to it as "Halsbury".

6. Sections 109 to 111 of the 1996 Act, as amended with effect from 1st October 2011, 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 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.
>
> (1A) The requirement in subsection (1)(a) to provide an adequate mechanism for determining what payments become due under the contract, or when, is not satisfied where a construction contract makes payment conditional on –
>
> (a) the performance of obligations under another contract, or
>
> (b) a decision by any person as to whether obligations under another contract have been performed.

(1B) In subsection (1A)(a) and (b) the references to obligations do not include obligations to make payments (but see section 113).

(1C) Subsection (1A) does not apply where –

(a) the construction contract is an agreement between the parties for the carrying out of construction operations by another person, whether under sub-contract or otherwise, and

(b) the obligations referred to in that subsection are obligations on that other person to carry out those operations.

(1D) The requirement in subsection (1)(a) to provide an adequate mechanism for determining when payments become due under the contract is not satisfied where a construction contract provides for the date on which a payment becomes due to be determined by reference to the giving to the person to whom the payment is due of a notice which relates to what payments are due under the contract.

(2) …

(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.

110A Payment notices: contractual requirements

(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

(b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.

(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.

(3) A notice complies with this subsection if it specifies-

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

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

(4) For the purposes of this section, it is immaterial that the sum referred to in subsection (2)(a) or (b) or (3)(a) may be zero.

(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.

(6) In this and the following sections, in relation any payment provided for by a construction contract-

"payee means the person to whom the payment is due;

"payer" means the person from whom the payment is due;

"payment due date" means the date provided for by the contract as the date on which the payment is due;

"specified person" means a person specified in or determined in accordance with the provisions of the contract.

110B Payments notices: payee's notice in default of payer's notice

(1) This section applies in a case where, in relation to any payment provided for by a construction contract-

(a) the contract requires the payer or a specified person to give the payee a notice complying with section 110A(2) not later than five days after the payment due date, but

(b) notice is not given as so required.

(2) Subject to subsection (4), the payee may give to the payer a notice complying with section 110A(3) at any time after the

date on which the notice referred to in subsection (1)(a) was required by the contract to be given.

(3) Where pursuant to subsection (2) the payee gives a notice complying with section 110A(3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the date referred to in subsection (2) that the notice was given.

(4) If –

(a) the contract permits or requires the payee, before the date on which the notice referred to in subsection (1)(a) is required by the contract to be given, to notify the payer of a specified person of –

(i) the sum that the payee considers will become due on the payment due date in respect of the payment, and

(ii) the basis on which that sum is calculated, and

(b) the payee gives such notification in accordance with the contract,

that notification is to be regarded as a notice complying with section 110A(3) given pursuant to subsection (2) (and the payee may not give another such notice pursuant to that subsection).

111 Requirement to pay notified sum

(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 of 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.

(8) Subsection (9) applied where in respect of a payment-

(a) a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract (and no notice under subsection (£) is given), or

(b) a notice under subsection (3) is given in accordance with this section.

but on the matter being referred to adjudication the adjudicator decides that more than the sum specified in the notice should be paid.

(9) In a case where this subsection applies, the decision of the adjudicator referred to in subsection (8) shall be construed as requiring payment of the additional amount not later than-

(a) seven days from the date of the decision, or

(b) the date which apart from the notice would have been the final date for payment,

whichever is the later.

(10) Subsection (1) does not apply in relation to a payment provided for by a construction contract where-

(a) the contract provides that, if the payee becomes insolvent the payer need not pay any sum due in respect of the payment, and

(b) the payee has become insolvent after the prescribed period referred to in subsection (5)(a).

(11) Subsections (2) to (5) of section 113 apply for the purposes of subsection (10) of this section as they apply for the purposes of that section."

7. Prior to 1st October 2011, sections 109 to 111 of the 1996 Act provided 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 under 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.

(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 contact such provision as is mentioned in subsection (1) or (2), the relevant provisions of the Scheme for Construction Contracts apply.

111 Notice of intention to withhold payment.

(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 the 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.
>
> (3) The parties are free to agree what that prescribed period is to be.
>
> In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts.
>
> (4) Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than-
>
> (a) seven days from the date of the decision, or
>
> (b) the date which apart from the notice would have been the final date for payment,
>
> whichever is the later."

8. I shall refer to the 1996 Act in its present form as "the current version". I shall refer to the 1996 Act as it was before 1st October 2011 as "the old version".

9. The scheme contained in the schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998 is usually referred to as "the Scheme". I shall follow that convention.

10. I shall refer to a notice served pursuant to section 111(3) of the current version of the 1996 Act or pursuant to section 111(1) of the old version of the 1996 Act as a "pay less" notice.

11. The "Conditions of Appointment for an Architect" published by the Royal Institute of British Architects are commonly referred to as "the RIBA Conditions". All references to those conditions in this judgment are references to the 2012 edition, incorporating amendments made in September 2011 and January 2012.

12. The RIBA Conditions include the following provisions:

> "***Payment notices***
>
> 5.14 The Architect shall issue payment notices at the intervals specified in the schedule of Fees and expenses.
>
> Each notice shall comprise the Architect's account setting out the sum that the Architect considers to be due at the payment due date including all accrued instalments of the fee and other amounts due, less any amounts previously paid and stating the basis on which that sum is calculated, which shall be "the notified sum". The payment due date shall be the date of the Architect's payment notice. Instalments of fees shall be

calculated on the Architect's reasonable estimate of the percentage of completion of the Services or stages or other services or any other specified method.

The Client shall pay the notified sum within 14 days of the date of issue of the relevant notice (which shall be the "final date for payment") unless:

(a) The Architect has become insolvent (as defined in the Construction Acts at any time between the last date on which the Client could have issued the Notice under 5.15 and the final date for payment);

(b) The Client issues a notice under 5.15.

Otherwise the amount due and payable shall be the notified sum. The Client shall not delay payment of any undisputed part of the notified sum,

The Architect shall submit the final account for fees and any other amounts due when the Architect reasonably considers the Services have been completed.

Notice of intention to pay less

5.15 If the Client intends to pay less than the notified sum the Client shall give a written notice to the Architect not later than five days before the final date for payment specifying the amount that the Client considers to be due on the date the notice is served, the basis on which that sum is calculated and, if any sum is intended to be withheld, the ground for doing so or, if there is more than one ground, each ground and the amount attributable to it. The Client shall on or before the final date for payment make payment to the Architect of the amount if any specified in the written notice.

If no such notice is given the amount due and payable shall be the notified sum stated as due in the Architect's account. The Client shall not delay payment of any undisputed part of the account. If the Client issues such a notice and the matter is referred to an adjudicator who decides that an additional sum greater than the amount stated in the notice of intention to pay less is due, the Client shall pay that sum within seven days of the date of the decision or the date which apart from the notice would have been the final date for payment.

…

Payment on suspension or termination

5.17 If the Architect or the Client suspends performance of any or all of the Services or terminates performance of the Services

> and/or other obligations the Architect shall issue an account or accounts as soon as reasonably practicable and the Architect shall be entitled to:
>
> 5.17.1 payment of any part of the fee and other amounts properly due to the date of the last instalment and a fair and reasonable amount up to the date of termination or suspension; and
>
> 5.17.2 payment of any licence fee due under clause 6; and
>
> 5.17.3 reimbursement of any loss and/or damages caused to the Architect by reason of the suspension of the termination, save where the Client gives notice of suspension or termination by reason of the material or persistent breach of the Agreement by the Architect.
>
> …
>
> ***Termination***
>
> 8.2 The provisions for termination are:
>
> 8.2.1 The Client or the Architect may by giving reasonable notice to the other terminate performance of the Services and/or other obligations, stating the reasons for doing so and the Services and obligations affected."

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

Part 2 – The facts

14. Halsbury is a property developer. Adam is an architectural practice which has worked for Halsbury on a number of development projects.

15. In 2015 Halsbury was proposing to construct 200 homes on land at Loddon in Norfolk. Adam did some preliminary work in relation to that development and received payments.

16. Halsbury wished to complete the design work and invited Adam to submit a fee proposal. On 7th October 2015 Adam duly submitted its fee proposal. Adam proposed to divide its work and its fees into four stages as follows:

Stage 1: Site analysis and feasibility	£12,750
Stage 2: Develop layout	£23,125

Stage 3: Design development	£66,650
Stage 4: Reserved matters planning application	£53,750
Total	£156,275

Adam stated that its appointment would be subject to the RIBA Conditions.

17. By letter dated 19th October 2015, Halsbury accepted the proposal and indicated its preferred housing mix. Adam duly set to work on the project.

18. On 2nd December 2015 David Bryant of Halsbury sent the following email to Adam:

> "As discussed with yourself and Jonathan approx 3 weeks ago we are utilising both Robert Adam Architects and Vince Douglas who is a local Architect for this scheme.
>
> I have now agreed that we will be using his Layout for this scheme and incorporating the various House styles that have been drawn for this development.
>
> We are not totally against including a dutch gable but both Phillip and I do not like the version you have included on the 3 Bed Detached house type, it does not appear to follow the style of that used on the Trowse development.
>
> We want to work with you on this Development and to include the House styles you have drawn but will utilise ASD as the Architect who will prepare the application and with the benefit of their in house Engineering practice will have the ability to coordinate all of the Road and Sewer designs, Roundabout, realignment of George Lane, Play area and other associated technical matters."

19. Mr Robert Adam of Adam responded six minutes later as follows:

> "Thank you for the note. This is not quite how I understood the relationship between ASD and ourselves was to develop. We had discussed engineering input from ASD but the layout design to come from us. As I have noted before, we design places, we do not assemble house types and the design of the layout is an essential part of that. If we have no input on the layout then there is really no place for us in this project."

Ten minutes after that Mr Jonathan Fox of Adam sent an email to Halsbury stating that he had been instructed to stop work. All work duly stopped.

20. On 3rd December 2015 Adam sent the following letter to Halsbury:

> "Following David Bryant's notification to us on 2nd December 2015 that we are no longer to be responsible for the masterplan at Loddon, our original scope of work is void. Our fee proposal of 7th October 2015 provided for a full service, from Site Analysis and Feasibility work through to preparation of material for the Reserved Matters Planning Application. Work was initiated under this proposal in October including the preparation of a draft layout for discussion at the Design Team Meeting held on 29th October 2015.
>
> During November, we made frequent requests for input and comment on the layout. None was forthcoming. In parallel, given the deadline for submitting the planning application, you asked us to progress the House Types. We had every expectation that we would continue to work together on the layout as confirmed in our Design Team Meeting notes dated 29th October 2015. This is clearly no longer the case.
>
> This represents a break in our anticipated design brief and, as we will not wish to work other than with our own layout, casts our continued involvement into doubt. Our agreed fee is no longer relevant and, all other matters considered, we need to draw a line under our work to date. Our invoice is enclosed which is due for payment by 24th December 2015."

21. The invoice enclosed with that letter claimed £46,239 for work done up to 2nd December. It was made up as follows: £12,750 for work on Stage 1; £2,313 for work done on Stage 2; £22,220 for work done on Stage 3; £1,246.25 for work done on proving layout; expenses £3.40.

22. Subsequently there was a separate agreement under which Adam did a small amount of further work, but nothing turns on that.

23. Halsbury failed to serve any pay less notice. Halsbury also failed to pay Adam's invoice for work done up to 2nd December 2015.

24. Adam commenced an adjudication to recover payment of £46,239 in respect of its December invoice and £747 in respect of an earlier invoice dated 21st October 2015. Adam gave credit for the sum of £1,246 for reasons explained in a credit note dated 18th January 2016.

25. The adjudicator found in favour of Adam, essentially because Halsbury had failed to serve any pay less notice in respect of either invoice. The adjudicator awarded £45,490 plus interest and costs.

26. Invigorated after their preliminary skirmish, both parties embarked upon the present proceedings.

Part 3 – The present proceedings

27. In April 2016 each party issued proceedings against the other in the Technology and Construction Court. Halsbury issued a claim under CPR Part 8 for declarations that:

    i) The pay less regime did not apply to the December invoice;

    ii) Halsbury was not liable to pay that invoice;

    iii) The adjudicator's decision was unenforceable.

    Adam issued proceedings under CPR Part 7 to enforce the adjudicator's decision.

28. Mr Justice Edwards-Stuart, the judge in charge of the Technology and Construction Court, held a hearing on 23rd May and 24th June 2016 to deal with Halsbury's application for declarations and Adam's application for summary judgment to enforce the adjudicator's decision. It was obviously sensible case management to deal with both matters at the same time.

29. Mr Robert Stevenson, who appeared for Adam, argued that under paragraphs 5.15 and 5.17 of the RIBA Conditions Adam was entitled to payment in full on its invoices, since Halsbury had failed to serve any pay less notice.

30. Ms Jessica Stephens for Halsbury argued that the contract had come to an end by 3rd December 2015, alternatively if still in existence the contract did not require the service of a pay less notice in respect of the Adam's invoice dated 3rd December 2015, because that was a final account.

31. The judge handed down his reserved judgment in both actions on 27th June 2016. That was just two months after the start of the litigation. The judge found in favour of Halsbury. He granted declarations as sought by Halsbury and dismissed Adam's various claims.

32. I would summarise the judge's findings and conclusions as follows:

    i) Halsbury's email to Adam dated 2nd December 2015 was a repudiation of the contract of engagement.

    ii) Adam accepted the repudiation by (a) its two emails of 2nd December, (b) stopping work on 2nd December, (c) its letter dated 3rd December with the invoice dated 30th November attached.

    iii) Even though Halsbury did not intend to pay the invoiced sum, it was not contractually required to serve a pay less notice, for three separate reasons:

        a) The contract had been discharged, so that neither party was required to perform its primary obligations under the contract.

b) The invoice sent on 3rd December was a final account within the meaning of the last sentence of clause 5.14 of the RIBA Conditions, with the consequence that the invoiced sum was not "the notified sum" as defined in the first sentence of clause 5.14.

c) The invoice sent on 3rd December was a termination account under clause 5.17 of the RIBA Conditions, with the consequence that the invoiced sum was not "the notified sum" as defined in the first sentence of clause 5.14.

iv) Accordingly Halsbury was entitled to the declaration which it sought.

v) In those circumstances, the issue upon which the adjudicator had reached his temporarily binding decision was now finally decided.

vi) Therefore the court would not enforce the adjudicator's decision, but would instead dismiss Adam's claim in the enforcement proceedings.

33. Adam was aggrieved by the judge's decision. Accordingly it appealed to the Court of Appeal.

Part 4 – The appeal to the Court of Appeal

34. By an appellant's notice dated 16th July 2016, Adam appealed to the Court of Appeal on three grounds, which I would summarise as follows:

i) Even though the contract of engagement only required pay less notices in respect of interim applications, section 111 of the 1996 Act required pay less notices in respect of both interim applications and any final account or termination account.

ii) The judge erred in his decision on repudiation. Alternatively, he ought not to have dealt with that complex issue in Part 8 proceedings.

iii) The court has not decided the dispute which was the subject of adjudication. Therefore the court ought to have enforced the adjudicator's decision.

35. Both parties instructed new counsel for the appeal. Mr Justin Mort QC now represents Adam and Mr David Sears QC now represents Halsbury.

36. The appeal came on for hearing on 11th October 2017. Mr Sears took a preliminary point that Adam should not be permitted to advance its first ground of appeal. Mr Sears said that Adam had not relied upon section 111 of the 1996 Act below, so he should not be permitted to do so in this court. Indeed, said Mr Sears, Adam's advocate had positively abandoned that line of argument in answer to a question from the judge.

37. Neither counsel before this court had appeared below, so they had no personal knowledge of what their predecessors said. Fortunately, however, there is a reliable record of what Adam conceded. That reads as follows:

> "AA specifically conceded at the outset of the hearing that it did not seek to argue that the payment provisions of the parties' agreement were non-compliant with the statutory payment provisions set out in the Housing Grants, Construction and Regeneration Act 1996 (as amended)."

38. Mr Mort accepts that his predecessor made that concession. He does not seek to retract it. He said in answer to Mr Sears' submission that he accepts that the contract of engagement complies with the statutory requirements.

39. It seems to me that the true position is this. In the court below either Adam did not rely upon section 111 of the 1996 Act, or it only did so faintly. Now Mr Mort wishes to put section 111 at the forefront of his case. He is not, however, going back on the concession which his client has previously made.

40. If this court is dealing with a dispute about payments due in relation to a construction project, it is unrealistic for us to ignore the relevant provisions of the 1996 Act. We must decide the dispute between the parties in accordance with the law. We would do a disservice to the construction industry if we give a judgment which disregards the relevant statutory provisions. All relevant facts and material are before the court. Both counsel have produced excellent skeleton arguments. Both understand precisely the case which they have to meet.

41. Having dealt with that preliminary point, I must now turn to the first ground of appeal, which concerns the effect of section 111 of the 1996 Act.

Part 5 – Ground 1: The effect of section 111 of the 1996 Act

42. Mr Mort submits that section 111 of the 1996 Act applies not only to interim payments during the course of a building project, but also to payments due under a final account or a termination account when the building contractor or construction professional has completed or ceased work.

43. Mr Sears challenges that submission. He points out that section 109 of the Act is limited to "payment by instalments, stage payments or other periodic payments". He submits that sections 110 to 111 are similarly limited in their scope.

44. Mr Sears refers to the Latham Report and a number of textbooks, all of which make clear that the principal objective of the 1996 Act is to maintain the cash-flow to contractors and subcontractors during the course of a project. I accept that interim payments are the principal target of the statutory provisions. On the other hand, as Mr Sears concedes, none of the textbooks say that section 111 applies only to interim payments.

45. Let me begin by looking at the language of the statute. Section 109 is expressly limited to interim payments. Both the heading of section 109 and the express words of subsection (1) make that clear. The same is not true of sections 110, 110A, 110B and 111. Those sections like their headings, talk about "payment", not "interim payment" or some synonym for interim payment.

46. Section 109(4) is also significant. The word "include" makes it clear that sections 110 to 111 are wider in their scope than section 109.

47. There is an important distinction between sections 109 to 110A on the one hand and sections 110B to 111 on the other hand. Sections 109, 110 and 110A set out what a contract must say. If the contract does not comply, then the relevant provisions of the Scheme are incorporated into the offending contract. Sections 110B to 111, by contrast, do not dictate what the contract must say. Instead those two sections set out, in somewhat convoluted language, what the parties may or must do in certain situations.

48. If I look at the language of the statute, both as it was and in the current version, it seems to me clear that section 111 relates to all payments which are "provided for by a construction contract", not just interim payments. I do not think that it is permissible to read into that perfectly sensible and workable provision words which are not there.

49. Let me now put down the statute and turn to the authorities cited by counsel. In *Rupert Morgan Building Services (LLC) Ltd v Jervis and another* [2003] EWCA Civ 1563; [2004] 1 WLR 1867 a building contractor sought to recover payment on an interim certificate. The employer had not served a pay less notice under section 111 of the 1996 Act. The contractor obtained summary judgment. The Court of Appeal upheld that decision.

50. Jacob LJ, with whom Schiemann LJ agreed, discussed the impact of section 111 on both interim and final certificates. He said:

> "9. The time period during which matters can be checked before the final certificate is to be issued is much longer than that for interim certificates. That is as one would expect. In this case it is essentially three months. In practice therefore a final certificate is more likely to be accurate than an interim certificate. But nothing actually turns on this for it is common ground that section 111(1) applies to both interim and final certificates.
>
> 10. It was the debate about a final certificate which brought out the true nature of the provision. Suppose a final certificate included items not done or charged for twice and the time for serving a withholding notice has passed. An obvious concern would arise if the provision had the effect of not only requiring the client to pay for such items, but was conclusive. The section would override the contractual term specifically saying certificates are not conclusive. But the section does not say that failure to service a withholding notice creates an irrebuttable presumption that the sum is in the final analysis properly payable. It merely says the paying party "may not withhold payment…of a sum due". This throws one back to the contract to find the answer to how the sum is determined and when it is due."

51. At paragraph 11 he added:

> "…In the absence of a withholding notice, section 111(1) operates to prevent the client withholding the due sum. The contractor is entitled to the money right away. The fundamental thing to understand is that section 111(1) is a provision about cash-flow. It is not a provision which seeks to make any certificate, interim or final, conclusive."

In other words the employer must pay the sum stated to be due and argue about it afterwards. After any subsequent arbitration, litigation, mediation or other dispute resolution procedure, the employer can recover any amount which it has overpaid.

52. In *Rupert Morgan* the Court of Appeal was considering the old version of the 1996 Act. Mr Mort submits that the court's observations about section 111 of the Act were correct and they are equally applicable to the current version of the Act. Mr Sears submits that those observations were obiter and wrong.

53. I am bound to say that the Court of Appeal's analysis of the 1996 Act, as it stood in 2003, seems to me to make good sense. Also it is consistent with the adjudication provisions. A contractor is entitled to refer issues concerning interim payments or the final account to adjudication. The adjudicator will reach a temporarily binding decision. The employer must pay whatever the adjudicator orders, but can argue about it later and claw back any overpayment.

54. The next authority, which has been the subject of much debate in the present appeal, is *Melville Dundas Ltd (in receivership) and others v George Wimpey UK Ltd and another* [2007] UKHL 18; [2007] 1 WLR 1136. This case, like *Rupert Morgan*, proceeded on the old version of the 1996 Act. Before the House of Lords both parties accepted that section 111 of the Act applied to both interim and final certificates. Lord Neuberger recorded that concession at paragraph 76 of his judgment and said that the concession was well founded. No member of the House of Lords said that the concession was not well founded.

55. It is on this unpromising foundation that Mr Sears seeks to build his case that section 111 applies only to interim payments. Let me therefore summarise the facts of *Melville Dundas* and then seek out the ratio.

56. There was a building contract for the construction of a residential development in Glasgow, dated March 2002. The contract incorporated the Standard Form JCT Conditions 1998. This provided for monthly interim payment applications, with payment due 14 days later unless the employer served a pay less notice 5 days before the final date for payment (i.e. 9 days after the interim application). On 2nd May 2003 the contractor submitted an interim payment application for work done up to 30th April. The employer did not serve a pay less notice. At the time there was no reason to do so. Unfortunately, on 22nd May administrative receivers of the contractor were appointed by its bank. On 30th May the employer determined the contract under clause 27.3.4 of the conditions. The contractor claimed the sum certified as due on its interim application, namely £396,630. The employer, relying on clause 27.6.5.1 of the conditions, maintained that, following the determination, no further payment was due

to the contractor until there was a final reckoning after others had completed the works.

57. The judge dismissed the contractor's claim. The Inner House allowed the contractor's appeal. The employer appealed to the House of Lords. The House of Lords by a majority of 3:2 allowed the employer's appeal. The majority held that the provisions of Part II of the 1996 Act (as it then stood) did not invalidate the effect of clause 27.6.5.1. The majority comprised Lord Hoffmann, Lord Hope and Lord Walker. Lord Walker expressed himself to be in full agreement with the reasons given by Lord Hoffmann for allowing the appeal. I must therefore turn to the speech of Lord Hoffmann in my quest for the ratio of the House of Lords' decision.

58. The essence of Lord Hoffmann's reasoning was as follows:

    i) If the contractor's employment is determined in consequence of the appointment of a receiver, then under clause 27.6.5.1 the employer has no further liability to make interim payments to the contractor.

    ii) In the present case it was not possible for the employer to serve a withholding notice by the due date under section 111(1) of the 1996 Act (11th May 2003) because the employer did not know about the appointment of receivers until 22nd May 2003.

    iii) The law does not compel people to do that which is impossible.

    iv) Therefore "section 111(1) should be construed as not applying to a lawful ground for withholding payment of which it was in the nature of things not possible for notice to have been given within the statutory time frame".

59. *Melville Dundas* was, therefore, a case about interim certificates and the operation of section 111 in relation to such certificates. It was not a case about final certificates or termination certificates. Undaunted by this circumstance, Mr Sears argues ingeniously that Lord Hoffmann held that section 111 does not apply to final certificates. He bases this submission on paragraph 21 of Lord Hoffmann's speech. That is a paragraph in which Lord Hoffmann considers and rejects other possible solutions to the problem before the Judicial Committee. In the course of paragraph 21 Lord Hoffmann expresses an opinion that the concept of "final date for payment" only applies to interim payments. That paragraph contains no discussion about the impact, or lack of impact, of section 111 on final accounts. It does not consider *Rupert Morgan* or the various arguments deployed on the present appeal. Furthermore, that paragraph is not part of the ratio of the decision. It does not form part of the chain of reasoning which I have summarised in paragraph 58 above.

60. Mr Sears is on firmer ground when he comes to the speech of Lord Hope. Although Lord Hope does not criticise the concession or the common basis on which both parties argued the appeal, he nevertheless indicates the view that section 111 only applies to interim payments: see [41] – [42]. Mr Sears is correct in that submission, but one swallow does not make a summer. Furthermore, Lord Hope's comments about section 111 do not form part of the ratio of the House of Lords' decision.

61. Four years after that decision Parliament amended the 1996 Act in the manner set out in Part 1 above. Section 111(10) specifically addresses the problem which arises on insolvency, as identified by the House of Lords in *Melville Dundas*.

62. The next authority cited by counsel is *Harding (trading as M.J. Harding Contractors) v Paice and another* [2015] EWCA Civ 1231; [2016] 1 WLR 4068. That case proceeded on the current version of the 1996 Act. The claimant building contractor sought an injunction to restrain the employer from proceeding with an adjudication to determine the sum properly due to the contractor following termination of the contract. The basis of the claim was that a previous adjudicator ordered the employer to pay the full amount shown as due on the contractor's final account pursuant to section 111 of the 1996 Act. That was because of the employer's failure to serve a valid pay less notice.

63. Mr Justice Edwards-Stuart dismissed the claim. The contractor appealed to the Court of Appeal, which dismissed the appeal. The court held that the employer's failure to serve a pay less notice meant that the employer had to pay the full amount shown on the contractor's account and argue about the figures later. The employer duly paid that sum. The employer was now entitled to proceed to adjudication in order to determine the correct value of the contractor's claims and the employer's counterclaims.

64. In *Harding* both parties accepted that section 111 of the Act applied to the final certificates as well as interim certificates. By coincidence, Mr David Sears QC appeared for the employer, as he has done in the present case. He did not seek to argue (either in reliance on *Melville Dundas* or otherwise) that his client could escape from the tentacles of section 111, because that provision only applied to interim certificates.

65. Let me now draw the threads together. Section 111 of the 1996 Act applies to both interim and final applications for payment. I reach this conclusion on the basis of the clear words of the Act and also in the light of the authorities cited. Therefore if Halsbury wished to resist paying Adam's final account or termination account, then (subject to the repudiation issue) it was obliged to serve a pay less notice. I therefore uphold the first ground of appeal.

Part 6 – Ground 2: Repudiation

66. The judge held that Halsbury's email of 2nd December 2015 was a repudiatory breach of contract. Mr Sears submits that this was a mixed finding of fact and law, with which the Court of Appeal should not interfere.

67. Mr Sears accepts that Halsbury was entitled to terminate the contract of engagement upon reasonable notice. In answer to a question from the court, he suggested that one month would be a reasonable period of notice. He argued that to terminate without any notice was a breach going to the root of the contract.

68. Mr Mort emphasised that under clause 8.2 of the RIBA Conditions Halsbury had an unfettered right to terminate the contract of engagement. He submitted that the mere failure to give due notice would be a breach of contract, but not a repudiation.

69. On this issue I shall assume, without deciding, that Mr Sears' submissions are correct and that Halsbury's email of 2nd December 2015 was a breach going to the root of the contract.

70. Even making that assumption, I do not think that Adam accepted any repudiatory breach. Adam treated the email of 2nd December 2015 as a termination of the engagement without the appropriate notice. Hence it stopped work and notified Halsbury that it was doing so. Adam promptly sent an invoice for all work done up to 2nd December, the date of termination. That invoice claimed payment for work done at the contractual rates. Although the invoice was carefully drawn, it contained one error which Adam subsequently corrected by means of a credit note. It can be seen from the correspondence that Adam was being scrupulous to claim the sums which were due under the contract of engagement for work actually done, but no more. Adam's expressions of dismay in correspondence at the turn of events does not change the legal character of what occurred.

71. I regard the invoice which Adam sent to Halsbury on 3rd December 2015 as an account following termination pursuant to clause 5.17 of the RIBA Conditions. If that analysis is too legalistic, the invoice was simply a bill for work done to date following Adam's cessation of work. Either way it was a claim for money due under the contract. It was not a claim for damages for breach of contract.

72. Adam had the benefit of the statutory payment regime, upon which it successfully relied in a subsequent adjudication. I do not accept that Adam shot itself in the foot by putting an end to the very contractual provisions upon which it was relying.

73. In those circumstances and in the absence of any pay less notice, Adam had a cast iron case to recover payment on both of its outstanding invoices.

74. As a consequence of those findings, it is not necessary to consider the third ground of appeal in any detail. The adjudicator's decision was plainly correct and enforceable.

Part 7 – Conclusion

75. Argument in the Court of Appeal has taken a different course from that in the court below. It is unsurprising, therefore, that I reach a different conclusion from the judge.

76. For the reasons set out in Parts 5 and 6 above, I would allow this appeal. I would dismiss Halsbury's Part 8 proceedings and give summary judgment in favour of Adam in the Part 7 proceedings.

Lord Justice Lindblom :

77. I agree.

Lady Justice Thirlwall :

78. I also agree.