HOUSE OF LORDS SESSION 2006–07
[2007] UKHL 18
on appeal from:

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Melville Dundas Limited (in receivership) and others (Respondents)
v.
George Wimpey UK Limited and others (Appellants) (Scotland)

Appellate Committee

Lord Hoffmann
Lord Hope of Craighead
Lord Walker of Gestingthorpe
Lord Mance
Lord Neuberger of Abbotsbury

Counsel

Appellants:
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Sean Smith
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Respondents:
Robert Howie QC
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Hearing dates:
12 and 13 March 2007
ON
WEDNESDAY 25 APRIL 2007

HOUSE OF LORDS

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LORD HOFFMANN

My Lords,

1. This is a dispute over liability to make an interim payment under a building contract. The facts may be shortly stated. The appellant George Wimpey UK Ltd ("Wimpey") contracted with the respondent Melville Dundas Ltd ("the contractor") for the construction of a housing development in Whitecraigs, Glasgow for a total sum of £7,088,270. The contract incorporated the conditions of JCT Standard Form of Building Contract with Contractor's Design (1998 edition) which provided in clause 30 for monthly applications for interim payments. By clause 30.3.6 the final date for payment of the amount due in an interim payment was 14 days after receipt by the employer of the application.

2. On 2 May 2003 the contractor applied for an interim payment of £396,630. There is no dispute that the contractor was entitled to be paid that sum or that the final date for payment was therefore 16 May 2003. Wimpey did not pay on that date and on 22 May 2003 administrative receivers of the contractor were appointed by its bank. Clause 27.3.4 provides that if the contractor has an administrative receiver appointed, the employer may determine the employment of the contractor. Wimpey exercised this right on 30 May 2003. That brought into effect clause 27.6.5.1, which is central to the dispute:

> "Subject to clauses 27.5.3 and 27.6.5.2 the provisions of this contract which require any further payment or any release or further release of retention to the contractor shall not apply; provided that clause 27.6.5.1 shall not be construed so as to prevent the enforcement by the

> contractor of any rights under this contract in respect of amounts properly due to be paid by the employer to the contractor which the employer has unreasonably not paid and which, where clause 27.3.4 applies, have accrued 28 days or more before the date when under clause 27.3.4 the employer could first give notice to determine the employment of the contractor…"

3. In the lower courts it appears to have been conceded that the effect of this clause was that upon determination by Wimpey, the interim payment was no longer payable. It had accrued less than 28 days before 22 May 2003, which was the date on which Wimpey could first have given notice of determination. Before the House, however, Mr Howie QC submitted on behalf of the contractor that the words "which require any further payment…to the contractor" should be read to mean "which give rise to any further liability to make payments to the contractor" and have no application to a liability for interim payment which has already accrued. In my opinion this is not what the clause says. "Require any further payment" means require the employer to pay any more money. Mr Howie's construction would make the proviso pointless, since the clause could not then apply to any amounts "properly due to be paid by the employer to the contractor", whenever they had accrued.

4. The next question is whether the effect of clause 27.6.5.1 is invalidated by the provisions of Part II of the Housing Grants, Construction and Regeneration Act 1996. These were enacted to give effect to certain of the recommendations of Sir Michael Latham's report *Constructing the Team* (1994). Broadly speaking, they deal with three topics: summary adjudication to enable the parties to obtain a provisional but enforceable ruling on any matter in dispute (section 108); entitlement to stage payments (sections 109 and 110) and the prohibition of conditional payment provisions (section 113). There are also certain provisions about notices in sections 110 and 111 to which I shall return later.

5. The only provisions directly relevant to the validity of clause 27.6.5.1 are those which concern the entitlement to stage payments. The effect of the clause is to disentitle a contractor from being paid an instalment to which, until determination under clause 27.3.4, he would have been entitled under the contract. Is there anything in the Act which says that the contract cannot so provide? Section 109(1) says that, subject to an exception for short contracts—

> "A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work done under the contract"

6. In addition, section 110(1) provides that—

> "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."

7. If the contract does not comply with the requirements of sections 109 and 110(1), the terms of a statutory model contract called "the Scheme for Construction Contracts" are to apply instead. It is not however suggested that the JCT conditions failed to provide for payment by instalments or for the matters mentioned in section 110(1). The question is whether they could in addition provide that in the circumstances specified in clause 27.6.5.1, an instalment payment which had previously been payable should cease to be payable.

8. Apart from the requirements of sections 109(1) and 110(1), the Act does not purport to interfere with the freedom of the parties to make their own terms about interim payments. Section 109(2) says:

> "The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due."

9. The references to "circumstances" shows that Parliament did not require that stage payments should become inexorably due at fixed intervals but that liability to pay them could be subject to contingency. Mr Howie submitted that the parties were free to agree on the circumstances in which interim payments would "become due" but not on any circumstances in which, having become due, they would cease to

be due. In my opinion this is an over-literal reading of legislation which was intended to have practical application to a wide variety of contractual relationships. I can think of no reason why Parliament should have left the parties free to agree the circumstances on which instalment payments should fall due but then insisted that nothing should be capable of discharging that liability. Mr Howie suggested that it was in the interests of certainty. But certainty does not require unalterability if the grounds of alteration are sufficiently certain. There can be no uncertainty about whether administrative receivers have been appointed and the contract therefore provides an "adequate mechanism" for determining whether a payment is due.

10. It is apparent from sections 109 and 110(1) that their object was to introduce clarity and certainty as to the terms of a construction contract rather than to dictate to the industry what those terms should be. The only substantive requirement is that the contractor should be "entitled to payment by instalments" and that there should be an adequate mechanism for determining what he is entitled to be paid and when. But the statute goes no further.

11. I would not go so far as to say that there could not be an agreement as to the circumstances in which instalment payments should fall due which would amount in practice to a denial of the entitlement to payment by instalments altogether. But this is not such a case. Instalments payments are in their nature provisional liabilities. As has been frequently said, they are to provide the cash flow for the contractor or sub-contractor to enable him to perform his duties under the contract. But when the contractor's employment has been determined in consequence of the appointment of a receiver, two consequences follow. First, the contractor no longer has any duties to perform. Secondly, the liability to make an interim payment is no longer provisional. While the employer retains the money, he can set it off against his cross-claim for non-completion against the contractor. In practice, where the contractor has become insolvent, the employer will have a cross-claim for damages which exceeds the contractor's claim for unpaid work. On the other hand, once the employer has paid the money, it is gone. It is swept up by the bank's floating charge and the employer will have to prove in the liquidation for his cross-claim. Upon insolvency, liability to make an interim payment therefore becomes a matter which relates not to cash flow but to the substantive rights of the employer on the one hand and the contractor's secured or unsecured creditors on the other.

12. The Inner House ([2006] SLT 95) in holding that clause 27.6.5.1 was in conflict with the terms of the 1996 Act, said (at p. 104) that if a contractor became insolvent, Parliament "has provided quite clearly that…the losses should be borne by the…employers under the contract." My Lords, I can find no trace of such an intention. It seems to me most unlikely that Parliament intended that provisions intended to improve the efficiency of the construction industry should determine priorities between the employer and an insolvent contractor's creditors. The Inner House added that not only would there be bankers with an interest in the [insolvent] contractor's cash flow but "there will be subcontractors awaiting payment". This seems to be based upon some misapprehension, because in most cases the position of subcontractors would be in no way improved by construing the Act as disabling an employer from retaining the money which provides him with security for his cross-claim. If he is made to pay, the money will go to the bank and neither the contractor nor the subcontractors will get anything.

13. A provision such as clause 27.6.5.1, which gives the employer a limited right to retain funds by way of security for his cross-claims, seems to me a reasonable compromise between discouraging employers from retaining interim payments against the possibility that a contractor who is performing the contract might become insolvent at some future date (which may well be self-fulfilling) and allowing the interim payment system to be used for a purpose for which it was never intended, namely to improve the position of an insolvent contractor's secured or unsecured creditors against the employer. Mr Howie said that to allow the employer *any* security in the form of an unpaid instalment payment would be to allow him to profit from his own wrong. But the security arises, not from the terms of the contract but from the law of bankruptcy set-off. As Chadwick LJ pointed out in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522, any creditor who owes a debt to an insolvent company, no matter how long overdue, may set off that debt in full against his own claim in the liquidation. It is in any case artificial to speak of the employer profiting from his own wrong when the contractor has no further interest in the matter and the issue is one of priority between the employer and the contractor's other creditors.

14. Although it is true that the appointment of an administrative receiver does not necessarily mean that the company is insolvent, it is common to treat such an appointment as evidence of insolvency (compare the definition of insolvency in section 113(2) of the Act) and it is admitted that in this case the contractors were in fact heavily insolvent. We were told that the clause has been part of the JCT

Conditions for a long time one and must infer that when those conditions were redrafted in 1998 to give effect to the provisions of the 1996 Act, the various industry bodies involved in the drafting saw no conflict.

15. In my opinion, there is no conflict between clause 27.6.5.1 and the statutory requirements as to the terms which the contract should contain. That leaves for consideration the notice provisions in section 110(2) and 111, which figured large in the judgments below:

> "110 (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.
>
> 111.(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.
>
> The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.
>
> (2) To be effective such a notice must specify—
>
> (a) the amount proposed to be withheld and the ground for withholding payment, or
>
> (b) if there is more than one ground, each ground and the amount attributable to it,
>
> and must be given not later than the prescribed period before the final date for payment.
>
> (3) The parties are free to agree what the prescribed period should be…"

16. The drafting of these provisions is not felicitous. Serving a notice under section 110(2) seems to have no consequences (except that

it may stand as a notice under section 111(1)) and there is no penalty for not doing so. The purpose of section 110(2) is therefore something of a puzzle. It seems to have dropped from heaven into the legislative process on its last day in the House of Commons, when the bill had emerged from Standing Committee and was being debated for second reading. The amendment by which it was inserted was neither explained nor debated.

17. Fortunately, your Lordships do not have to consider section 110(2) and its relationship to section 111(1). The contractor relies entirely on the latter section. Mr Howie says that Wimpey is not entitled to withhold the interim payment because it did not serve a notice earlier than the prescribed period (which the JCT Conditions fix at 5 days) before the final date for payment on 16 May 2003.

18. In the present case, it would not have been possible for Wimpey to serve such a notice by 11 May 2003. The earliest that they could have known that they were entitled to withhold the interim payment was when the receivers were appointed on 22 May 2003. To make clause 27.6.5.1 subject to the notice requirement of section 111(1) would be in effect to write it out of the contract.

19. What is the purpose of the notice requirement in section 111(1)? Obviously to enable the contractor to know immediately and with clarity why a payment is being withheld. It is primarily part of the machinery of adjudication, so that the contractor can decide whether he should dispute the employer's right to withhold the payment and refer the question to adjudication. But I suppose it also provides the contractor with information for the purpose of any other action which may depend upon knowing the reason why a payment is being withheld.

20. In the case of clause 27.6.5.1 the contractor will have been given notice of why the payment is being withheld because he will have received the notice of determination. But the retrospective operation of the clause means that he will not have received it within the time stipulated in the statute. It seems to me, however, that it would be absurd to impute to Parliament an intention to nullify clauses like 27.6.5.1, not by express provision in the statute, but by the device of providing a notice requirement with which the employer can never comply. Section 111(1) must be construed in a way which is compatible with the operation of clause 27.6.5.1.

21. The Lord Ordinary (Clarke) solved the problem by holding that section 111(1) applied only during the currency of employment under the contract and not after that employment had been determined. I doubt whether that can be right. The employer may be withholding a payment on the ground that he has determined the employment for breach under clause 27.2 and in such a case I think that the contractor should be entitled to a notice stating the grounds for determination, so that he may refer the question for adjudication. Before the Inner House, counsel for Wimpey submitted that the effect of clause 27.6.5.1 was to extend the final date for payment until after the final account had been taken. I do not think this is right either. In my opinion the concept of a "final date for payment" in the Act applies only to interim payments. Clause 27.6.5.1 does not extend the final date for making the interim payment. It makes it cease to be payable as such. Before the House, Mr Akenhead QC submitted for Wimpey that once clause 27.6.5.l had operated, the interim payment was no longer "due" within the meaning of section 111(1). This is an attractive submission because once a receiver has been appointed, the interim payment is, under the terms of the contract, plainly not due. But I find it difficult to give the word "due" in section 111(1) a consistent meaning which excludes this case, because it must include cases in which the payment turns out, after adjudication or litigation, not to have been due.

22. The problem arises because I very much doubt whether Parliament, in enacting section 111(1), took into account that parties would enter into contracts under which the ground for withholding a payment might arise *after* the final date for payment. One cannot therefore find an answer in a close examination of the language of the section. I would prefer simply to say *lex non cogit ad impossibilia* and that on this ground section 111(1) should be construed as not applying to a lawful ground for withholding payment of which it was in the nature of things not possible for notice to have been given within the statutory time frame. That may not be particularly elegant, but the alternative is to hold that the parties' substantive freedom of contract has been indirectly curtailed by a mere piece of machinery, the operation of which would serve no practical purpose. This I find even less attractive. I would therefore allow the appeal and restore the interlocutor of the Lord Ordinary.

LORD HOPE OF CRAIGHEAD

My Lords,

23. In this case a contractor (now in receivership) sues the employer under a construction contract for an interim payment which had been applied for less than 28 days before appointment of the receiver, on which ground the employer determined the contractor's employment under the contract. The solution to the problem it raises is to be found in the answer to two questions. The first is what is meant by the words "any further payment" in the opening words of clause 27.6.5.1 of the JCT Standard Form of Building Contract with Contractor's Design 1998 Edition ("JCT 1998"), which was incorporated into the Scottish Building Contract with Contractor's Design Sectional Completion Edition (January 2000 Revision) which the parties entered into in March 2002. The second is whether section 111(1) of the Housing Grants, Construction and Regeneration Act 1996 applies to prevent the employer from relying on the protection which clause 27.6.5.1 would otherwise afford to him in the events that it refers to.

24. There was no dispute in the Court of Session as to how the first question should be answered. Mr Howie QC for the respondents accepted in the discussion in the Outer House before the Commercial Judge, Lord Clarke, that if the question as to the contractor's entitlement to be paid the sum sued for under the interim certificate turned on an analysis of the contractual provisions, he was not in a position to contradict the construction of clause 27.6.5.1 that was contended for by the employer: 2005 SLT 24, para 7. He renewed this concession in the Inner House. Lord Nimmo Smith, who delivered the opinion of the Extra Division, said that the court proceeded on the assumption that, in the absence of the statutory provisions, clause 27.6.5.1 would, in the circumstances of this case, entitle the employer to withhold payment of the sum sued for until the completion of the works and the preparation of the account provided for by clause 27.6.5.2: 2006 SLT 95, para 31. Mr Howie confessed to have been haunted by this concession as he sought to argue the contrary before your Lordships. But in my opinion his first instincts were right. I think that the assumption on which the Extra Division proceeded stands up to examination when the wording of clause 27.6.5.1 is analysed.

25. The opening words of clause 27.6.5.1 state:

> "Subject to clauses 27.5.3 and 27.6.5.2 the provisions of this Contract which require any further payment or any release or further release of Retention to the Contractor shall not apply."

The clause then goes on to say that it shall not be construed so as to prevent the enforcement by the contractor of any rights under the contract in respect of amounts properly due to be paid by the employer to the contractor which the employer has unreasonably not paid and, where the contractor's employment has been determined on the ground of insolvency (other than cases where the employment is determined automatically under clause 27.3.3), have accrued 28 days or more before the date when the employer could first have given notice to determine his employment.

26. Mr Howie said that once a sum had become due under the contract it could not cease to be due. The words "any further payment" should not be read as including an interim payment which the employer was already obliged to pay under clause 30.3.5 because the final date for its payment in terms of clause 30.3.6 had already passed by the date of the determination of the contractor's employment. The position would have been different if the employer had given a written notice to the contractor under clause 30.3. 4 not later than 5 days before the final date for payment stating the amount proposed to be withheld and the grounds for doing so. No such notice was given in this case. As the interim payment was an amount that the employer was already due to pay under the provisions of the contract before the determination of the contractor's employment, it was not a "further payment".

27. There are two problems with this argument. First, it involves reading into this part of the clause words that are not there. It seeks to confine it to payments which are not already due. But the words "any further payment" are unqualified. Their plain meaning is that the contractor ceases to be entitled to require any further payment whatever. As my noble and learned friend Lord Hoffmann has said, their effect is that the contractor cannot require the employer to pay any more money. This is, of course, a temporary arrangement, as the reference to clause 27.6.5.2 at the beginning of the clause indicates. The employer cannot be required to pay any more money to the contractor in the meantime, pending the making up of the account as to the consequences of the determination referred to in clause 27.6.5.2.

28. Secondly, if the words "not already due" were to be read into this part of the clause, there would be no need for the proviso which permits the contractor, under certain conditions, to enforce any rights under the contract in respect of amounts properly due to be paid by the employer despite the determination of his employment. The purpose of the proviso is to strike a balance between the contractor and the employer. The contractor's interest lies in enforcing the payment of sums which were already due before the determination. The employer's interest lies in retaining sums already due so that they can be set off against amounts which he can properly claim against the contractor in consequence of the determination of his employment under the contract. Thus the purpose of the clause, read as a whole, is to bring the contractor's right to enforce payment of any sums which have not already been paid to him by the employer to an end, except to the extent which the proviso permits, pending the making up of an account under clause 27.6.5.2.

29. The second question is more difficult. The relevant part of section 111(1) of the 1996 Act provides:

> "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."

No notice was given in this case under either clause 30.3.3 or clause 30.3.4 of an intention to withhold payment. The final date for payment, in terms of clause 30.3.6, of the sum sued for had already passed by the date of the appointment of the receiver, which was the ground on which the contractor's employment was terminated. At first sight the situation that has arisen in this case seems plainly to fall within the words of the subsection, even though it would have been impossible for a timeous and effective notice to be given in the events that happened in this case. If that is so, the protection which the proviso to clause 27.6.5.1 gives to the employer if he determines the employment of the contractor is written out of the contract. But must the words of this subsection be taken literally?

30. There was a difference of opinion in the Court of Session. Lord Clarke said that sections 109 to 111 of the 1996 Act were concerned with cash flow questions arising during the course of a continuing, non-determined construction contract, not with the situation provided for in clause 27.6.5.1 as to which the parties' freedom of contract was

unaffected: 2005 SLT 24, para 12. The Extra Division agreed that section 111 was a provision about cash flow: 2006 SLT 95, para 30. But they said that the sum sued for was for work already done, the "final date for payment" of which within the meaning of that section could not be altered retrospectively. The effect of section 111(1) was that, as the final date for payment had already passed without any effective notice having been given, the losses flowing from paying the sum to the insolvent contractor were to be borne by the employer as the employer under the contract.

31. At first sight, as I have said, the wording of the subsection seems to support the interpretation that the Extra Division gave to it. But it is a surprising result when it is applied to the situation which the proviso to clause 27.6.5.1 seeks to regulate. This raises the question whether the result was one that was intended by Parliament. To answer that question it is necessary to examine the purpose which the proviso seeks to achieve more closely, and to look more closely too at what Parliament was seeking to achieve by Part II of the 1996 Act, which is the Part that is concerned with construction contracts.

32. The purpose of the proviso to clause 27.6.5.1 is most easily seen by assuming that the ground for the determination of the contractor's employment is the making of a winding up order and that this is a compulsory winding up on the ground of insolvency: see clause 27.3.3. As *Goudy, The Law of Bankruptcy in Scotland*, 4th ed, pp 550-551 explains, the general doctrine of the law entitles a creditor upon the threatened insolvency of his debtor to attach the debtor's funds by diligence in security. But by the operation of equity this doctrine has been extended so as to entitle the creditor of a person who has become bankrupt to set off illiquid debts against the debtor's liquid claim: *Bell, Commentaries on the Law of Scotland*, vol ii, 122-124. This is known as compensation, or the balancing of accounts, in bankruptcy. Its purpose is to prevent the hardship of a debtor who is also a creditor being forced to pay in full, when he will come in only as a creditor for a dividend for his debt as a result of ranking pari passu with the ordinary creditors. The liquidation of a company is treated as the equivalent for this purpose as bankruptcy: *Highland Engineering Ltd v Thomson*, 1972 SC 87, 91, per Lord Fraser. The parties to a construction contract are entitled to the benefit of the doctrine, just like anyone else. The same result is achieved under English law by rule 4.90 of the Insolvency Rules 1986: see *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522, paras 30-32 per Chadwick LJ, although the point was not taken in that case.

33. The doctrine is available only in the event of liquidation or bankruptcy. As Bell puts it in his *Commentaries*, vol ii, 122, the imminent necessity for the payment of the liquid debt is taken away by the bankruptcy. But there are other situations closely related to insolvency, listed in clause 27.3.1, where the employer may have good reasons for wishing to determine the contractor's employment. There may also be good reasons in those situations for thinking that the contractor, although not yet actually insolvent, is on the verge of insolvency. JCT 1998 seeks, in the employer's interest, to deal with this situation in two ways.

34. First, clause 27.3.4 gives the employer the right to determine the employment of the contractor in those other situations too. To this is added the right to recover from the contractor any direct loss and damage caused as a result of the determination, and to set that sum off against sums due to the contractor when the account referred to in clause 27.6.5.2 is made up. Secondly, clause 27.6.5.1 applies the principle of compensation in bankruptcy to all cases where the employer determines the employment of the contractor by giving the employer the right to withhold payment of liquid debts pending the making up of the account. But it does not drive this principle too far. It excludes payments that the employer has unreasonably not paid and which, in a case of determination on the ground of insolvency, accrued 28 days or more before the date when the employer could first have given notice to determine the employment of the contractor.

35. JCT 1998 is not a consumer contract. The Joint Contracts Tribunal by which this standard form is issued includes among its members contractors' representatives as well as representatives of employers. That is true also of the Scottish Building Contract Committee under whose auspices the form of contract used in this case was issued. The proviso to clause 27.6.5.1 must be taken to have the approval of both sides of the building industry. There is nothing inherently unfair in holding the parties to a building contract, who can be assumed to have equal bargaining powers, to an agreement in these terms. Why then should Parliament wish to interfere with the parties' freedom of contract as to how the potential for losses should be apportioned between them in the events that it refers to?

36. Part II of the 1996 Act contains a package of measures relating to construction contracts which followed upon the recommendations of Sir Michael Latham's Report *Constructing the Team* (HMSO 1994). His report was jointly funded by the construction industry and the

Department of the Environment. In May 1995 the Department of the Environment issued a consultation paper entitled *Fair Construction Contracts*. It was concerned with the extent to which improved construction contracts could and should be underpinned in law: para 2. It was noted that the Latham Report had confirmed what was widely believed, that the existing arrangements militated against co-operation and teamwork, and that the reform of current contractual relations was central to the competitiveness of the industry in both the short and long term: para 4, 5. Attention was drawn to the list of principles that *Constructing the Team* had identified in para 5.18 as those which the most effective form of contract in modern conditions should include. Among these principles, which were set out in Annex A to the consultation paper, was the following:

> "9. Clearly setting out the period within which interim payments must be made to all participants in the process, failing which they will have an automatic right to compensation, involving payment of interest at a sufficiently heavy rate to deter slow payment."

None of the principles listed here deals with the situation referred to in the proviso to clause 27.6.5.1.

37. In para 23 of the consultation paper it was noted that the proposals in *Constructing the Team* had identified the following as essential terms in all construction contracts: dispute resolution; right of set off; prompt payment; protection against insolvency. In para 12 it was noted that legislation in this area could significantly restrict to some extent the freedom of parties to contract on any terms they chose. The first point on which the government wished to have views was whether the proposals for legislation set out in *Constructing the Team* and elaborated in the consultation paper were likely to improve contractual relations sufficiently to justify this regulatory intervention. So it is important to see what the consultation paper does, and does not, address.

38. The section of the consultation paper which deals with prompt payment refers to payments that fall to be made during the course of the project, and to the need for a clearly defined period within which interim payments must be made to all participants in the process: paras 34, 35. In para 38 it was suggested that the practice of withholding payment until payment had been received from a party higher up the chain ought not to be recognised in any statutory scheme for the approval of a

standard from of building contract. The section on the right of set off refers to the widely applied practice of setting off unliquidated cross claims against sums due on interim certificates: see *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689. *Constructing the Team* recommended that this right should be constrained: para 8.9. The consultation paper proposed various steps that might be taken to deal with this problem: paras 31, 32. But set-off in the circumstances referred to in clause 27.6.5.1 is not discussed. There is no indication that there was thought to be any need to constrain, or to restrict, the employer's right of set off in the event of the determination of the contractor's employment under the contract.

39. In the section of the consultation paper on protection against insolvency it was noted that a complication in creating trust among the members of the construction team which had attracted particular attention was the fear that during the course of the contract one of the parties, including the client, might become insolvent: para 39. In para 40 the consultation paper stated that it was not possible to give absolute protection against this risk which was a normal commercial one faced by all those doing business. It was suggested that the risk could be minimised, in the case of the client, by the use of trust funds. But there is no indication here that it was the intention to reduce the protection that it was already the practice for the employer to seek to obtain against the risk of the contractor's insolvency in the event of the determination of his employment under the contract.

40. That then is the background to Part II of the 1996 Act. In general its provisions follow the agenda that was indicated in the consultation paper. Legislation on trust funds to increase protection against the client's insolvency was omitted, as was the provision of a statutory right to interest for late payment. But provision was made for entitlement to stage payments (section 109), for the inclusion in every construction contract of an adequate mechanism for determining what payments become due under it and the final date for payment in relation to any sum which becomes due (section 110), for notice to be given of an intention to withhold payment (section 111), for a right to suspend performance for non-payment (section 112) and for the prohibition of provisions making payment conditional on payment received from a third person (section 113). Leaving aside the small print, there is nothing in this part of the Act that would surprise anyone who had engaged in the consultation process that preceded it. Nor is there anything to suggest that regulatory intervention had been resorted to on matters that had not been put out for consultation with the construction industry.

41. In the light of this background I would give a purposive construction to section 111(1), although it does not contain any obvious ambiguity. The mischief that it addresses is that of the withholding payment without notice of stage payments or other periodic payments (see section 109(1)), not the withholding of payment of sums already due in the event of the determination of the contractor's employment pending the making up of an account to identify the balance, if any, due to either party once the loss and damage caused to the employer as a result of the determination has been taken into account. The parties' freedom of contract as to the circumstances in which the contractor's employment may be terminated and, if so, with what consequences has not been affected.

42. As the commentator in *Current Law Statutes* indicates, section 111 is primarily designed to reduce the incidence of set-off abuse by formalising the process by which the payer claims to be entitled to pay less than expected by the payee. Construing it in its context, section 111(1) is concerned with the entitlement to stage payments referred to in clause 109. The procedure that applies where an effective notice of intention to withhold payment is given in terms of section 111(4) supports this approach. That subsection envisages that the only issue, if the matter is referred to adjudication, will be whether the whole or part of the amount withheld should be paid and that payment will be made within a very short time thereafter. I agree with Lord Clarke that section 111(1) does not apply to the situation where the employer wishes to exercise the right of set-off that he is given by clause 27.6.5.1 when he has determined the contractor's employment under the contract.

43. For these reasons, and for those given by Lord Hoffmann (except for his doubt as to whether section 111(1) applies only during the currency of the employment under the contract – a determination for breach under clause 27.2.2 will always have been preceded by a notice under clause 27.2.1 specifying the default or defaults, which will give the contractor an opportunity to refer the matter to adjudication within the period of 14 days referred to in clause 27.2.2), I would allow the appeal, recall the Extra Division's interlocutor, restore the interlocutor of the Lord Ordinary and dismiss the action.

LORD WALKER OF GESTINGTHORPE

My Lords,

44. I have had the great advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I am in full agreement with it and for the reasons given by Lord Hoffmann I would allow this appeal.

LORD MANCE

My Lords,

45. I have had the benefit of reading in draft the opinions prepared by my noble and learned friends, Lord Hoffmann, Lord Hope of Craighead and Lord Neuberger of Abbotsbury.

46. The first issue is whether, putting the Housing Grants, Construction and Regeneration Act 1996 on one side, clause 27.6.5.1 of the JCT Standard Form is in its terms apt to enable the appellant to withhold payment of the instalment which became finally due on 16th May 2003. In agreement with the reasoning of all of your Lordships, in my opinion it is.

47. On the second issue I agree with the reasoning and conclusion of Lord Neuberger. This issue turns on the effect of the 1996 Act, particularly section 111 read in the context of sections 108-113. The House was informed that clause 27.6.5.1 of the JCT Form dates from long before the 1996 Act. Other clauses in the JCT Form have been introduced or amended to reflect the statutory concepts of that Act. The retention unaltered of clause 27.6.5.1 no doubt witnesses the JCT draftsmen's belief, or hope, that its provisions were consistent with the statute. But one cannot approach the present problem with any pre-conception that the statute should be construed to validate them.

48. It is, I think, accepted on all sides that the terms of section 111(1) are on their face unambiguous and unqualified. Their evident aim was to

crystallise a time after which a payment becoming due under a contract would have to be made, regardless of any ground for refusal of payment which might otherwise have existed, unless the ground had been raised by notice complying with the requirements in and time limit prescribed under section 111(2). This is underlined by paragraph 35 of the Department of the Environment's consultation paper, to which Lord Neuberger refers, which contemplated that the legislative provisions covering prompt payment of interim payments would provide "an automatic right to compensation", and that "any attempt to amend or delete them should be invalid".

49. I see no room for reading into section 111 some exception in respect of grounds subsequently arising. I cannot think that Parliament can have overlooked the fact that grounds for withholding payment could arise after the cut off date for a notice under section 111. Neither the statutory nor the JCT scheme appears to me consistent with the appellant's submission that a sum due under the contract can be provided to become retrospectively "undue". The phrase "after the final date for payment of a sum due under the contract" in section 111(1) refers simply to the contractual time stated in the contract in compliance with section 110(1)(b); it does not enable a revisiting of the question whether there is still a sum due, to take into account events subsequent to the expiry of the period for notice prescribed under paragraph 111(2).

50. Equally, I cannot see any basis for carving out of the operation of section 111 situations defined by reference to a subsequent claim by the employer to have determined the contractor's employment or by reference to some general conception of insolvency. Situations of true insolvency carry, of course, their own different statutory scheme, to which others of your Lordships refer in their opinions. But we are concerned not with a situation of statutory insolvency, but with a contractual scheme. In this connection, it is relevant to note that clause 27.6.5.1 is not in terms limited to cases of contractual determination on account of insolvency (or financial difficulty, such as those leading to appointment of a receiver: cf clause 27.3.3). It is also liable to be triggered in cases of contractual determination for alleged default (cf clauses 27.2.3 and 27.3.3). The cash flow which section 111 aims to protect is clearly engaged for the benefit of the contractor (and others relying on the contractor for payment in the ordinary course of business) in the latter case, even if in the former case any payment made by the employer may well only benefit the contractor's bank or general body of creditors. As I have indicated, I cannot in fact see any basis for excluding either case from the clear operation of section 111.

51. I would therefore dismiss this appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

52. The appellant, as employer, and the respondent, as contractor, entered into a building contract on 11 April 2000 (the "Contract") for the design and construction of houses at Ayr Road, Whitecraigs, Glasgow. The contract sum was around £7.1m. The contract incorporated (with variations irrelevant for present purposes) the terms of the JCT Standard Form of Building Contract With Contractor's Design, 1998 Edition.

53. Clause 27 was headed "Termination by the Employer", and it included a right to determine in the event of the contractor being in persistent default of its contractual obligations (clause 27.2), going into liquidation, or having a receiver, administrator or administrative receiver appointed (clause 27.3), or being involved in corruption (clause 27.4). Under clause 27.3, liquidation automatically determined the contract (clause 27.3.3), whereas the other events gave the Employer a right to determine by notice (clause 27.3.4). Clause 27.6 contained provisions which applied if the contract was determined pursuant to these provisions. It included clause 27.6.5.1, which is quoted by my noble and learned friend, Lord Hoffmann, whose speech I have had the privilege of reading in draft.

54. Clause 30 was concerned with "Payment", and clause 30.3 dealt with the contractor's right to apply for interim payments on a monthly basis. Clause 30.3.2 provided that the contractor could render periodic applications for interim payments. Clause 30.3.3 entitled the employer to give notice, within five days of the receipt of an application, specifying the amount the employer proposed to pay on the application, and the basis upon which that amount is assessed. It also provided that that amount, subject to clause 30.3.4, should be paid by the employer "no later than the final date for payment". Clause 30.3.4 provided that "not later than 5 days before the final date for payment", the employer should give notice of "any amount proposed to be withheld and/or deducted from" the sum otherwise payable under clause 30.3.3, and the reasons for any such withholding or deduction. In the absence of an

employer's notice under clauses 30.3.3 or 30.3.4, clause 30.3.5 provided that the amount sought in the application for interim payment should be paid by the employer. Clause 30.3.6 provided that "the final date for payment shall be 14 days from the date of [the] Application for Interim Payment".

55. The provisions of clause 30 which I have just referred to were no doubt formulated so as to comply with sections 110 and 111 of Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"), the relevant parts of which are quoted in the speech of Lord Hoffmann, and do not need to be repeated. They are to be read together with sections 109 and 112 to 113, and constitute a group of five sections in the 1996 Act, which are under the heading "Payment".

56. On 2 May 2003, the respondent contractor applied for an interim payment of £396,630 ("the sum"). No notice was served by the appellant employer under clause 30.3.3 - which reflects section 110(2) – or under clause 30.3.4 – which reflects section 111(2). Accordingly, the final date for payment of the sum, by virtue of clause 30.3.6 – reflecting section 111(1) – was 16 May 2003. The appellant did not pay the sum. On 22 May, an administrative receiver was appointed in respect of the respondent, and, on 30 May, the appellant exercised its consequent right to determine the contract under clause 27.3.4.

57. The appellant contends that it is, and has been since 30 May 2003, entitled to withhold the payment of the sum, notwithstanding that its obligation to pay it by the "final date" of 16 May 2003 had arisen pursuant to the provisions of clauses 30.3.5 and 30.3.6. The reason the appellant so contends is that it determined the contract on 30 May pursuant to clause 27.3.4, and it therefore argues that it can rely on clause 27.6.5.1, and in particular the proviso thereto.

58. The respondent puts forward two arguments in reply. The first is that, on its true construction, clause 27.6.5.1 does not, at least on the facts of this case, have the effect of enabling the appellant to avoid having to pay the sum. In the alternative, if clause 27.6.5.1 does have the effect for which the appellant contends as a matter of contract, it falls foul of the provisions of the 1996 Act, and in particular, section 111(1).

59. So far as the respondent's first point is concerned, Mr Robert Howie QC contends that clause 27.6.5.1 could not avail an employer

who relied on a determining event (as identified in clauses 27.2, 27.3.3, 27.3.4 or 27.4, as mentioned in clause 27.6) to avoid payment of a sum, the "final date for payment" for which had arisen under clause 30.3.6 before the determining event. It may be that that contention could have been made out in the absence of the proviso to clause 27.6.5.1, but it appears to me that the proviso renders the contention unarguable.

60. The opening part of clause 27.6.5.1 provides that, once the contract is determined on one or more of the grounds identified in clause 27.6, the employer is effectively discharged from having to make "any further payment"(subject to clauses 27.5.3 and 27.6.5.2). In the absence of the proviso to clause 27.6.5.1, there might well have been room for argument that "further payment" was intended to be limited to sums that had not fallen due for payment, or at any rate, in respect of which a "final date for payment" has not yet arisen. However, at least on the basis of the arguments advanced before your Lordships, I do not see how such an interpretation of the opening part of clause 27.6.5.1 could be maintained in the light of the proviso and, in particular, to its extending the opening part of the clause (albeit through a double negative) to "amounts…which…have accrued [less than]" 28 days before the date when the employer could first have given notice under clause 27.3.4, or, where that clause does not apply, 28 days before the employer determined the contract.

61. It appears that this point was conceded by the respondent both in the Outer House (see paragraph 7 of the Opinion of Lord Clarke and paragraph 21 of the Opinion of the Inner House) and in the Inner House (see paragraph 27 of the Opinion of the Inner House). In my view, that concession was rightly made.

62. Accordingly my Lords, it appears to me that the real issue in this case centres on the effect of sections 110 and 111 which, as Lord Hoffmann says, do not appear to have been conspicuously well drafted. Thus, it is by no means clear why the legislature has seen fit to provide for two separate notices, the first under section 110(2) and the second under section 111(1), particularly given that second sentence of the latter subsection appears to accept a section 110 notice can also function as a section 111 notice.

63. As I see it, the respondent's case is very simple, and it proceeds as follows. Section 110(1)(b) requires a construction contract to "provide a final date for payment in relation to any sum which becomes

due". In this case, the contract complied with this requirement in relation to interim payments through the medium of clause 30.3.6. On the facts of this case, the "final date" for the payment of the sum was 16 May 2003. Section 111(1) prohibits the appellant from "withhold[ing] payment …" after "the final date for payment of a sum due under the contract". In this case, that must mean that the appellant "may not withhold payment" of the sum after 16 May 2003. Accordingly, in so far as clause 27.6.5.1 has the effect of permitting the appellant to withhold payment of the sum, it is purporting to permit that which section 111(1) prohibits. Therefore, to that extent, it is ineffective. That simple approach commended itself to the Inner House.

64. It is also an approach that commends itself to me, at least as a matter of simple statutory interpretation. On the face of it at any rate, if a statute provides that a person "may not withhold payment" after a specified date has passed, it appears to me that a contractual provision that he may do so must be ineffective. That conclusion is supported, in my view, by the fact that sections 110 and 111 (and, indeed, sections 108, 109 and 113) appear to have the aims of (a) providing a clear and simple system to ensure that parties to construction contracts know where they are with regard to payments, and (b) ensuring that contractors and sub-contractors can be confident about their cash-flow.

65. I also consider that this conclusion is consistent with observations in the consultation paper, "Fair Construction Contracts", issued by the Department of the Environment in May 1995. This paper, tracked down by my noble and learned friend, Lord Hope of Craighead, was published after Sir Michael Latham's report referred to by Lord Hoffmann, and preceded the publication of the Bill which became the 1996 Act. In paragraph 19, the DoE paper indicated that the Act should provide that construction contracts should contain "certain essential terms [which] may not be omitted or substantially varied". Those essential terms were suggested in paragraph 23 as being "dispute resolution", "right of set off", "prompt payment", and "protection against insolvency". Paragraph 35 of the paper referred to the fact that the Latham report recommended a provision "for a clearly defined period … 'within which interim payments must be made …'", and that "any attempt to amend or delete" such a provision "should be invalid".

66. However, there are substantial arguments the other way, and I now turn to consider them.

67. The first argument is that it is clear that, in sections 109 to 111, the legislature did not intend to interfere, at any rate radically, with the freedom of parties to a construction contract to negotiate such terms as they see fit. The importance of freedom of contract is emphasised in three places, namely in section 109(2), the second sentence of section 110(1) and the first sentence of section 111(3). However, it is important to identify what those "freedom provisions" are concerned with. If a particular contractual clause is outside the ambit of any of those three freedom provisions, and, even more, if the clause conflicts with a specific statutory prohibition, then none of those provisions can assist the appellant.

68. The freedom provisions in sections 110(1) and 111(3) are not in point in the present case. The freedom provision in section 109(2), particularly with its reference to "circumstances", can fairly be said to be more in point. If parties are free to stipulate the "circumstances" in which a sum "become[s] due", then I see the force of the argument that, at least in the absence of any other statutory provision to contrary, they should be free to agree circumstances where a sum, which has become due, ceases, in a sense retrospectively, to be due. However, that does not necessarily follow as a matter of language, and whether section 109(2) has that effect must be assessed by considering the other relevant provisions of the 1996 Act.

69. In that connection, it appears to me that there are three problems with the contention that section 109(2) entitles parties to agree in their contract that, once a "final date for payment" of a sum has passed, the sum can nonetheless cease to be due for payment. First, as my noble and learned friend, Lord Mance, pointed out in argument, the contention proves too much: if right, it would be possible for parties to agree terms which could retrospectively render undue a stage payment, which had become due for final payment, in almost any circumstances which they wished. If section 109(2) enabled parties freely to agree any circumstances they wished in which stage payments which had become due should cease to be treated as due, section 109 and indeed sections 110 and 111, could be rendered a dead letter. The only answer suggested to this point was that such a provision would be ineffective if its effect was to circumvent the provisions of sections 109 to 111. I do not find that a satisfactory answer, not least because it would be hard to define with any confidence circumstances in which a contractual provision would undermine or circumvent the purpose of those provisions. Indeed, in the context of the present dispute, it is almost a circular argument.

70. Secondly, all that section 109(2) is concerned with is to ensure that a construction contract should provide for stage payments, and what section 109(2) is doing is to emphasise that the parties are free to agree the circumstances in which such stage payments arise. However, once they have agreed, as in this case they have agreed, on terms that satisfy section 109(1), then the provisions of sections 110 and 111 apply, and the appellant's case then runs into the problem of the simple and clear meaning of section 111(1) read together with section 110(1)(b).

71. Thirdly, if a sum whose final date for payment has passed can subsequently cease to be due, then the notice requirements of section 111 cannot be applicable, as they have to be implemented before "the final date for payment". If a particular interpretation of sections 110 and 111 results in the conclusion that a notice which appears to be required by section 111 cannot be served, then rather than implying a term or an exception that, in such circumstances, no notice is needed, it seems to me more appropriate to conclude that the particular interpretation is incorrect.

72. The second argument which must be considered is that, by virtue of the termination of the Contract on 30 May, and the fact that it could have been determined by 22 May, the effect of clause 27.6.5.1 is that the Sum, which had fallen due for payment within the 28 days prior to 22 May, ceased to be a "sum due under the contract" within section 111(1), and therefore section 111 ceased to apply to it. That is an ingenious argument, but I would reject it.

73. In the first place, it suffers from the same problem as the appellant's reliance on section 109(2) identified by Lord Mance, namely that such an interpretation would mean that parties could agree a term that could effectively render the provisions of section 109 and 111 entirely nugatory, unless one could invoke the vague and unsatisfactory proposition that any such term would be invalid, if in the court's view, it undermined or circumvented the purpose of those sections.

74. Secondly, it seems to me that such an interpretation of section 111(1) involves an inappropriate semantic analysis. The subsection is concerned with the "final date for payment of a sum due under the contract", which relates back to section 110(1)(b). It does not appear to me that the notion of the sum becoming due on its final date and for some reason ceasing to be due lies easily with the purpose of the three sections, in particular with the emphasis on finality in section 111.

75. The third argument which has been raised is that the provisions of section 109 to111 do not apply once a construction contract has determined.

76. During argument, it was conceded on behalf of the appellant that the sections applied to a final payment under a construction contract just as much as the applied to interim payments. I consider that concession to be well founded. The heading of that part of the 1996 Act containing sections 109 to113 is simply "Payment". This contrasts with the text of section 109 itself which, by its title and in the light of the opening words of subsection (1), is clearly concerned with stage or interim payments. However, sections 110 and 111 refer simply to payments or sums "due under the contract" and require notices to be given in respect thereof. The contrast between sections 110 and 111, on the one hand, and, on the other hand, section 109 speaks for itself. Furthermore, the purposes of section 110 and 111 appear to be (a) to enable a contractor to know very promptly whether a payment he is seeking is challenged in whole or in part by the employer, and if so, on what grounds, and (b) to enable the adjudication procedure in section 108 to be implemented. Accordingly, I consider that it was a realistic concession on behalf of the appellant that that sections 110 and 111 should apply to final payment. This as I see it, is relevant to the present dispute, because it emphasises that, merely because a construction contract has "determined", in the sense of the building work ceasing, that does not mean that the provisions of sections 109 to 111 cease to apply, as there could be many payments which remain outstanding.

77. In addition, it seems to me that it would cut across the purpose of section 111(1) if what appeared to be a final date for payment, with its concomitant prohibition on refusal to pay, could somehow be retrospectively vitiated simply because the contract has been brought to an end. If, as I see it, the purpose of sections 110 and 111 is to assist the cash flow for contractors and subcontractors, then it seems to me that it would be inconsistent with the way in which section 111(1) is expressed and also with its purpose, if it ceased effectively to be effective on the determination of the contract, at least in a case such as this, where determination occurs after the final date for payment had passed.

78. Fourthly, it was suggested with some force in my view, that at least so far as it was concerned with insolvency, a provision such as clause 27.6.5.1 was not intended to be subverted by sections 109 to111. Once a contractor becomes insolvent, there is at any rate in English law, and as I understand it in Scots law, an automatic set off arrangement

(see rule 4.90 of the Insolvency Rule 1986 as discussed in *Stein v Blake* [1996] AC 243 and, in the context of a case such as this, in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522 paras 29-34). Accordingly, the importance given by the legislature to cash flow for contractors and subcontractors in sections 109 to 111 effectively gives way to the importance of rights of creditors once there is an insolvency. In those circumstances, one can see the argument that there should be nothing objectionable in the parties providing for a regime such as that contemplated by the proviso to clause 27.6.5.1 in anticipation of liquidation. Indeed, it can be said with some force that the 1996 Act itself (in section 113) recognises that different considerations may arise when the contractor is insolvent or (as in the present case) where the contractor is in a position similar to insolvency, namely in administration, or subject to the appointment of an administrative receiver or a manager.

79. While, as I say, there is obvious force in that point, it seems to me that the very fact that the legislature has excluded from the prohibition contained in section 113(1) cases of insolvency (as defined in the following subsections) can be said to undermine, rather than to support, the contention of sections 109 to 111 should not be interpreted so as to apply in a case of insolvency. Where the legislature intended a rule in this part of the 1996 Act to be inapplicable in cases of insolvency, the legislation expressly so provided, so that, where there is no such specific exclusion, as in sections 109 to 111, the natural inference is that the provisions are not intended to be disapplied in cases of insolvency.

80. The DoE paper discussed insolvency at paras 39 to 43. It suggested that contracts might be required to include provisions setting up trust funds which could be used to pay contractors and sub-contractors in the event of insolvency of an employer and a contractor respectively. These proposals were not adopted, but they tend to suggest that it was not the intention that insolvency should result in payments ceasing, and a case where the final date for payment had passed before the insolvency, as in this case, could be said to be *a fortiori*.

81. Fifthly, it was suggested that sections 110 and 111 should be given a relatively limited meaning in terms of their potential interference with freedom of contract, because their purpose was ultimately merely supplementary to the important adjudication provisions in section 108. It is true that there is some support for that proposition (in something of a throwaway line in paragraph 23 of the judgment of Sir Murray Stuart-

Smith in *C & B Scene Concept Design Ltd v Isobars Ltd* [2002] BLR 93), and it is also true that, as already mentioned, part of the purpose of sections 110 and 111 is to enable a contractor to know whether his claim for payment is disputed and on what grounds it is disputed, in order to enable him (or indeed the employer) to decide whether to seek adjudication under section 108.

82. However, I do not think it can be possibly said that the purpose of sections 109 to111 is merely to be supplementary to section 108. First, section 108 is subject to its own heading, "Adjudication", whereas, as already mentioned, sections 109 to113 are subject to a different heading, namely "Payment". Secondly, the provisions of sections 109, 112 and 113 clearly impose free-standing and substantive rights or prohibitions on parties to construction contracts, in that they are rights which do not relate, at any rate exclusively, to the existence of the adjudication system introduced by section 108. Thirdly, the way in which the purpose of what became sections 108 to 114 is described in paragraph 23 of the DoE paper seems to me hard to reconcile with the view that sections 109, 110 and 111 are merely supportive of section 108.

83. In all these circumstances, I do not consider that any of the arguments advanced on behalf of the appellant are persuasive, or at any rate persuasive enough to justify departing from a natural meaning of sections 110(1) and 111(1), read according to their natural tenor in their context.

84. In all these circumstances, for my part, I would dismiss this appeal.