Neutral Citation Number: [2018] EWCA Civ EWCA 2448 (Civ)

Case No: A1/2018/0649

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Mr Justice Coulson
[2018] EWHC 123 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2018

Before:

LORD JUSTICE LONGMORE
LADY JUSTICE KING
and
SIR RUPERT JACKSON

- -

Between :

S&T(UK) Limited	**Appellant**
- and -	
Grove Developments Limited	**Respondent**

- -
- -

Anthony Speaight QC and Matthew Thorne (instructed by **Trowers & Hamlins Llp**) for the **Appellant**
Alexander Nissen QC (instructed by **Macfarlanes Llp**) for the **Respondent**

Hearing dates: Tuesday 9th and Wednesday 10th October 2018

- -

Approved Judgment

Sir Rupert Jackson :

1. This judgment is in nine parts, namely:

Part	Paragraphs
Part 1 – Introduction	Paragraphs 2 – 12
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Part 3 – The Litigation in the Technology and Construction Court	Paragraphs 28 – 32
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Part 6 – First Issue: Was the Purported Pay Less Notice Valid and Effective?	Paragraphs 46 – 59
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Part 1- Introduction

2. This is an appeal by a building contractor against a decision by Mr Justice Coulson that the contractor is not entitled to recover an interim payment of some £14 million. There are three issues in the appeal. They are:

   i) Whether the employer's purported Pay Less Notice sent in response to interim application 22 complied with the contractual requirements.

   ii) Whether the employer is entitled to pursue a claim in adjudication to determine the correct value of the works on the date of interim application 22.

   iii) Whether, in April 2017, the employer complied with the contractual requirements in order to maintain its claim for liquidated damages.

3. The second of those three issues is one of great importance to the construction industry. It is an issue upon which there are conflicting decisions of High Court judges. Because of my decision on the first issue, the second issue has become academic. Nevertheless, I shall deal with it, because it has been fully argued and the parties have asked the court to decide the second issue in any event. Both the profession and the industry need to know which of the conflicting High Court decisions are correct. The first and third issues, by contrast, turn on the particular facts of this case.

4. The contractor in this case is S&T(UK) Limited ("S&T"). S&T has been the referring party in three adjudications. In the subsequent litigation S&T is claimant in one action and defendant in the other. It is the appellant before this court.

5. The employer is Grove Developments Limited ("Grove"). Grove was the responding party in the three adjudications. In the subsequent litigation, Grove (like S&T) is claimant in one action and defendant in the other. It is the respondent in this court.

6. I shall refer to the Housing Grants, Construction and Regeneration Act 1996 in its original form as "HGCRA". This Act came into force on 1st May 1998. I shall refer to the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009, as "the Amended Act". The Amended Act applies to construction contracts entered into on or after 1st November 2011.

7. The payment regime and adjudication regime which that legislation introduced now play a critical role in the functioning of the construction industry. The payment rules lead to prompt interim payments by employers to main contractors and by main contractors to subcontractors. The adjudication regime leads to the early resolution of many disputes without the need for formal arbitration or litigation. Adjudications are swift. They are generally completed within 28 days. There is a limit to how much money people can spend on their disputes within that limited time frame. Overall the payment regime and the adjudication regime have been successful. At least fourteen overseas jurisdictions (including New Zealand, Malaysia, Singapore and most Australian states or territories) have adopted similar rules, with greater or lesser variations according to their local circumstances.

8. The Appendix to this judgment sets out sections 108-111 of the HGCRA and sections 108-111 (omitting section 108A) of the Amended Act.

9. I shall refer to the Scheme for Construction Contracts mentioned in sections 108(5) and 110(3) of the HGCRA and sections 108(5) and 110A(5) of the Amended Act as "the Scheme".

10. Paragraph 20 of the Scheme under the Amended Act provides:

> "20. The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute. In particular, he may-
>
> (a) open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive,
>
> (b) decide that any of the parties to the dispute is liable to make a payment under the contract (whether in sterling or some other currency) and, subject to section 111(9) of the Act, when that payment is due and the final date for payment,
>
> (c) having regard to any term of the contract relating to the payment of interest decide the circumstances in which, and the rates at which, and the periods for which simple or compound rates of interest shall be paid."

11. I shall refer to the notice mentioned in section 110(2) of the HGCRA and in section 110A(1) and (2) of the Amended Act as a "Payment Notice". I shall refer to the notice mentioned in section 111(1) and (2) of the HGCRA as a "Withholding Notice". I shall refer to the notice mentioned in section 111(3) and (4) of the Amended Act as a "Pay Less Notice". I shall refer to the Technology and Construction Court as the "TCC".

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

Part 2- The Facts

13. By a contract dated 26th March 2015, Grove engaged S&T to design and construct a hotel at Heathrow Airport. The contract was in a standard form, namely the JCT Design and Build Contract 2011, subject to certain amendments as set out in a schedule. The contract sum was £26,393,730. The contractual completion date was 10th October 2016.

14. The terms of the contract set out below are relevant to the present litigation. In relation to clause 4.7, the contract particulars specified that Alternative B should apply.

"Clause 2.28

2.28 If the Contractor fails to complete the Works or a Section by the relevant Completion Date, the Employer shall issue a notice to that effect (a 'Non-Completion Notice'). If a new Completion Date is fixed after the issue of such a notice, such fixing shall cancel that notice and the Employer shall where necessary issue a further notice.

Clause 2.29

2.29.1 Provided:

2.29.1.1 the Employer has issued a Non-Completion Notice for the Works or a Section; and

2.29.1.2 the Employer has notified the Contractor before the due date for the final payment under clause 4.12.5 that he may require payment of, or may withhold or deduct, liquidated damages,

the Employer may, not later than the day before the final date for payment of the amount payable under clause 4.12, give notice to the Contractor in the terms set out in clause 2.29.2.

2.29.2 A notice from the Employer under clause 2.29.1 shall state that for the period between the Completion Date and the date of practical completion of the Works or that Section:

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

2.29.2.2 that he will withhold or deduct liquidated damages at the rate stated in the Contract Particulars, or at such lesser stated rate, from sums due to the Contractor.[1]

2.29. 3 If the Employer fixes a later Completion Date for the Works or a Section, the Employer shall pay or repay to the Contractor any amounts recovered, allowed or paid under clause 2.29 for the period up to that later Completion Date.

2.29.4 If the Employer in relation to the Works or a Section has notified the Contractor in accordance with clause 2.29.1.2 that he may require payment of, or may withhold or deduct, liquidated damages, then, unless the Employer states otherwise in writing, clause 2.29.1.2 shall remain satisfied in relation to the

[1] *In addition to the notice under clause 2.29.2, the Employer, if he intends to withhold or deduct all or any of the liquidated damages payable, must give the appropriate Pay Less Notice under clause 4.9.4 or 4.12.8.* [NOTE – this footnote is included within the Contract.]

Works or Section, notwithstanding the cancellation of the relevant Non-Completion Notice and issue of any further Non-Completion Notice.

Clause 4.7.1

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.

Clause 4.7.2

4.7.2 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:

4.7.2.1 any amount which may be deducted and retained by the Employer as provided in clauses 4.16 and 4.18 ('the Retention');

4.7.2.2 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

4.7.2.3 the amounts paid in previous Interim Payments.

4.8.1

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.

Clause 4.8.3

4.8.3 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.

Clauses 4.9.1, 4.9.2, 4.9.3, 4.9.4

4.9.1 The final date for payment of an Interim Payment shall be 21 days from its due date.

4.9.2 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.

4.9.3 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.

4.9.4 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 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 Pay Less Notice.

Clause 4.10

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 the sum has been calculated.

4.10.2 A Pay Less Notice:

4.10.2.1 (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;

4.10.2.2 (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.

Clause 4.14

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.
>
> Clause 9.2.1
>
> 9.2 If a dispute or difference arises under this Contract which either Party wishes to refer to adjudication, the Scheme shall apply, subject to the following:
>
> 9.2.1 for the purposes of the Scheme the Adjudicator shall be the person (if any) and the nominating body shall be that stated in the Contract Particulars;"

15. S&T duly commenced work in March 2015. Delays occurred for reasons which are in dispute. S&T did not achieve practical completion by 10th October 2016. On 13th October 2016, Grove served on S&T a non-completion notice pursuant to clause 2.29.1 of the contract.

16. Work continued over the next five months. On 24th March 2017, S&T achieved practical completion.

17. On 31st March 2017, S&T sent interim application for payment number 22 to Grove. This application showed that the total value of S&T's work was £39,707,085 and that the increase over Grove's valuation for interim application 21 was £14,009,906. A detailed spreadsheet set out the build-up of those figures.

18. Clause 4.9.2 of the contract required Grove to send a Payment Notice to S&T within five days, namely by the evening of 5th April 2017. Grove failed to do so. Instead, on 13th April 2017, Grove sent three documents by email to S&T, namely:

    i) A Payment Notice showing that £1,407,748 was due to S&T on interim application 22 (i.e. £26,042,654 minus £24,634,906 previously certified);

    ii) A copy of S&T's spreadsheet with figures added in red showing Grove's assessment of each item. This document explained how Grove arrived at a valuation of £1,407,748 rather than S&T's figure of £14,009,906.

    iii) Payment Certificate number 22, showing that £1,407,748 was due to S&T. This certificate was not a document with any formal status under the contract. It summarised the financial consequences of the accompanying spreadsheet.

19. On the afternoon of 18th April 2017, Grove emailed to S&T a Pay Less Notice. This read as follows:

> "Pursuant to clauses 4.9.4 and 4.10.2 of the Building Contract, this Pay Less Notice gives written notification of the Employer's intention to pay less than the sum stated as being otherwise due from the Employer.
>
> The Employer considers that the sum that is due on the date this notice is given is £0.00.

The basis on which the sum is calculated is as follows:

1. the sum which, absent point 2 below, would have been due from the Employer at 31 March 2017 is £1,407,748.00 plus VAT (the "**Sum**"). The basis on which the Sum is calculated is set out in the Payment Certificate 22 dated 13 April 2017; and

2. subject to paragraph 2, the Employer is entitled to withhold from the sum which would otherwise be due on that date liquidated damages of £2,506,857.00 (the "**Liquidated Damages**"). The Liquidated Damages have been calculated on the following basis:

   2.1 Liquidated damages 11th October 2016 – 24th March 2017 @ £107,000.00 per week or proportion for any part thereof (total: £2,506,857.00)."

20. On the same afternoon, Grove sent to S&T by email two documents concerning its claim for liquidated damages for delay. At 17:00:49 hrs, Grove sent a notice under clause 2.29.1.2 stating: "we may require payment of liquidated damages and/ or withhold or deduct liquidated damages". S&T received this notice at 17:03:12 hrs. At 17:00:57 hrs, Grove sent to S&T a deduction notice pursuant to clause 2.29.2 of the contract. S&T received this notice at 17:03:19 hrs.

21. In the result, relying upon the various notices which it had served, Grove made no payment to S&T in respect of interim application 22. There was then a lull in hostilities, while the parties marshalled their legal battalions.

22. In July 2017, S&T commenced an adjudication seeking a decision that the schedule of amendments was not part of the contract. The adjudicator, Mr Piers Stansfield QC, ruled against S&T on that issue.

23. The second round of the battle began in August 2017. S&T commenced an adjudication claiming an extension of time from 11th October 2016 to 18th May 2017. Grove resisted any award of extra time. Both parties enjoyed a measure of success in this adjudication. On 19th September 2017 the adjudicator, Mr Philip Eyre, granted an extension of time, but only until 9th January 2017.

24. On that basis, Grove was only entitled to liquidated damages for delay in respect of the period 9th January to 24th March 2017. This amounted to £1,131,142. That was less than the valuation figure shown in Grove's Payment Certificate 22. Accordingly, Grove made a balancing payment of £276,695 to S&T.

25. S&T took the view that Grove's payment was derisory and that the full sum shown on interim application 22 was due. On 1st November 2017, S&T commenced a third adjudication, contending that Grove's Pay Less Notice was invalid. Mr Philip Eyre was, once again, the adjudicator.

26. By an award dated 6th December 2017, Mr Eyre held that Grove's purported Pay Less Notice was invalid. This was because it did not "specify" both the sum which was due

to S&T and the basis on which that sum had been calculated. Accordingly, the adjudicator ordered Grove to make an immediate payment of £14,009,906 to S&T.

27. This award brought an end to the series of adjudications between the parties. They now moved to a new theatre of war, the Technology and Construction Court.

Part 3- The Litigation in the Technology and Construction Court

28. By a claim form issued in the TCC on 16th November 2017, under Part 8 of the Civil Procedure Rules, Grove claimed declarations against S&T. In essence, Grove asked the court to declare that the Pay Less Notice, dated 18th April 2017, was valid and that Grove was entitled to commence an adjudication to establish the true sum due to S&T in respect of interim application 22.

29. S&T resisted Grove's claim. Also, on 11th December 2017, it served a counterclaim contending that Grove had not complied with the notice procedure set out in clause 2.29 of the contract; accordingly, Grove was not entitled to recover liquidated damages for delay.

30. On 11th December 2017, S&T commenced a separate action in the TCC against Grove, seeking to enforce Mr Eyre's decision in the third adjudication. S&T claimed £14,009,906 plus VAT. It applied for summary judgment, following the normal TCC procedure.

31. The actions launched by both parties came on for hearing before Mr Justice Coulson on 19th and 25th January 2018. The judge handed down his reserved judgment on 27th February 2018. He held that Grove's Pay Less Notice dated 18th April 2017 was valid; that Grove was entitled to commence an adjudication to determine the 'true' value of S&T's interim application 22; that Grove had complied with the notice requirements set out in clause 2.29 of the contract and accordingly was entitled to recover liquidated damages for S&T's delay. As a consequence of the first of those three decisions, the judge declined to enforce the adjudicator's award dated 6th December 2017.

32. S&T was aggrieved by the judge's decision. Accordingly, with the permission of the judge, it appealed to the Court of Appeal.

Part 4- The Appeal to the Court of Appeal

33. By an appellant's notice dated 19th March 2018, S&T appealed to the Court of Appeal, contending that the judge had erred in reaching each of the three decisions set out in paragraph 31 above.

34. The appeal came for hearing on 9th October 2018 and lasted for two days. Mr Anthony Speaight QC and Mr Matthew Thorne appeared for S&T, as they had done in the court below. Mr Alexander Nissen QC appeared for Grove, as he had done in the court below. I thank all counsel for their excellent skeleton arguments and oral submissions.

35. Having set the scene, I must now address the issues in the appeal, following the same sequence as the judge.

Part 5- The Interrelationship between the Legislation and the Contractual Provisions

36. In this Part, I shall refer to the payer as 'employer' and the payee as 'contractor', even though that is not always the case, for example in sub-contractor claims.

37. Section 109 of the HGCRA required a construction contract to provide for interim payments. Section 110 (1) (a) required the contract to provide a mechanism for determining what sums became due and when (i.e. what was the due date). Section 110 (1) (b) required the contract to provide a final date for payment which would be later than the due date.

38. Section 110 (2) required a construction contract to require the employer to serve a Payment Notice not later than five days after the due date.

39. If a contract complied with the requirements of sections 109 and 110, those provisions had no operational effect. What mattered was the contract and, in particular, how the contract dealt with those matters which the statute left the parties to sort out for themselves. If and to the extent that the contract did not comply with sections 109 and 110, then the Scheme came into force and overrode the offending contractual provisions.

40. Section 111 of the HGCRA imposed direct obligations on the contracting parties. In so far as the contractual terms provided otherwise, they were overridden. In so far as the contractual terms said the same thing, they were a mere aide memoire – what mattered were the statutory provisions. The statute required the employer to pay the "sum due" by the final date for payment, unless it had specified a lesser sum in a timeous Payment Notice or Withholding Notice.

41. Under the Amended Act, the basic principles are the same as they were under the HGCRA. Sections 109 and 110 (1) of the Amended Act are substantially the same as their predecessors. Section 110A replaces old section 110 (2) with much more detailed provisions about the employer's Payment Notice. But the essential features are the same. The contract must require the employer to serve a Payment Notice within five days of the due date. If a contract complies with the requirements of sections 109 – 110A, those provisions have no operational effect. What matters is the contract and, in particular, how the contract deals with those matters which the statute leaves the parties to sort out for themselves. (The background statute could still be an aid to interpretation in the event of ambiguity.) If and to the extent that the contract does not comply with sections 109 – 110A, then the Scheme comes into force and overrides the offending contractual provisions.

42. Section 111 of the Amended Act is more elaborate than its predecessor, but it works in the same way. Section 111 imposes direct obligations on the contracting parties. In so far as the contractual terms provide otherwise, they are overridden. In so far as those contractual terms say the same thing as the statute, they are a mere aide memoire – what matter are the statutory provisions. The statute requires the employer to pay the "notified sum" by the final date for payment, unless it has specified a lesser sum in a timeous Payment Notice or a timeous Pay Less Notice.

43. There has been some debate between counsel about the fact that old section 111 refers to the "sum due", whereas new section 111 refers to "the notified sum". Mr Speaight

submits that this marks a fundamental change, as set out in paragraph 24 of his skeleton argument and amplified orally. I do not think that is right. In my view the phrase "sum due" in old section 111 was a reference to the sum specified in the relevant contractual document governing interim payments (e.g. an architect's certificate). That phrase could not mean the 'true' value of work done, calculated under the detailed valuation provisions of the contract. I say this for two reasons. First, it is usually not practicable to determine (let alone agree) the true value of work done at each interim stage. What is required at each interim stage is an identified sum in the right ball park, which can be adjusted later. Secondly, if "sum due" meant the true value of work done (assuming that the employer could somehow know what that true figure was), the employer would have no basis for serving a Withholding Notice, as envisaged by old section 111 (2). There would be nothing to withhold. It is fanciful to suppose that old section 111 (2) was directed solely to set-offs.

44. The wording of old section 111 was unsatisfactory. This was evident as new forms of contract became popular, under which there was no independent professional person certifying the amounts of interim payments. Mr Speaight has drawn the court's attention to page 36 of the DTI paper 'Improving Payment Practices in the Construction Industry' dated June 2007, which highlighted this problem. Parliament corrected the wording of section 111 in the Amended Act to make the intended meaning clearer.

45. Let me now turn to the present contract. The provisions concerning the contractor's interim applications and the employer's Payment Notices complied with the requirements of sections 109 -110A. Therefore, for those purposes, all that we need to look at is the contract itself: i.e. clauses 4.8, 4.9.1, 4.9.2 (first one-and-a-half lines) and 4.10.1. After that, what we must concentrate on is section 111 of the Amended Act. The latter part of clause 4.9.2, clause 4.9.3 and clause 4.10.2 of the contract are a mere aide memoire of what the statute requires the employer to do in relation to payment. Clause 4.9.4, however, does have a useful function: it specifies the time for serving a Pay Less Notice, since the statute allows the parties latitude to reach agreement about that matter.

Part 6- First Issue: Was the Purported Pay Less Notice Valid and Effective?

46. Section 111 (4) of the Amended Act requires that a Pay Less Notice given by the employer "shall specify" both the sum that he considers to be due and "the basis on which that sum is calculated".

47. It is common ground that the notice which Grove sent to S&T on 13th April 2017 satisfied the first of those two requirements. It stated that Grove considered the sum due to be £0.00.

48. The issue is whether the notice specified the basis on which that sum had been calculated. The adjudicator held that it did not. This was because it said:

> "The basis on which this sum is calculated is set out in the Payment Certificate 22 dated 13th April 2017."

That was clearly a reference to the spreadsheet dated 13th April 2017, which accompanied Payment Certificate 22. The adjudicator held that that was insufficient to satisfy the contractual requirement.

49. In accepting S&T's submissions on this issue the adjudicator said:

> "(27) On the use of the word "specify" I agree that the use of this particular word in drafting precludes an interpretation referring the reader to another earlier issued document. Had the parties intended that such reference would be permitted, they would certainly not have used the word "specify" and would have used different terminology such as "identify". The word "specify" imposes a requirement on the party seeking to pay less to ensure that the explanatory calculation is somehow provided together with the PLN. The approach is consistent with the language of the Judge at paragraphs 49 and 53 of *Surrey and Sussex.*
>
> (28) Reply paragraph 15.2 outlines, in explanation of the relevant policy considerations, the possibility for undesirable satellite disputes arising from the validity of the PLN being reliant on the incorporation of information from earlier issued documents. Requiring the PLN to contain or attach the explanatory calculation avoids "*fact-specific ambiguity".* S&T refers to a particular scenario of documents being issued earlier having been lost or no longer available. Ultimately, the reasonable recipient of a PLN should not be expected to have to search and/or look/check elsewhere for the relevant explanatory calculation. That should be the case whatever the potential for ease of identification of the document elsewhere and whatever the potential proximity in time of provision of the document containing the explanatory calculation. The imposition of the requirement for the PLN to have all the explanatory information with it avoids the possibility of the party seeking to rely on the PLN adopting a "scattergun" approach to multiple reference to earlier issued documents. The requirement to "specify" promotes the greatest amount of certainty in the payment mechanism in requiring the explanatory calculations to be in or with the PLN. Of course, Grove could have avoided running into any difficulty with meeting the Clause 4.10.2.1 requirement by attaching the Payment Certificate setting out the explanatory calculation to the PLN."

50. The judge rejected that approach. Relying upon the House of Lords' decision in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, he said that the construction of such notices must be approached objectively. He noted a number of first instance TCC decisions which had applied that principle to notices under building contracts. The question was how a reasonable recipient would have understood the notice. The judge found that the spreadsheet with figures added in red, which Grove sent on 13th April 2017, properly set out the basis of Grove's assessment of the sum due. At paragraph 34 the judge stated:

> "… There can be no possible objection in principle to a notice referring to a detailed calculation set out in another, clearly

> defined document. That is how these things are commonly done."

51. By way of example, the judge commented that an architect's specification is usually festooned with references to British Standards, Codes of Practice and Building Regulations. That is true.

52. In argument before this court, Mr Speaight commended to us the reasoning of the adjudicator, who is an experienced construction solicitor. He submitted that the word "specify" meant "must contain or have attached to it" all the detailed calculations upon which the employer relies to substantiate his assessment. Mr Speaight presented this, effectively, as a bright line rule. He said that the sender cannot know whether the recipient has the earlier document. In a corporate body the individual dealing with the Pay Less Notice may be different from the recipient of the earlier document. He asked rhetorically:

> "If reference back to earlier documents is permissible, why not two? If two, why not five?"

53. My answer to Mr Speaight's rhetorical question is this. There is no bright line rule. It is neither tenable to say that reference to other documents is always permissible nor to say that such reference is never permissible. As King LJ pointed out during Mr Speaight's submissions, it is a question of fact and degree in each case whether the purported Pay Less Notice achieved the requisite degree of specificity.

54. In the present case, Grove's Pay Less Notice was sent to the individuals in S&T who were dealing with interim application 22. They were bound to be familiar with the package of documents which Grove had sent to them five days earlier. As Mr Speaight concedes, those individuals knew perfectly well what were the detailed calculations to which Grove was referring in the Pay Less Notice.

55. The cross-reference to the calculation sent on 13th April 2017 did not, and could not, give rise to any doubt or misunderstanding in the mind of a reasonable recipient standing in the shoes of S&T on 18th April 2017.

56. The Shorter Oxford English Dictionary defines "specify" as:

> "1. Speak or treat of a matter etc in detail; give details or particulars.
>
> 3. Mention or name (a thing, that) explicitly; state categorically or particularly. Also, include in an architect's, engineer's etc specification."

That seems to me to be an apt definition. As the judge noted, it is common practice for an architect's specification to include documents by reference.

57. I have come to the conclusion, essentially for the same reasons as the judge set out at paragraphs 20-49 of his judgment, that Grove's notice dated 18th April 2017 did "specify" the basis on which Grove's valuation figure of £0.00 had been calculated.

58. In the course of his reply (but not in his skeleton argument or opening speech) Mr Speaight criticised the judge's reliance on *Mannai Investment*. He submitted that the *Mannai* line of cases is not on point, because those cases concern notices the wording of which did not quite follow the contractual requirements. I think that the *Mannai* principle is wider than that: see the speech of Lord Steyn at 768 A-D. The principle is apposite to cases such as the present.

59. In the result, I have come to the conclusion that Grove's Pay Less Notice was valid and effective. My answer to the question posed in this part of the judgment is yes.

Part 7- Second Issue: Is Grove Entitled to Pursue a Claim in Adjudication to Determine the Correct Value of Interim Application 22?

60. This question is academic, because I have held in Part 6 above, that Grove succeeded in serving a valid Pay Less Notice. Nevertheless, it is appropriate for me to deal with this question, assuming the Pay Less Notice to be invalid, for two reasons. First, I cannot exclude the possibility that in future litigation S&T will challenge and overturn the decision in the first adjudication that the schedule of amendments was incorporated into the contract. If the schedule was not incorporated, then Grove's Pay Less Notice was out of time. Secondly, the issue is one of general importance for the reasons set out in paragraph 3 above.

61. I have set out the relevant statutory provisions in the Appendix to this judgment. Before grappling with the second issue I must first review the relevant authorities.

i. <u>The Relevant Authorities</u>

62. *Beaufort Developments (NI) Ltd v Gilbert-Ash N.I Ltd* [1999] 1 AC 266 was a case concerning the JCT Standard Form of Building Contract, 1980 edition. This form of contract was widely used in the 1980s and 1990s. It provided for an architect to administer the project. The architect issued interim certificates for payment, certified practical completion and so forth. An arbitration clause empowered the arbitrator to "open up, review and revise" the architect's interim certificates. The House of Lords held that the court possessed the same wide power as the arbitrator. In so holding, the House of Lords overruled *NRHA v Crouch* [1984] QB 644. Lord Hoffmann stated at 280 that in respect of interim certificates "the court has exactly the same right to interpret the contractual obligations of the parties as an arbitrator would have had". Lord Hope said at 286:

> "On this approach, if there is no stay, the court will be able to exercise all its ordinary powers to decide the issues of fact and law which may be brought before it and to give effect to the rights and obligations of the parties in the usual way. It will have all the powers which it needs to determine the extent to which, if at all, either party was in breach of the contract and to determine what sums, if any are due to be paid by one party to the other whether by way of set-off or in addition to those sums which have been certified by the architect. It will not be necessary for it to exercise the powers which the parties have conferred upon the architect in order to provide the machinery for working out their contract. Nor will it be necessary for it to exercise the

> power which clause 41.4 confers on the arbitrator to revise certificates. This is because the court does not need to make use of the machinery under the contract to provide the parties with the appropriate remedies. The ordinary powers of the court in regard to the examination of the facts and the awarding of sums found due to or by either party are all that is required. There would be no risk of any injustice to the contractor."

63. *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814; [2005] 1 WLR 3850 concerned a contract made in 1994 incorporating the ICE Standard Conditions (6th edition). Under that form of contract the engineer was the certifying officer. The Court of Appeal held that the contractor's entitlement to each interim payment arose when a certificate either was issued or ought to have been issued. Therefore, the absence of a certificate did not bar the right to payment. Dyson LJ (with whom Thomas LJ and Sir Andrew Morritt VC agreed) explained at [23]:

> "It does not, however, follow from the fact that a certificate is a condition precedent that the absence of a certificate is a bar to the right to payment. This is because the decision of the engineer in relation to certification is not conclusive of the rights of the parties, unless they have clearly so provided. If the engineer's decision is not binding, it can be reviewed by an arbitrator (if there is any arbitration clause which permits such a review) or by the court. If the arbitrator or the court decides that the engineer ought to have issued a certificate which he refused to issue, or to have included a larger sum in a certificate which he did issue, they can, and ordinarily will, hold that the contractor is entitled to payment as if such certificate had been issued and award or give judgment for the appropriate sum."

64. Let me now move on to contracts which were made after May 1998, when the HGCRA came into force. *Watkin Jones & Son Ltd v Lidl UK GmbH* [2002] EWHC 183 (TCC); 86 Con LR 155 concerned the JCT Standard Form Building Contract with Contractor's Design, 1998 edition. Clause 30 provided for the contractor to make interim applications for payment, which the employer may question by serving a notice under clause 30.3.3 within five days. If that was done, then the employer was only obliged to pay the sum which it did not question. The employer had a further right under clause 30.3.4 within five days to specify an amount to be deducted from the sum due. On 17 July, the contractor sent interim valuation 11. The employer failed to serve any notice under clause 30.3.3 or 30.3.4. An adjudicator held that the employer was obliged to pay the sum claimed in valuation 11. The contractor sought to have a separate adjudication to determine the "properly calculated sum" in respect of valuation 11. HH Judge Moseley QC enforced the first adjudicator's award. HH Judge Humphrey LLoyd QC held that the contractor was not entitled to embark upon the second proposed adjudication. However, the employer would be entitled to challenge the sums properly due to the contractor in an adjudication about the final account.

65. Significantly, at [22] Judge LLoyd said this:

> "In my opinion, the absence of a timeous notice of intention to withhold payment does not relieve the party making the claim of the ordinary burden of showing that he is entitled under the contract to receive the payment he claims. It remains incumbent on the claimant to demonstrate, if the point is disputed, that the sum claimed is contractually due."

66. In *Rupert Morgan Building Services (LLC) Ltd v Jervis & anr* [2003] EWCA Civ 1563; [2004] 1 WLR 1867 the parties entered into a contract in the standard form issued by the Architecture and Surveying Institute. This provided for payment to be made on the basis of interim certificates issued by the architect. The seventh interim certificate required payment of £44,000. The employer considered that only £17,000 was due at that stage, but it failed to serve a Withholding Notice within five days, as required by HGCRA section 111(1). The employer duly paid £17,000. The contractor sued for the balance of £27,000, relying on HGCRA section 111(1). The county court judge granted summary judgment. The Court of Appeal dismissed the employer's appeal. Jacob LJ (with whom Sedley and Schiemann LJJ agreed) explained that the relevant provisions of the HGCRA were concerned with cashflow, rather than final determination of what sums were due to the contractor. At [9] to [10] 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 serve 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."

67. Jacob LJ commended the analysis of the HGCRA by Sheriff Taylor in *Clark Contracts Ltd v The Burrell Co* 2002 SLT (Sh Ct) 103. He then said:

> "14. Sheriff Taylor's analysis, once articulated, is obviously right. And it has a series of advantages…

> (b) It provides a fair solution, preserving the builder's cash flow but not preventing the client who has not issued a withholding notice from raising the disputed items in adjudication or even legal proceedings.
>
> (c) It requires the client who is going to withhold to be specific in his notice about how much he is withholding and why, thus limiting the amount of withholding to specific points. And these must be raised early.
>
> (d) It does not preclude the client who has paid from subsequently showing he has overpaid. If he has overpaid on an interim certificate the matter can be put right in subsequent certificates. Otherwise he can raise the matter by way of adjudication or if necessary arbitration or legal proceedings."

68. In the last sentence of paragraph 14(d) Jacob LJ is saying that, once the employer has paid the sum certified by the architect (as required by section 111 (1)), it is entitled to embark upon an adjudication in order to determine the correct sum due upon that architect's certificate.

69. Sedley LJ said at [17]:

> "There is, as Jacob LJ demonstrates, nothing irrevocable about the section 111 process. It is designed simply to ensure that once a certificate is issued, payment follows unless proper notice of withholding is given. It has no legal effect, even presumptively, on the true incidence of liability."

70. I now move on to judicial decisions reached after the HGCRA was amended. *ISG Construction Ltd v Seevic College* [2014] EWHC 4007 (TCC); [2015] BLR 233 concerned the JCT Design and Build Contract 2011 (the same form as in the present case, although the amendments would have been different). In interim application 13 the contractor claimed that £1,097,696 was due. The employer failed to serve a timeous Payment Notice or Pay Less Notice. The adjudicator made a declaration that the contractor was entitled to be paid £1,097,696. The contractor then launched a second adjudication, seeking a declaration as to the contractual value of the work as at the date of interim application 13. The adjudicator found this to be £615,450, including loss and expense. Mistakenly believing that the employer had complied with the first award, the adjudicator ordered the contractor to repay the overpayment. In the subsequent litigation the employer conceded that the first adjudication award must be enforced, but claimed the benefit of the second adjudication award. Edwards-Stuart J granted a declaration that the second adjudication award was invalid for want of jurisdiction.

71. The contractor placed heavy reliance on *Watkin Jones*, as did the judge in his judgment. Unfortunately, neither counsel cited *Rupert Morgan* or drew attention to the consequences of that decision. Based on his analysis of *Watkin Jones*, the judge said this at [28]:

> "I agree also with His Honour Judge LLoyd's conclusion that if the employer fails to serve any notices in time it must be taken to be agreeing the value stated in the application, right or wrong. In my judgement, therefore, in that situation the first adjudicator must be in principle taken to have decided the question of the value of the work carried out by the contractor for the purposes of the interim application in question."

72. A few weeks later Edwards-Stuart J encountered similar issues in *Galliford Try Building Ltd v Estura Ltd* [2015] EWHC 412 (TCC); [2015] BLR 321. This case also concerned the JCT Design and Build Contract 2011. Interim application 60 was for £3.9 million. The employer considered that that sum was excessive, but failed to serve any Payment Notice or Pay Less Notice. The adjudicator ordered the employer to pay £3.9 million. The contractor applied to the court for summary judgment enforcing that payment. The employer commenced a second adjudication seeking a decision that the proper sum due on interim application 60 was £1.14 million. The second adjudicator held that he did not have jurisdiction to re-open the question of the proper value of the works as at interim application 60. Edwards-Stuart J granted summary judgment to enforce the first adjudicator's decision. He held that the employer was not entitled to bring a second adjudication to determine the value of the works as at interim application 60.

73. On this occasion counsel cited *Rupert Morgan* in argument. The judge dealt with that authority in this way at [20]:

> "This means that the employer cannot bring a second adjudication to determine the value of the work at the valuation date of the interim application in question. But it does not mean any more. There is nothing to prevent the employer challenging the value of the work on the next application, even if he is contending for a figure that is lower than the (unchallenged) amount stated in the previous application. If this was not made clear by my judgment, then it should have been and it is certainly made clear by the decision of the Court of Appeal in *Rupert Morgan Building Services (LLC) Ltd v Jervis* [2004] 1 WLR 1867, in particular the passage from paragraph 14 that is set out in paragraph 30 below. My judgment in *ISG v Seevic* was not intended to go behind that."

74. Edwards-Stuart J was troubled by the decision which he felt impelled to reach because of the large sum claimed in interim application 60 and because there may be no opportunity to correct any error in later interim certificates. He therefore ordered that his judgment should be enforced to the extent of £1.5 million, but enforcement of the balance should be stayed until further order.

75. In *Harding (trading as M J Harding Contractors) v Paice and another* [2015] EWCA Civ 1231; [2016] 1WLR 4068 the parties entered into a construction contract which did not comply with the requirements of the Amended Act, with the result that the Scheme applied. In late 2013, the contract was terminated for reasons which were in dispute. The contractor pursued two adjudications to recover sums due as interim payments. It

then served a final account showing that £397,912 was due. The employer refused to pay. Mr Linnett, the adjudicator in the third adjudication, held that the employer's purported Pay Less Notice was defective; therefore, section 111 of the Amended Act required the employer to pay the full amount of £397,912. After making that payment, the employer began a fourth adjudication seeking the correct valuation of the final account and an appropriate repayment from the contractor. That process was aborted for reasons which are not material. The employer then proposed to start a fifth adjudication for the same purpose. The Court of Appeal held that the employer was entitled to do so.

76. The core of the Court's reasoning is at [69] – [73] of the principal judgment. After summarising *ISG* and quoting from *Galliford Try*, the judgment continues:

> "69. I do not need to decide whether or not that passage is correct in relation to interim valuations and interim payments. In almost all construction contracts special contractual provisions apply to interim payments. Mistakes can usually be put right at a later stage, although that was not possible in the *Galliford Try* case because the contract prevented negative valuations.
>
> 70. The important point for present purposes is that the quoted passage (whether right or wrong in relation to interim valuations) does not apply to final accounts. Edwards-Stuart J said so in the *Galliford Try* case at para 25, where he emphasised the "fundamental difference" between payment obligations which arise on an interim application and those that arise on termination.
>
> 71. In the present case we are concerned with a final account following termination of the construction contract. Clause 8.12.5 of the contract conditions requires an assessment of the amount which is "properly due in respect of the account". The clause expressly permits a negative valuation. Mr Linnett did not carry out any such valuation exercise in the third adjudication. Therefore PS were entitled to refer that dispute for resolution in the abortive fourth adjudication. They will be entitled to do so again in the proposed fifth adjudication.
>
> 72. This conclusion is consistent with the reasoning of Judge Humphrey Lloyd QC in the *Watkin Jones* case 86 Con LR 155 and the reasoning of the Court of Appeal in the *Rupert Morgan* case [2004] 1 WLR 1867. Nothing in the *ISG* case [2015] 2 All ER (Comm) 545 or the *Galliford Try* case [2015] BLR 321 contradicts this conclusion.
>
> 73. One may then ask, what did the third adjudication achieve? The answer is that the third adjudication achieved an immediate payment to the contractor. Harding will be entitled to retain the monies paid to him unless and until either the adjudicator in the fifth adjudication or a judge in litigation arrives at a different valuations of Harding's final account under clause 8.12."

77. In *Wilson and Sharp Investments Ltd v Harbour View Developments Ltd* [2015] EWCA Civ 1030; 162 Con LR 154 the court restrained a contractor from presenting a winding up petition based on unpaid interim certificates, despite the absence of any Payment Notice or Pay Less Notice. At [66] Gloster LJ (with whom Sir Colin Rimer and McCombe LJ agreed) cited paragraph 14(d) of Jacob LJ's judgment in *Rupert Morgan.* She said that the employer's obligation to make an interim payment did not preclude him from challenging disputed items later.

78. The next two authorities in the sequence cited by counsel are *Kilker Projects Ltd v Purton (trading as Richwood Interiors)* [2016] EWHC 2616 TCC; [2017] Bus LR 418 and *Adam Architecture v Halsbury Homes* [2017] EWCA Civ 1735; [2018] 1 WLR 3739. These judgments summarise the earlier cases and apply established principles in relation to final accounts. The court held in *Adam Architecture* that section 111 of the Amended Act applied to both interim and final applications for payment.

79. *Kersfield Developments (Bridge Road Ltd) v Bray & Slaughter Ltd* [2017] EWHC 15 (TCC); 170 Con LR 40 was another case concerning the JCT Design and Build Contract 2011. The contractor claimed £1,208,279 in interim application 19. The employer failed to serve a timeous Payment Notice or Pay Less Notice. The adjudicator ordered the employer to pay the full sum claimed in interim application 19. In subsequent TCC litigation, O'Farrell J enforced the adjudicator's decision. She rejected the employer's contention that it was entitled to start a further adjudication to determine the true valuation of interim application 19. At [95] she said:

> "Section 108 of the Act entitles the parties to refer any dispute to adjudication at any time. That would include a dispute regarding the proper valuation of the works. However, where a particular interim payment has been fixed by the default notice mechanism under the contract, as in this case, there is no contractual basis on which to revise that payment by reference to a proper valuation of the works and therefore there is no relevant dispute that can be referred to adjudication."

80. Six months after *Kersfield,* similar issues arose for consideration in *Imperial Chemical Industries v Merit Merrell Technology Ltd* (No. 2) [2017] EWHC 1763 (TCC); 173 Con LR 137. This concerned a contract incorporating the NEC 3 Conditions for the construction of a steelworks. The NEC contract, unlike the other forms of contract discussed above, permits negative interim certificates. There were complex disputes between the parties. ICI failed to pay sums claimed in two interim applications, despite failing to serve any timeous Payment Notice or Pay Less Notice. The adjudicator ordered ICI to pay those sums, totalling some £8.3 million. ICI duly did so. The construction contract came to an end as a result of ICI's repudiation. The contractor went into creditors' voluntary liquidation. In the circumstances there were going to be no further interim applications. Fraser J held that ICI was entitled to recover from the contractor the amount by which the sum of £8.3 million exceeded the correct valuation of the last two interim applications.

81. At [196]-[199] Fraser J said:

> "196. I consider it well-established law that, if a contract comes to an end through repudiation, the parties' existing rights and

obligations under that contract remain in existence. Further performance of the contract by both parties comes to an end. Neither party has any future substantive obligations. However, the existing rights and obligations the parties have, as at the time the contract comes to an end, remain, and the parties remain governed by the contract terms in that respect. Accordingly, if ICI had a right as of 17 February 2015 to recover overpayments under the contract, that right remained in being notwithstanding the repudiation by ICI of the contract.

197. The nature of the payment obligation upon any employer in a construction contract is to make interim or stage payments. This was required by the Housing Grants, Construction and Regeneration Act 1996 initially, and now as amended by the Local Government Economic Development and Construction Act 2009. Contracts governed by this legislation must include certain terms on some matters, including payment, and a failure to do so has the provisions of the Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649 imposed into that contract. Even before this legislation, the majority if not all the standard forms had provisions for interim payments to be made (usually against interim certificates) to the contractor during the project, to assist with cashflow. Some agreements – and a recent example is in *Balfour Beatty Regional Developments Ltd v Grove Developments Ltd* [2016] EWCA Civ 990, (2016) 168 ConLR 1, [2017] 1 WLR 1893 – actually identify in advance the specific dates in different months when each instalment or stage payment will be applied for, and paid. Others identify this by particular intervals stated to be in number of days. Some, more basic, contracts might have specific percentages of the overall contract value as the interim payments. Most are, however, assessed by way of some sort of interim valuation.

198. This contract has two components so far as payment to MMT is concerned. One is the defined cost, and the other is the fee. Clause 50.1 makes it clear that the project manager assesses the amount due at each assessment date. That amount – the 'amount due' – is, by cl 50.2, made up of three elements:

> 1. The Price for Works Done to Date
>
> 2. Plus other amounts to be paid to the Contractor
>
> 3. Less amounts to be paid by or retained from the Contractor.

199. I do not consider that such an interim assessment can be said to be a definitive or final valuation of the works for all purposes at that point in the project. Clause 50.5 makes it clear that: 'The Project Manager corrects any wrongly assessed

> amount due in a later payment certificate'. That later payment certificate could, potentially, be an interim assessment. It is not only at the final assessment stage that the project manager can correct any 'wrongly assessed amount'."

82. At [201] and following Fraser J doubted that *ISG* provided support for the contractor's case (see the first sentence of [202]) and he doubted the correctness of the *ISG* decision.

83. The whole section of Fraser J's judgment entitled "the contractual route to recovery of overpayment" spans six pages of the law reports and is too long to set out in full. It contains a detailed review of the authorities cited above. It concludes that ICI was entitled to re-open the correct valuation of the two interim applications in respect of which there had been no Payment Notice or Pay Less Notice.

84. Finally in this Odyssey, I come to Coulson J's judgment in the present case. The judge held that there were six reasons why Grove was entitled to bring a separate adjudication to determine the correct value of interim application 22, even if (contrary to the judge's view) there was no valid Pay Less Notice. Those six reasons were:

    i) *Henry Boot* (in particular the passage quoted in paragraph 62 above) is authority for the proposition that the court can determine the true value of any certificate, notice or application. That included a power to open up and revise a sum notified in an interim application. The adjudicator has the same powers as the court.

    ii) The wide powers of an adjudicator under section 108(1) of the Amended Act and paragraph 20 of the Scheme meant that there was no limit on the nature of disputes which either party could refer to adjudication.

    iii) The adjudicator ordered payment of £14,009,906 on the ground that there was no timeous Pay Less Notice. Therefore, there had not yet been any adjudication about the true value of interim application 22.

    iv) The "sum due" under clause 4.7 is different from "the sum stated as due" in clause 4.9. The mechanism of section 4 of the contract is designed, in the end, to achieve payment of the true sum which is due under clause 4.7.

    v) If a contractor objects to the employer's Payment Notice or Pay Less Notice, it can start an adjudication to ascertain the correct figure, even though the Act does not say this expressly. As a matter of fairness, the employer should have a similar right to adjudication if he considers that the sum notified by the contractor is too high.

    vi) There is no justification for treating interim and final applications differently.

85. The judge then reviewed the authorities and held that they did not drive him to a different conclusion. Finally, he turned to the repayment mechanism. Relying upon the Supreme Court's decision in *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38; [2015] 1 WLR 2961, he held that Grove was entitled to recover any overpayment on interim application 22, either pursuant to an implied term or as a matter of restitution.

(ii) Analysis

86. Mr Speaight reminds the court that at common law a building contract is an entire contract. The builder has no entitlement to interim payments, save as provided by the contractual terms or by statute. I agree. He points out that in the present case the contract complied with the statutory requirements. Therefore, we are not concerned with the Scheme. This court must focus on the applicable contractual provisions and on section 111 of the Amended Act. Section 111 is a statutory provision of direct application, rather than one which dictates what the contract must say: see *Adam Architecture* at [47].

87. Mr Speaight submits that the employer's primary obligation at an interim stage is to pay the sums stated in the relevant notice. If the employer has served a Payment Notice or Pay Less Notice, then that dictates what the employer must pay: see clauses 4.9.2 and 4.9.4. If the employer has served no such notice, then the contractor's interim application dictates what the employer must pay: see clause 4.9.3 of the contract and section 111 of the Amended Act. I agree with Mr Speaight that clause 4.9.3 and section 111 do impose those obligations on the employer, although it is the statute which is operative. The contractual provisions are a mere aide memoire. Also, I would characterise the employer's payment obligation as 'immediate' rather than 'primary'.

88. I characterise the payment obligation as 'immediate' because section 111 of the HGCRA was, and section 111 of the Amended Act is, a provision concerned with cashflow and immediate payments. The Court of Appeal made that plain in relation to the HGCRA in *Rupert Morgan*. As discussed in Part 5 above, none of the changes made to section 111 in the Amended Act change the character of that provision. It is still a provision dealing with cashflow and immediate payments. If the employer fails to make a payment required, the contractor can enforce payment by adjudication, litigation or (if there is an arbitration clause) arbitration.

89. Mr Speaight takes issue with each of the judge's six reasons. Let me therefore go through those six reasons, addressing counsel's submissions as I do so.

90. The judge's first reason is, as Mr Nissen comments, a new line of argument which does not feature in the earlier authorities. Mr Nissen submits that neither the Amended Act nor the present contract make the sums payable at interim stages conclusive as to the correct valuation of work done under clause 4.7. Therefore, that remains a justiciable issue between the parties, if it is disputed. I think that is correct. The House of Lords explained in *Beaufort* that the court gives effect to the parties' contractual rights, but it is not bound by the machinery of the contract: see the speech of Lord Lloyd at 270 and the speech of Lord Hope at 286. The judgment of Dyson LJ in *Henry* Boot is to the same effect. The wide powers of the court (and in consequence of the adjudicator) as explained in *Beaufort* and *Henry Boot* permit opening up and revising the sums shown as due in an interim application in any case where the interim application determines what is payable. Mr Speaight submits that *Henry Boot* adds little to *Beaufort*. That may be so, but the general proposition still stands.

91. As to the judge's second reason, Mr Speaight points out that there is no express provision in the Act or in paragraph 20 of the Scheme enabling adjudicators to review interim applications in the absence of a Payment Notice or Pay Less Notice. There are two answers to this. First, paragraph 20 of the Scheme on its face is wide enough to do

that. See *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358; [2006] BLR 15 at [91]. Secondly, there is no express power in the Act or the Scheme for the contractor to challenge the employer's Payment Notice or Pay Less Notice in adjudication. But everyone accepts that such a power exists. Section 111(8) presupposes that such a power exists, but does not confer the power.

92. As to the judge's third reason, in my view the correct analysis under this form of contract is that the interim application, the Payment Notice and the Pay Less Notice are three documents one of which, in every case, will trigger the operation of section 111. That section generates an obligation to pay the notified sum before the final date for payment. But section 111 is not the philosopher's stone. It does not transmute the sum notified by one or other of those three documents into a true valuation of the work done under clause 4.7. Subsequently, the adjudication provisions of the Act or (if correctly drafted) of the contract come into play. Either party can challenge the correctness of the notified sum by adjudication: see the reasoning of this court in *Harding*.

93. It follows from the foregoing analysis that I agree with the judge's first three reasons.

94. The judge's fourth reason distinguishes between "the sum due" and "the sum stated as due". Mr Nissen submits that this reflects the difference between the 'payment' bargain and the 'valuation' bargain. Mr Speaight notes the distinction, but submits that reference to the true valuation "involves the danger of subconsciously fostering a thought process regarding any other figure as untrue or wrong". He submits that the employer has no contractual entitlement to a separate determination of the correct sum which is due under clause 4.7 at that interim stage.

95. In my view, the distinction is a helpful one. The payment bargain dictates what must be paid immediately. The valuation bargain sets out the process for reviewing and adjusting the payments which have been made.

96. Turning to the judge's fifth reason, Mr Speaight submits that there is nothing unfair in the arrangements as he interprets them. The employer has two chances to present his own valuation. If he fails to serve a timeous Payment Notice or Pay Less Notice, he has only himself to blame.

97. Despite the attractions of this argument, there is a problem. The employer has very little time to carry out a complex valuation. The contract in the present case allowed a period of 18 days for the preparation of a Pay Less Notice. Under the Scheme, the period is only 10 days. Such a rushed process cannot sensibly lead to a definitive valuation of the work at any particular date. The mechanism is simply intended to generate a provisional figure for immediate payment. The adjudication provisions stand behind the notice provisions, in order to facilitate a more detailed valuation of the work at that date, if such is required. Finally, in the background either arbitration or litigation (and under this contract it is litigation) is available, if either party is dissatisfied with the adjudicator's evaluation.

98. In relation to the judge's sixth reason, Mr Speaight points out that there are special reasons why there must be a proper valuation of the work at the stage of the final account. Also, clause 4.12 of the contract expressly provides for a negative final payment, whereas there is no express provision for negative interim payments. That is true. On the other hand, the wording of section 111 applies to both interim and final

certificates: see *Adam Architecture*. Although this court did not have to decide the point in *Harding*, it would be strange if that same form of words has a conclusive effect in relation to interim certificates which it does not have in relation to final certificates.

99. Overall, the judge's six reasons support my view that the employer, having failed to serve a Payment Notice or Pay Less Notice, is nevertheless entitled to adjudicate to determine the true value of an interim application. The only point where I differ from the judge is that he places some reliance upon the contractual provisions which paraphrase parts of section 111, whereas I do not. The judge states at [81], [87] and elsewhere that Grove was under a contractual obligation to pay the sum "stated as due". That is a reference to clause 4.9 of the contract. In my view, the correct analysis is that Grove was under a statutory obligation to pay the "notified" sum, as defined in section 111 of the Amended Act. The source and character of the payment obligation will be important when we come to the issue discussed in paragraphs 104 – 110 below.

100. Let me turn now to the mechanism by which an employer can recover any overpayment made at the interim stage, as a consequence of his failure to serve a Payment Notice or Pay Less Notice. In many cases, this can conveniently be done by way of adjustment at the next interim payment. However, in some cases, such as the present, that is not practicable. The judge held that the employer can recover any overpayment by virtue of an implied term, alternatively by restitution. Mr Speaight has launched a formidable attack on that analysis. Mr Nissen's principal response is that he does not need to rely upon any implied term or the doctrine of restitution. If an adjudicator finds that the employer has overpaid at an interim stage, he can order re-payment of the excess as the dispositive remedy flowing from the adjudicator's re-evaluation. I agree with that analysis. The parties have agreed (albeit under statutory compulsion) that the adjudicator should have jurisdiction to deal with disputes between them, including any dispute concerning the correct valuation of work under clause 4.7. Having determined the true value of the works at an interim stage, the adjudicator (whose powers are co-extensive with the powers of the court[2] in matters such as this) must be able to give effect to the financial consequences of his decision.

101. In the course of their oral and written submissions, both counsel embarked on a pilgrimage through the authorities, which I have summarised in Part 7 section (i) of this judgment. Mr Speaight commended the analysis in *ISG*, *Galliford Try* and *Kersfield*. Mr Nissen criticised the reasoning in those cases. He submitted that if the employer fails to serve a timeous Payment Notice or Pay Less Notice, he is not thereby agreeing that the sum shown in the interim application is a correct valuation under clause 4.7. Mr Speaight responded that there is acquiescence, even if not formal agreement. Mr Nissen submitted that the stay granted in *Galliford Try* shows the difficulties flowing from Edwards-Stuart J's analysis, but the stay solution is not satisfactory.

102. I find it impossible to reconcile all of the first instance decisions with one another or to say that all of them are right in every particular. In so far as Fraser J in *ICI* and Coulson J in this case differed from the analyses in *ISG*, *Galliford Try* and *Kersfield*, I conclude that Coulson J and Fraser J were correct. This is not a criticism of any of the judges concerned. We are all trying to hack out a pathway through a dense thicket of amended legislation, burgeoning case law and ever-changing standard form contracts.

[2] As to which, see *Beaufort* and *Henry Boot* discussed above.

103. Let me now turn, more briefly, to the Court of Appeal decisions in this area. None of those decisions which I have reviewed above are inconsistent with either the judgment of Coulson J in this case or the judgment of Fraser J in *ICI*.

104. The next question which arises is this. If the employer has a right to dispute by adjudication the valuation contained in an interim application, despite the absence of any Payment Notice or Pay Less Notice, when can he exercise that right? Coulson J held that the employer can only exercise that right after he has paid the notified sum, as required by section 111: see [90] and [103].

105. Mr Speaight says that the judge did not state the juridical basis for that proposition and, on analysis, there is none. If the employer has an accrued right, he can exercise it at any time. This means that an employer who has failed to serve any Payment Notice or Pay Less Notice can escape the statutory consequences of his omission. He can sit tight refusing to pay and, at the same time, commence a 'true value' adjudication. That adjudication will be completed within 28 days. The contractor probably cannot issue proceedings and obtain summary judgment, enforcing payment pursuant to section 111 within that period. By the time of the summary judgment hearing the employer can point to the re-valuation decision and say that the 'notified sum' in the contractor's interim application has been superseded. Mr Speaight submits that this state of affairs would undermine the legislation. The employer can avoid meeting his payment obligation under section 111 with impunity, by the simple expedient of exercising his contractual or statutory right to adjudicate. That, says Mr Speaight, calls into question the correctness of the judge's whole approach.

106. Mr Nissen submits that the time when an employer can commence a 'true value' adjudication is a question for another day, which this court should not address. Mr Nissen and his clients are 'agnostic' on the question. Agnostic they may be, but I do not have the luxury of agnosticism. As Mr Speaight rightly said in his reply, the court cannot duck the issue. The timing argument is one of the bases on which the appellant attacks the judge's decision. I must therefore address this issue without the assistance of any reasoned argument from the respondent.

107. Mr Speaight's argument has attractions, but I do not accept it. Both the HGCRA and the Amended Act create a hierarchy of obligations, as discussed earlier. The immediate statutory obligation is to pay the notified sum as set out in section 111. As required by section 108 of the Amended Act, the contract also contains an adjudication regime for the resolution of all disputes, including any disputes about the true value of work done under clause 4.7. As a matter of statutory construction and under the terms of this contract, the adjudication provisions are subordinate to the payment provisions in section 111. Section 111 (unlike the adjudication provisions of the Act) is of direct effect. It requires payment of a specific sum within a short period of time. The Act has created both the prompt payment regime and the adjudication regime. The Act cannot sensibly be construed as permitting the adjudication regime to trump the prompt payment regime. Therefore, both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation.

108. One important policy of the HGCRA and the Amended Act is to promote cashflow in the construction industry. In other words, there should be prompt payment followed by

any necessary financial adjustments. See *Melville Dundas Ltd (in receivership) and others v George Wimpey UK Ltd and another* [2007] UKHL 18; [2007] 1 WLR 1136 at [65]; the DTI paper 'Fair Construction Contracts' referred to in *Melville Dundas at* [65]; the subsequent DTI paper 'Improving Payment Practices in the Construction Industry' (2007), upon which Mr Speaight relies. If the statutory provisions are ambiguous (and I do not think that they are), a purposive approach to interpretation supports my conclusion in the previous paragraph.

109. It may be argued that my conclusion on the timing issue operates harshly in situations where the contractor is veering towards insolvency. The employer may pay out a large sum (in a scenario like the present some £14 million), which is then swallowed up by secured creditors before there is any re-valuation of the works. I emphasise that there is no suggestion of insolvency here. I am merely exploring the potential issues. My answer to that hypothetical argument is that in any case where there is a perceived risk of insolvency the employer would (or at least should) be scrupulous to protect itself by serving timeous Payment Notices or Pay Less Notices.

110. In summary, the position is this. The judge held that the employer must make payment in accordance with clause 4.9 of the contract (or, as I would say, in accordance with section 111 of the Amended Act) before it can commence a 'true value' adjudication. I accept, as Mr Speaight submits, that the judge did not give reasons for that conclusion. Nevertheless, I think that the judge's conclusion was right for the reasons which I have set out above.

111. If I am wrong in the four preceding paragraphs, the consequence will be that the employer can commence a 'true value' adjudication without troubling to meet its payment obligation under section 111 Act. That would be unfortunate for the construction industry and it would indicate a need for statutory amendment. But that unfortunate state of affairs does not cause me to reject my earlier conclusion that the employer, who has failed to serve any timeous Payment Notice or Pay Less Notice is nevertheless entitled to embark upon a 'true value' adjudication.

112. I have, with the help of a judicial assistant, had a general look at some of the overseas jurisdictions which have copied our payment and adjudication regimes, with adjustments to suit their local circumstances. I have not found any authority or guidance which assists in relation to the problems discussed in this part of the judgment.

113. Let me now draw the threads together. For the reasons set out above, my answer to the question posed in Part 7 of this judgment is yes.

Part 8- Third Issue: were the Notices Served by Grove in April 2017 Sufficient to Entitle Grove to Deduct or Recover Liquidated Damages for Delay?

114. Clauses 2.28 and 2.29 of the contract require the employer to give three separate notices in a specified sequence to the contractor, before it can recover liquidated damages for delay. The first notice is a non-completion notice, as described in clause 2.28 and 2.29.1.1. The second notice is a notification under clause 2.29.1.2 that "the employer may require payment of, or may withhold or deduct, liquidated damages". The third notice is a deduction notice as described in clause 2.29.2. I shall refer to these three documents as 'notice 1', 'notice 2' and 'notice 3'.

115. In the present case Grove sent notice 1 to S&T on 13th October 2016. Grove sent notices 2 and 3 on 18th April 2017. As set out in Part 2 above, Grove sent notice 2 at 49 seconds after 5 p.m. Grove sent notice 3 just 8 seconds later, namely at 57 seconds after 5 p.m.

116. It took a couple of minutes for the notices to speed across the internet. Notice 2 appeared on S&T's computer at 3 minutes and 12 seconds after 5 p.m. Notice 3 travelled slightly more swiftly. It arrived 7 seconds later, namely at 3 minutes and 19 seconds after 5 p.m.

117. It is S&T's case that this process did not amount to compliance with clause 2.29. Grove sent notice 3 before S&T had received, or could reasonably have received, notice 2. S&T had no opportunity to see, read and digest notice 2 before notice 3 arrived.

118. The judge rejected S&T's case, essentially because the contract did not require there to be any specified period of time between notice 2 and notice 3. There was no express term to that effect and it was impossible to imply such a term. The contract did no more than specify a sequence and Grove adhered to that sequence.

119. On appeal Mr Speaight submitted, correctly, that Grove had not "notified" S&T of the matters in clause 2.29.1.2 until notice 2 was received. He then argued that Grove gave notice under clause 2.29.2 before that moment in time. This submission is wrong for the reason identified by Longmore LJ in argument, namely that notice of the matters in clause 2.29.2 is not given until such notice is received. That must be correct, both on the reasoning of the majority and on the reasoning of the minority in *Haywood v Newcastle Upon Tyne Hospitals NHS Foundation Trust* [2018] UKSC 22; [2018] 1 WLR 2073. Therefore notices 2 and 3 were received in the correct order.

120. Mr Speaight then developed the submission that there must be some reason for requiring notice 2 to be given before notice 3. Notice 2 is essentially a warning that the employer may exercise his right to recover liquidated damages. Notice 3 is a statement that the employer definitely will recover liquidated damages for delay. Mr Speaight submits that the warning notice is deprived of any possible use, unless the contractor has a brief period of time to do something about it.

121. I see force in this argument. The procedure in clause 2.29 provides no obvious benefit to anyone, if the employer warns the contractor of what he may do just seven or eight seconds before he actually does it. At one point I was minded to allow S&T's appeal on the third issue. On reflection, however, I find it impossible to identify any specific period of time which should elapse between serving notice 2 and serving notice 3. To say that there must be a 'reasonable' lapse of time is unworkable and does not satisfy the requirements for an implied term: *Marks & Spencer Plc v BNP Paribas* [2015] UKSC 72; [2016] A.C. 742 at [14]-[24]. Also, it would create huge uncertainty in future cases. Where the contract requires a specific period of time to elapse between notices, it says so in terms. See the termination provisions in clause 8. In the end, I am driven to the same conclusion as the judge. However surprising it may seem to a judge, clause 2.29 of the contract requires no more than the giving of notices in a specified sequence. Judges should not generally impose their notions of commercial common sense upon the parties to business disputes. Provided that a scintilla of time elapses after giving notice 2 and before giving notice 3, that is sufficient.

122. In the result, my answer to the question posed in Part 8 is yes.

Part 9- Executive Summary and Conclusion

123. Grove engaged S&T to design and construct a hotel, using the JCT Design and Build Contract 2011 with amendments. After a period of delay, for which S&T obtained only a partial extension of time, practical completion occurred on 24th March 2017. On 31st March 2017 S&T sent an interim application for payment in the sum of some £14 million. Grove sent its detailed evaluation of the sum due in a spreadsheet dated 13th April 2017. On 18th April 2018 Grove sent its Pay Less Notice, relying upon the spreadsheet sent five days earlier as the basis of the sum which Grove stated was due. On the same day Grove sent a warning notice and then a deduction notice in support of its demand for liquidated damages for delay. The contract required the notices to be sent in that sequence. The deduction notice arrived seven seconds after the warning notice.

124. Coulson J has held that the Pay Less Notice was valid, despite the fact it referred back to a spreadsheet sent five days earlier; if it had been invalid, Grove would have been required to pay £14 million to S&T pursuant to section 111 of the Housing Grants, Construction and Regeneration Act 1996, as amended; but thereafter Grove would have been entitled by adjudication to determine the true value of the work done and to recover any overpayment. The judge also held that Grove, having served its notices in the right sequence, was entitled to recover liquidated damages for delay.

125. S&T appeals against all three of the judge's decisions. For the reasons set out at some length above, I have come to the same conclusions as the judge. I would therefore dismiss this appeal.

LADY JUSTICE KING: I agree.

LORD JUSTICE LONGMORE: I also agree.

APPENDIX

Housing Grants, Construction and Regeneration Act 1996

Adjudication

108 Right to refer disputes to adjudication.

(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose, "dispute" includes any difference.

(2) The contract shall—
(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
(b)provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
(c)require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
(d)allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
(e)impose a duty on the adjudicator to act impartially; and
(f)enable the adjudicator to take the initiative in ascertaining the facts and the law.

(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

(4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.

(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.

(6) For England and Wales, the Scheme may apply the provisions of the Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate.

For Scotland, the Scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator's decision.

Payment

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 contain 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 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.

Housing Grants, Construction and Regeneration Act 1996 (As Amended)

Adjudication

108 Right to refer disputes to adjudication

(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose "dispute" includes any difference.

(2) The contract shall include provision in writing so as to -
(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
(e) impose a duty on the adjudicator to act impartially; and
(f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

(3) The contract shall provide in writing that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.
The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

(3A) The contract shall include provision in writing permitting the adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission.

(4) The contract shall also provide in writing that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.

(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.

(6) For England and Wales, the Scheme may apply the provisions of the [1996 c. 23.] Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate.
For Scotland, the Scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator's decision.

…

Payment

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 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.

(1A) The requirement under 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 purpose 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 to 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 Payment 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 or 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 or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.
(4) A notice under subsection (3) must specify –
(a) the sum that the payer considers to be due on the date the notice is served, and
(b) the basis on which that sum is calculated.
It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.
(5) A notice under subsection (3) –
(a) must be given not later than the prescribed period before the final date for payment, and
(b) in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.
(6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).
(7) In subsection (5) "prescribed period" means –

(a) such period as the parties may agree, or
(b) in the absence of such agreement, the period provided by the Scheme for Construction Contracts.
(8) Subsection (9) applies 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 (3) 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.