HOUSE OF LORDS SESSION 2007–08
[2008] UKHL 12

on appeal from: [2007] EWCA Civ 601

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Reinwood Limited (Respondents) v L Brown & Sons Limited (Appellants)

Appellate Committee

Lord Hope of Craighead
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Brown of Eaton-under-Heywood
Lord Neuberger of Abbotsbury

Counsel

Appellants:
John Marrin QC
Alexander Hickey
(Instructed by Hammonds)

Respondents:
Stephen Furst QC
Andrew Singer
(Instructed by Hill Dickinson)

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LORD HOPE OF CRAIGHEAD

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Neuberger of Abbotsbury. I adopt with gratitude his account of the facts and of the provisions of the contract that have given rise to the dispute. I add these brief comments to explain why, after some initial hesitation, I agree with him that the appeal should be dismissed.

2. For the reasons that were explained in *Melville Dundas Ltd v George Wimpey UK Ltd* [2007] UKHL18, [2007] 1 WLR 1136, the background to the case is to be found in the provisions of the Housing Grants, Construction and Regeneration Act 1996. Section 108(1) of that Act provides that a party to a construction contract has the right to refer a dispute arising under the contract to adjudication under a procedure complying with that section. Section 109 provides that a party to a construction contract is entitled to payment by instalments for any work under the contract and that the parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due. Section 110(1)(a) provides that every construction contract shall provide an adequate mechanism for determining what payments become due under the contract. Section 110(2) provides that every construction contract shall provide for the giving of notice specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.

3. The provision of the Act that lies at the heart of this case is section 111. It is 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 that expected by the payee. The mechanism that has been designed for this purpose is, as in the case of section 110(2), the giving of notices. Section 111(1) 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."

4. It is important to notice the word "effective" in the passage which I have just quoted. Section 111(2) provides:

> "To be effective such a notice must specify –
>
> (a) the amount 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."

The giving of such a notice will enable a payee who considers that the proposal to withhold is not in accordance with the contract, if he is so minded, to refer the dispute to adjudication under the procedure that section 108 describes. As Lord Hoffmann said in *Melville Dundas Ltd v George Wimpey UK Ltd*, para 19, the purpose of the notice requirement is to enable the contractor to know immediately and with clarity why a payment is being withheld. The meaning which is conveyed by the word "effective" is that, if the contractor does not refer the question to adjudication, the employer will not be in default if the amount of which he has given notice is withheld from the amount stated as due in an interim certificate.

5. The standard form of contract which the parties to this case entered into contains provisions which were designed to satisfy the requirements of the statute. The mechanism which is provided for by section 111 is to be found in clause 24, which is headed "Damages for non-completion". If the contractor fails to complete the works by the completion date the architect is to issue a certificate to that effect: clause 24.1. This is the trigger for the serving of a notice under clause 24.2 of

the kind that section 111 envisages. The mechanism that it provides proceeds in two stages. First, the employer must give notice in writing that he may require payment of, or withhold or deduct, liquidated and ascertained damages: clause 24.2.1. Then, not later than 5 days before the final date for payment of the debt due under the final certificate, the employer may require payment of the liquidated and ascertained damages, which he may then recover as a debt. Or, as happened in this case, he must give a notice under clause 30.1.1.4 that he will deduct liquidated and ascertained damages from monies due to the contractor under an interim certificate. Clause 30.1.1.4 provides that such a notice must specify any amount proposed to be withheld and the ground or grounds for such withholding.

6. On 14 December 2005 the employer received a certificate of non-completion from the architect under clause 24.1 which entitled him to recover an amount of liquidated and ascertained damages. He served the requisite notices on the contractor on 17 January 2006. On 20 January 2006, in reliance upon those notices, he paid to the contractor the sum due under the interim certificate that was then due for payment under deduction of an amount of liquidated and ascertained damages calculated in accordance with the architect's certificate of non-completion. The notices which he served, taken together, satisfied all the requirements of an effective notice within the meaning of section 111(1) of the 1996 Act.

7. The contractor claims that the employer was nevertheless in default within the meaning of clause 28.2.1. This is because on 23 January 2006, three days after the employer had paid the amount stated as due in the interim certificate under deduction of an amount calculated in accordance with the architect's clause 24.1 certificate of 14 December 2005, the architect granted an extension of time which reduced the amount of the liquidated and ascertained damages to which the employer was entitled under the contract. The question is whether the employer was in default because he did not pay the balance of the amount due to the contractor before the final date for payment under clause 30.1.1.4. In the Court of Appeal Dyson LJ, with whom Mummery and Arden LJJ agreed, answered this question in the negative. He said that a valid clause 30.1.1.4 notice does not cease to be effective when a certificate of non-completion is cancelled: [2007] EWCA Civ 601, para 25. The short question on this appeal is whether this is a sound interpretation of the provisions of this contract.

8. Clause 24.1 provides that, in the event of a new completion date being fixed after the issue of a certificate of non-completion under that sub-clause, such fixing shall cancel that certificate. Nowhere in clause 24, however, is it stated that such fixing will have the effect of cancelling any notices that the employer may have served on the contractor in reliance upon the certificate that is cancelled. Clause 24.2.3 is an important indication to the contrary. Picking up the word "effective" in section 111(1) of the 1996 Act, it provides:

> "Notwithstanding the issue of any further certificate of the architect under clause 24.1 any requirement of the employer which has previously been stated in writing in accordance with clause 24.2.1 shall remain effective unless withdrawn by the employer."

The clause is silent on the question as to what is to happen if the further certificate is issued before the requirement is acted upon. I would give the phrase "shall remain effective" its ordinary meaning in this context. The requirement remains effective whether or not it has been acted upon because there is no indication in the clause to the contrary.

9. The facts of this case do not match those which are envisaged by clause 24.2.3. Clause 24.1 provides that in the event of a new completion date being fixed the architect shall issue such further certificate under clause 24.1 as may be necessary. But no such further certificate was issued by the architect until after the final date for payment of the amount stated as due on the interim certificate. The absence of a clause which deprives the clause 24.2.1 notices of effect in the event of a new completion date being fixed is more directly relevant. But the way clause 24.2.3 deals with the situation that it refers to also supports the employer's argument that his notices remained effective despite the cancellation of the original clause 24.1 certificate.

10. Some further support can be drawn from the provisions of clause 24.2.2. It provides for the payment or repayment of any amounts recovered, allowed or paid under clause 24.2.1 if the architect fixes a later completion date. It does not address the point that has arisen in this case directly. But it would be odd, in the light of what clause 24.2.3 provides, for there to be no provision depriving the clause 24.2.1 notices of effect before they had been acted on if it was the intention that they should indeed cease then to be effective in those circumstances. A balance appears to have been struck between setting up a system that

gives sufficient notice to the contractor of the amount of the payment proposed to be made and one which, by providing for every possible event, is over-elaborate.

11. In my opinion the conditions of contract ought to be construed in the light of the provisions of the statute that they were intended to give effect to. The concept which is to be found in section 111(1) is that of an effective notice – that is to say of a notice on which the employer is entitled to rely when the time comes for him to act on it unless the question as to the amount which he proposes to withhold is referred to adjudication. A contractor who, on being told that a new completion date has been fixed which reduces his liability in liquidated and ascertained damages, does not refer the matter to adjudication before the final date for payment of the amount due on an interim certificate cannot be heard to say that the employer who withholds the amount of which he has given notice is in default within the meaning of clause 28.2.1.

12. I agree with Dyson LJ that the scheme which emerges from this construction of the contract is a sensible one: para 29. The employer, in such a situation, is entitled to deduct the liquidated and ascertained damages specified in his notice under clause 30.1.1.4 from the amount that is stated to be due in the interim certificate. But he is obliged by clause 24.2.2. to pay or repay any liquidated and ascertained damages that were recovered, allowed or paid under clause 24.2.1 after he has been informed by the architect of the fixing of the new completion date. This must be done within a reasonable time after receipt of that information. The time allowed will be short, having regard to the default provisions in the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649). In this case the employer paid the balance of the amount due on the interim certificate, with interest, on 1 February 2006. It would have been open to him, to avoid having to pay that amount with interest later, to reduce the amount of the deduction notwithstanding the terms of the notice that he had given under clause 30.1.1.4. But he was not in default within the meaning of clause 28.2.1 because he chose not to do so.

LORD SCOTT OF FOSCOTE

My Lords,

13. Having had the advantage of reading in advance the opinion prepared by my noble and learned friend Lord Neuberger of Abbotsbury, I agree that for the reasons he gives this appeal should be dismissed.

LORD WALKER OF GESTINGTHORPE

My Lords,

14. I am in full agreement with the opinion of my noble and learned friend Lord Neuberger of Abbotsbury, which I have had the advantage of reading in draft. I add a few comments of my own, mainly as regards Part II of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"). None of my comments detracts from my full agreement with Lord Neuberger's opinion.

15. Part II of the 1996 Act was intended to reduce the amount of time, money and other resources wasted on disputes about building contracts (see generally Chapter Nine, Dispute Resolution, in Sir Michael Latham's final report, Constructing the Team, HMSO 1994). In particular, it sought to avoid what my noble and learned friend Lord Hope of Craighead, in *Melville Dundas Ltd v George Wimpey UK Ltd* [2007] 1 WLR 1136, para 42, referred to as "set-off abuse" by deductions from stage payments, a course of action which can sometimes put unfair pressure on a contractor who is already having liquidity problems.

16. The 1996 Act sought to achieve these aims by two means: by ensuring that building contracts include some basic provisions about stage payments and deductions from stage payments; and by machinery for rapid adjudication, on a provisional basis, of disputes, including (but not limited to) disputes about deductions from stage payments. The first of these objectives is achieved by sections 109 (entitlement to stage payments), 110 (dates for payment) and 111 (notice of intention to

withhold payment) together with the "default" provisions in the Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998 No. 649. Within limits permitted by sections 109 to 111 the parties to a written building contract are free to agree the content of the basic provisions which must be included in the contract; but so far as they omit to do so, the Scheme fills the gap.

17. Part II of the 1996 Act, and the Scheme, are therefore most actively engaged in the (probably relatively unusual) case of a written building contract which (while not excepted from the operation of sections 109 to 111) makes no provision whatsoever for stage payments or notices in connection with such payments. A rudimentary contract of that sort will contain no provision for architect's interim certificates (indeed, there may be no architect involved at all) and in such a case section 110 performs a useful function in requiring a notice spelling out the employer's understanding of the effect of the default provisions in para 2 of Part II of the Scheme, and the amount of the stage payment which the employer considers to be due under those provisions. That lets the parties know where they stand, and serves a useful purpose even when there is no question of a sum being withheld (either as liquidated damages for delay, or for any other reason). In such circumstances the section 110 notice is the nearest equivalent (but is obviously not a close equivalent) to an architect's interim certificate.

18. In the more usual case where a standard form of contract is used (such as the JCT standard form used in this case) the requirements of sections 109 to 111 are reproduced in detail in the form of contract and reference to the Scheme is unnecessary (except, as Lord Neuberger points out, in connection with the date for a balancing payment under clause 24.2.2). The notice required by section 110(2) does little more than repeat what the parties already know from the most recent architect's interim certificate, unless the employer is proposing to make a deduction (in which case section 111 comes into play). Parliament has recognised this overlap by providing that a section 110(2) notice may suffice as a section 111 notice, so long as it complies with the requirements of section 111(2).

19. All these provisions are, as I have said, aimed at letting the parties know where they stand, in order to avoid unpleasant last-minute surprises and disputes. Parties cannot know where they stand if their obligations are liable to be changed at the last moment, with retrospective effect.

20. Under the JCT form of contract stage payments are due, under interim certificates, at monthly intervals on the 7th day of each calendar month (clause 30.1.3 and Appendix); the final date for payment is fourteen days after a certificate (clause 30.1.1.1); and the "prescribed period" for the purposes of section 111(2) is five days before the final date for payment (clause 24.2.1). It is therefore possible to state precisely how the contractual machinery should have operated, and to compare this with what actually happened (all dates referring to January 2006):

(a) an interim certificate should have been issued on the 7th (in fact the architect did not issue it until the 11th, and so it is necessary to work from that date);

(b) the final date for payment was therefore the 25th (but the certified amount was nevertheless due as from the 11th);

(c) the employer should have given its clause 24.2.1[b] (or section 110(2)) notice by the 16th (in fact it was a day late);

(d) the last date for a clause 24.2.1.2 (or section 111) notice was the 20th (the employer gave this notice on the 17th).

21. The clause 24.2.1.2 (or section 111) notice was effective when it was given, because the architect had not yet issued a certificate fixing a new completion date (which would, under clause 24.1, have cancelled the certificate of non-completion, which was a precondition to withholding part of a stage payment). The employer paid £126,359 on 20 January, and it was at that date the sum properly due from the employer. The extension of time granted by the architect on 23 January (not formally certified by him until some days later) could not retrospectively alter the fact that the employer had, on 20 January, paid the sum then properly payable by it. The obligation to make a further payment was dealt with separately by clause 24.2.2. Any other interpretation of the contract would ignore clause 24.2.2 and negate the underlying purpose of clause 24 as a whole (and also the purpose of Part II of the 1996 Act, which clause 24 gives effect to).

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

22. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Hope of Craighead, Lord Walker of Gestingthorpe and Lord Neuberger of Abbotsbury. I agree with them all and for the reasons they give I too would dismiss this appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

23. The issue on this appeal concerns the interrelationship of the provisions relating to damages for non-completion and those relating to extension of time contained in the JCT Standard Form of Building Contract 1998 Edition.

24. The contract the subject of the appeal was made on 16 January 2003 between Reinwood Ltd as employer, L Brown & Sons Ltd as contractor, and OMI Architects as architect. It was in the JCT Standard Form of Building Contract 1998 Edition, Private with Quantities, incorporating amendments 1 of 1999, 2 of 2000, and 3 of 2001. (The parties agreed certain amendments to this Form, but they are irrelevant for present purposes, and I shall therefore disregard them). The contract was for the construction of fifty-nine apartments on a site at Duke Street, Castlefield, Manchester. The Completion Date (as agreed by a subsequent amendment) was 18 October 2004, and liquidated and ascertained damages (known as LADs) were agreed at £13,000 per week or part thereof.

25. Clause 25 of the contract enabled the architect to "give an extension of time" on the application of the contractor "by fixing such later date as the Completion Date as he then estimates to be fair and reasonable".

26. Clause 30 of the contract was concerned with "Certificates and payments", and it included the following:

> "30.1 1.1 The Architect shall from time to time…issue Interim Certificates stating the amount due to the Contractor from the Employer…; and the final date for payment pursuant to an Interim Certificate shall be 14 days from the date of issue of each Interim Certificate.…
>
> "30.1.1.3 Not later than 5 days after the date of issue of an Interim Certificate, the Employer shall give written notice to the Contractor which shall, in respect of the amount stated as due in that Interim Certificate, specify the amount of the payment proposed to be made….
>
> "30.1.1.4 Not later then 5 days before the final date for payment of the amount due pursuant to clause to 30.1.1.1 the Employer may give a written notice to the Contractor which shall specify any amount proposed to be withheld and/or deducted from that due amount….
>
> "30.1.1.5 Where the Employer does not give any written notice pursuant to clause 30.1.1.3 and/or to clause 30.1.1.1.4 the Employer shall pay the Contractor the amount due pursuant to Clause 30.1.1.1…..
>
> "30.1.4…[I]f the Employer shall, subject to any notice issued pursuant to Clause 30.1.1.4, fail to pay the Contractor in full….by the final date for payment….and such failure shall continue for 7 days after the Contractor has given….written notice of his intention to suspend the performance of his obligations….then the Contractor may suspend such performance…until payment in full occurs....."

27. Clause 24 of the contract was headed "Damages for non-completion", and it was in these terms:

> "24.1 If the Contractor fails to complete the Works by the Completion Date then the Architect shall issue a certificate to that effect. [I omit a sentence inserted as an agreed amendment, but which rightly played no part in either party's argument]. In the event of a new Completion Date being fixed after the issue of such a certificate such fixing shall cancel that certificate and the Architect shall issue

such further certificate under Clause 24.1 as may be necessary.

"24.2.1 Provided: [a] the Architect has issued a certificates under Clause 24.1; and [b] the Employer has informed the Contractor in writing before the date of the Final Certificate that he may require payment of, or may withhold or deduct, [LADs], then the Employer may, not later then 5 days before the final date for payment of the debt due under the Final Certificate:

either:

24.2.1.1 require in writing the Contractor to pay to the Employer [LADs]….for the period between the Completion Date and the date of Practical Completion….;

or 24.2.1.2 give a notice pursuant to Clause 30.1.1.4….to the Contractor that he will deduct from monies due to the Contractor [LADs].…for the period between the Completion Date and the date of Practical Completion.

24.2.2 If, under Clause 25.3.3, the Architect fixes a later Completion Date…., the Employer shall pay or repay to the Contractor any amounts recovered, allowed or paid under Clause 24.2.1 for the period up to such later Completion Date.

24.2.3 Notwithstanding the issue of any further certificate of the Architect under Clause 24.1 any requirement of the Employer which has been previously stated in writing in accordance with Clause 24.2.1 shall remain effective unless withdrawn by the Employer."

28. Clause 28 of the contract was entitled "Determination by Contractor". Clause 28.2.1 entitled the contractor to give the employer a notice of certain types of default which included a failure by the employer to "pay by the final date of payment the amount properly due to the Contractor in respect of any certificate". Clause 28.2.4 provided, *inter alia*, that if the employer "repeats…a specified default", then the contractor may determine the employment of the contractor under the contract.

29. The two notices referred to in Clauses 24.2.1[b] and 30.1.1.3, and in Clauses 24.2.1.2 and 30.1.1.4, have their respective origins in sections 110 and 111, in Part II, of the Housing Grants, Construction and Regeneration Act 1996.

30. Section 108 of the 1996 Act entitles any party to a construction contract "to refer a dispute arising under the contract for adjudication under a procedure complying with this section". Section 109 requires every construction contract, save one estimated to last for less than 45 days, to contain provisions for stage payments, the parties being free to agree the terms of those provisions.

31. 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."

Section 110 (2) requires a construction contract to provide for a notice to be served "not later than 5 days after the date on which a payment becomes due from him under the contract", specifying the amount of the payment he proposes to make. There is no sanction if such a notice is not served or is served late.

32. Section 111 is in these terms:

> "(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 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…the amount proposed to be withheld….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 is to be…."

33. Subsection (3) of each of sections 109, 110 and 111 states that in the absence of such agreement the relevant provisions of "the Scheme for Construction Contracts" are to apply. The scheme ("the Scheme") applicable in the present instance is that contained in the schedule to The Scheme for Construction Contracts (England and Wales) Regulations 1998, S.I. 1998/649.

34. The contractor took possession of the site on 11 August 2003. Although there were many other disputes between the parties, the facts relevant to the present dispute are within a small compass. On 7 December 2005, the contractor made an application for an extension of time. On 14 December 2005, the architect issued a certificate of non-completion ("the December non-completion certificate") under Clause 24.1. On 11 January 2006, he issued interim certificate no 29 ("the interim certificate"), showing a net amount payable of £187,988. Pursuant to Clause 30.1.1.1, the final date for payment of this sum was 25 January.

35. On 17 January, the employer served two notices on the contractor. The first notice ("the preliminary notice") was stated to be under Clause 24.2, and it said that it was the employer's "intention to deduct from monies due to you under Interim Certificates issued after 14 December 2005 [LADs]…for the period from 14 December 2005 up to the date of Practical Completion of the Works". The second notice ("the withholding notice") stated that the employer proposed to withhold £61,629 LADs from the sum due under certificate no. 29, and that "[i]n accordance with Clause 30.1.1.3", which it is common ground should be treated as a reference to clause 30.1.1.4, the employer proposed to pay £126,359 (the difference between the certified amount and the claimed LADs).

36. Three days later, on 20 January, the employer paid the contractor £126,359. On 23 January, pursuant to the contractor's request, the architect granted an extension of time until 10 January 2006 ("the January extension"). The following day, the contractor wrote to the employer stating that the effect of that extension was to reduce the LADs to which the employer was entitled to £12,326, and that the amount due under certificate no. 29 was therefore £175,662. The employer nonetheless made no further payment, and, on 26 January, the contractor served notice of default under Clause 28.2.1.1. The following day the employer stated that it would pay the sum of £49,303 which it duly did on 1 February. Thereafter, the contractor claimed to be entitled to determine the contract under clause 28 on a number of grounds, the

only relevant one for present purposes being the alleged failure of the employer to pay the sum due under the interim certificate in full by the final date for payment, namely 25 January 2006.

37. As at 20 January 2006, when it paid the sum due under the interim certificate, the employer was entitled to rely on the December non-completion certificate to justify its withholding £61,629 LADs from the payment due under the interim certificate: that is, of course, how the payment of £126,359 made on 20 January 2006 was calculated. However, the contractor argues that the January extension, crucially granted before the "final date for payment" of the sum due under the interim certificate, disentitled the employer from relying on the December non-completion certificate, so that the employer should have paid the whole of the £187,988 by the "final date for payment" of 25 January 2006. (This is a more extreme, but more principled, position than the contractor took in its letter of 26 January 2006.)

38. There is no doubt that, if the January extension had been granted before 11 January 2006, the employer would not have been entitled to deduct the LADs resulting from the December non-completion certificate, as that certificate would have been "cancelled" under clause 24.1 as a result of the January extension, by the time of the issue of the interim certificate. Equally, there is no doubt that, if the January extension had been granted after 25 January 2006, the employer's deduction of the LADs based on the December non-completion certificate would have been unassailable, as that certificate would not have been cancelled under clause 24.1 by the January extension until after the "final date for payment" under the interim certificate. The difficulty in this case arises from the fact that the January extension was granted after the date of issue of the interim certificate, but before the "final date for payment" thereunder.

39. The contractor's case is that, although the employer was apparently entitled to rely on the December non-completion certificate when it served the preliminary notice and the withholding notice on 17 January, and when it actually paid under the interim certificate, the fact that that entitlement did not exist by the final date for payment deprives the employer of the right to rely on the December non-completion certificate in relation to payment under the interim certificate.

40. At least on the face of it, the effect of clause 24.2 appears clear. Provided the two preconditions in what I have characterised as paras [a]

and [b] are satisfied, clause 24.2.1.2 entitles the employer to give notice under clause 30.1.1.4. Although not spelt out, it must, in my view, follow (save, perhaps, in special circumstances) that, where the two preconditions are satisfied and the employer has served a withholding notice under clause 30.1.1.4, both parties should be entitled to proceed on the basis that payment will, and can properly, be made in accordance with that notice. Any other conclusion would fly in the face of commercial common sense: the detailed procedures set out in clause 24.2 would appear to have little point if they did not, at least normally, govern the parties' subsequent rights and obligations. That point is reinforced by the fact that the notices referred to in clauses 24.2.1[b] and 24.2.1.2 are, respectively, the notices required by sections 110 and 111 of the 1996 Act, and part of the purpose of those sections is to enable parties to a construction contract to know where they stand (see e.g. *Melville Dundas Ltd (in receivership) v George Wimpey UK Ltd* [2007] UKHL 18, [2007] 1 WLR 1136, at para 19 per Lord Hoffmann).

41. If that analysis applies in this case, it would follow that the employer was entitled to make the deduction from the sum due under the interim certificate that it made in respect of the LADs based on the December non-completion certificate. The issue of that certificate satisfied the first precondition, in clause 24.2.1[a], the service of the preliminary notice satisfied the second pre-condition, in clause 24.2.1[b], and the service of the withholding notice complied with clause 24.2.1.2. (The fact that the preliminary notice was served later than the date identified in clause 30.1.1.3 – and in section 110(2) – does not invalidate it, not least because there is no reference to such date in clause 24.2.1[b].)

42. So the question is whether, in accordance with the submission of the contractor, the issue of the January extension, after the employer had both served the withholding notice and paid on the assumption that he had the right to rely on the December non-completion certificate, deprived the employer of that right. In my judgment, in agreement with the Court of Appeal, the issue of the January extension did not have that effect.

43. It is true that, by virtue of clause 24.1, the effect of the January extension was to "cancel" the December non-completion certificate, upon which the employer's right to deduct depended. However, such a cancellation was not retrospective in its effect. That is not the normal meaning or effect of the word "cancel". Indeed, it would be an absurd meaning to give the word here. It would mean that, even if the January

extension had been granted after 25 January, it would have resulted in the employer having underpaid on the interim certificate.

44. Once one accepts that the effect of the January extension was not to cancel the December non-completion certificate retrospectively, it appears to me to follow that, in making any payment before the January extension was granted, the employer was entitled to rely on that certificate, unless the provisions pursuant to which the payment was made provided otherwise.

45. In my view, far from providing otherwise, the contractual provisions support this conclusion. As already mentioned, there is the policy (reflected in the 1996 Act) that the parties should know in advance where they stand. The contractor's case appears to me to be inconsistent with that policy. Not merely could neither party rely on a valid withholding notice as conclusively determining their rights and obligations with regard to payment on an interim certificate, but neither party could even rely on an actual payment, correct at the time it was made, as being effective.

46. Such an outcome would also be rather unfair on an employer: he would have underpaid due to an event which occurred after he had paid. It would also be unsatisfactory if he had to instruct his bank, or find some other method of payment, at the last minute. Thus, on the contractor's case, if the January extension had been granted on 24 January, the day after it was it was in fact granted, the employer would have had to find and pay over to the contractor around £50,000 or £60,000 on one day's notice.

47. Further, if, as should happen, but did not happen here, the architect issues a new certificate of non-completion at the same time as the extension of time, it may well (as it would in this case) come too late for the employer to serve a fresh withholding notice under clause 24.2.1.2, and therefore to take advantage of his right of deduction under the new certificate, given the time limits for the service of that notice. (This would be particularly unfair where the new certificate identified an earlier completion date than had been identified in the certificate on which the employer had relied.) The fact that clause 24.2.3 is intended to enable the employer to rely on his clause 24.2.1[b] notice in such a case underlines the point that this consequence of the contractor's argument casts doubt on its correctness.

48. A contractor's position is properly protected if the employer's argument is correct. On the assumption that the employer was entitled to rely on the December non-completion notice when it paid on 20 January, the effect of the January extension on 23 January was not only to cancel that notice under clause 24.1; it was also to give the contactor the right to be paid the amount retained – see clause 24.2.2. No date for payment is included in that clause. The Court of Appeal said that the contractor's right in those circumstances was to be paid within a reasonable time of the grant of the January extension, which (rightly in my view) they indicated would normally be a matter of days. However, it appears to me that section 110(1) is engaged, and, as no time for payment is specified, the provisions of the Scheme, and in particular paras 7 and 8 of Part II, would apply. On that basis, after the grant of the January extension, the contractor could have applied (as it appears to have done) for payment of the sum of £61,629 or £49,303 (probably depending on whether the architect had issued a further non-completion certificate), whereupon the sum would have become due after 7 days, and the final date for payment would have been 17 days thereafter.

49. It was argued by the contractor that this conclusion lies uneasily with the fact that the January extension had cancelled the effect of the December non-completion notice by 25 January, which was the date by which the interim certificate had to be paid. In my opinion, 25 January was the "final date for payment", not the date on which payment became due. A sum becomes due under a certificate when it is issued, and the "final date for payment" is the date by which failure to pay can have serious consequences for the employer. As my noble and learned friend, Lord Walker of Gestingthorpe, observed during the argument, the function of the "final date" is akin to making time of the essence of the payment as at that date. It is fair to say that the contract is not completely clear on this issue. However, section 110(1) required this contract to specify both a date "when" "payments become due under [it]" and "a final date for payment", and this requirement is inherent in section 110(2). As the contract has to comply with that requirement, it seems to me that it must be construed as so complying unless it is impossible to do so. I have no difficulty in reading clause 30.1.1.1 as having the effect of rendering a payment under a certificate due as at the date of its issue; indeed, it is otherwise hard to see the purpose of the word 'final' in that clause.

50. It was also argued by the contractor that accepting the employer's argument could lead to abuse by employers. I do not agree. Unlike clause 30.1.4, which appears to contemplate the employer being able to rely on any deduction in his withholding notice, clause 24.2 only covers

deductions which are claimed in reliance on a certificate of non-completion issued by the architect. Even where, as may well have been the position in this case, the deduction is made at a time when the employer has reason to believe that an extension of time will be granted in the near future, the contractor will be able to retrieve the monies very quickly after the extension is granted under clause 24.2.2, as already explained.

51. It follows that, for my part, I would dismiss the contractor's appeal. An outstanding question which should be mentioned is whether the employer would still have succeeded if the January extension had been granted after the service of the clause 24.2.1.2 withholding notice, but before the employer actually paid out on the interim certificate (e.g. if the January extension had been granted on 18 or 19 January). It was not a point which was debated (as it does not strictly arise) and therefore it seems to me that we should only express a view on it if the answer is tolerably clear.

52. There is undoubtedly a case for saying that the employer should not have succeeded on those facts. There is plainly a difference between paying in reliance on a withholding notice which is accurate at the time of payment and paying in reliance on such a notice which is no longer accurate at the time of payment. Further, clause 24.2.3 seems to refer to clause 24.2.1[b], but not to clause 24.2.1.2, which tends to suggest that it may not be possible to rely upon a withholding notice under the latter clause once the certificate of non-completion on which it is based is cancelled.

53. However, there are arguments the other way. The principle that a withholding notice, valid when it is served, should be able to be relied on in relation to the payment to which it relates, even after its basis has been undermined, appears at least arguably consistent with the policy of the 1996 Act as discussed above. Further, the points that an employer could face practical difficulties in relation to payment where an extension of time is granted shortly before the final date for payment, and may unfairly lose his right to rely on a new certificate of non-completion because of the time limit in clause 24.2.1, appear~~s~~ to apply to a case where the extension of time is granted before actual payment pursuant to an interim certificate almost as much as it applies where the extension is granted after payment.

54. In these circumstances, while it is generally desirable to give as much guidance as possible to the meaning and effect of a provision such as clause 24, I consider that it would be wrong to express a view on this outstanding question.