Neutral Citation Number: [2020] EWHC 3583 (TCC)

Case No. HT-2020-000153

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Rolls Building,
Fetter Lane, London EC4A 1NL

Date: 31 December 2020

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- - - - - - - - - - - - - - - - - - - -

Between :

JSM CONSTRUCTION LIMITED

Claimant

- and -

WESTERN POWER DISTRIBUTION (WEST MIDLANDS) PLC

Defendant

- - - - - - - - - - - - - - - - - - - -

Sebastian Pigott (instructed by **Donald Pugh Solicitor**) for the **Claimant**
Gaynor Chambers (instructed by **Osborne Clarke LLP**) for the **Defendant**

Hearing date: 8 July 2020

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Approved judgment

I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. By a contract dated 24 October 2016, JSM Construction Limited agreed to install two 132kV cables and associated ductwork between Nechells and Bordesley in Birmingham to the order of Western Power Distribution (West Midlands) plc. The works have been completed and, by this action, JSM claims £1,521,087.09 being the sum of the alleged final balance payable together with damages. Western Power says that such claim is not arguable because JSM's contractual entitlement was only to a series of interim payments. Western Power therefore seeks to strike-out the claim or alternatively enter summary judgment against JSM.

THE CONTRACT

2. By its final tender submitted on 20 October 2016, JSM offered to undertake the works on the basis of the information contained in Western Power's Invitation to Tender and subject to a number of assumptions and caveats. On 24 October 2016, Western Power accepted the tender and the parties contracted on the basis of an Ad Hoc Agreement for Underground Works together with Western Power's detailed terms. The pro forma agreement recorded that interim payments would apply but provided no further details. The parties agreed that retention would be 5% of the contract price. They left, however, the details as to the contract price, the contract commencement date and the contract period blank.

THE CONTRACT PRICE

3. The contract incorporated the Pricing Schedule submitted by JSM with its tender showing its price for each element of the main route (Section A), the cost of additional works (Section B) and the rates for extra materials (Section C) comprising the total tender value of £3,981,406.74. The schedule also set out:

   3.1 the agreed hourly rates for additional or substitute work undertaken on a daywork basis (Schedule 2);

   3.2 that extra materials would be charged at cost plus 12½%;

   3.3 the additional sums payable per metre for digging through solid rock, reinforced concrete or other hard substances (Schedule 3); and

   3.4 the additional sums payable per metre for extra wide, or per cubic metre for extra deep, trenches (Schedule 4).

4. Further, clause 18.1 of the detailed terms provided:

   > "WPD shall ascertain and determine the value of work done in accordance with the Contract using the rates and prices and the method of valuation stated in the Pricing Schedule. The prices in the Pricing Schedule shall remain fixed for the Contract Period."

5. By clause 3.7, Western Power was responsible for "the provision of any instructions, drawings or other information necessary for the proper and adequate construction and completion of the Works." By clause 3.9, JSM was deemed to have inspected

and examined the site and to have satisfied itself so far as was practicable and reasonable before commencing work as to, among other matters, the ground conditions, and the extent and nature of the work and materials required.

6. Further, by clause 3.10, JSM was deemed to have:

> "(a) based [its] rates and prices on [its] own inspection and examination as aforesaid and on all information whether obtainable by [it] or made available by WPD; and
>
> (b) satisfied [itself] before submitting [its] rates and prices as to their correctness and sufficiency stated by [it] in the Pricing Schedule which shall (unless otherwise provided in the Contract) cover all [its] obligations under the Contract."

7. By clause 3.11, JSM could, however, claim additional payment in respect of any obstructions or physical conditions (other than weather conditions) that could not have been reasonably foreseen. In such cases, JSM was required to give Western Power early written notice of such obstructions and conditions (clause 3.11(a)), and clause 3.11(b) provided:

> "If in the opinion of WPD such obstruction or condition could not reasonably have been foreseen by an experienced contractor then WPD shall certify a fair and reasonable sum and WPD shall pay such sum to cover the cost to the Contractor of performing any additional work or using any additional plant or equipment as a result of:
>
> i. complying with any instructions which WPD may issue; and/or
>
> ii. taking proper and reasonable measures to overcome or deal with the obstruction or condition in the absence of instructions from WPD.
>
> Failing agreement of such sums WPD shall determine the fair and reasonable sum to be paid."

8. Further, JSM could claim for extra cost under clauses 8.3 and 17, which provided:

> "8.3 *Delay and extra cost*
>
> If WPD issues instructions which involve the Contractor in delay or disrupt [its] arrangements or methods of carrying out [its] obligations so as to cause [it] to incur cost beyond that reasonably to have been foreseen by an experienced contractor at the time of tender, then WPD shall take such delay into account in determining any extension of time to which the Contractor is entitled under Clause 5.4 and the Contractor shall, subject to Clause 17 be paid in accordance with Clause 18 the amount of such cost as may be reasonable, except to the extent that such delay and extra cost result from the Contractor's default …
>
> 17.1 *Valuation of ordered variations*
>
> The valuation of variations ordered by WPD shall be ascertained and agreed by WPD and the Contractor using the appropriate rates and prices in the Pricing Schedule and added to the Contract Price …

17.3 *WPD to determine additional sums and deductions*

If the Contractor:

(a) carries out additional works instructed in writing by WPD, or

(b) intends to make any claim for additional payment, or

(c) incurs additional cost including any costs arising from delay or disruption to the progress of the Works …

then [it] shall give notice to WPD to that effect as soon as reasonably practicable and in any event within 14 days of the commencement of the relevant event such notice to be accompanied by the Contractor's estimate of the cost which the Contractor will incur or intends to claim from WPD.

The Contractor shall regularly update WPD should the Contractor's estimate of cost change and shall provide WPD with such information and details as WPD may reasonably require in support of the Contractor's claim and/or to substantiate such estimate.

Provided the Contractor has complied with the obligations in this Clause 17.3 including without limitation to give notice within such 14 day period (which for the avoidance of doubt shall be a condition precedent to the entitlement of the Contractor to claim any additional cost) and provided in respect of matters falling within paragraph (c) above the Contractor has taken all reasonable steps to avoid or minimise the cost incurred as a result of the delay or disruption, WPD shall determine a fair and reasonable adjustment to the Contract Price to reflect the cost incurred by the Contractor …

17.4 *Valuation of additional work*

In determining a fair and reasonable sum under Clause 17.3 for additional work WPD shall have regard to the rates and prices contained in the Pricing Schedule."

9. The problem of incomplete drawings, specifications and instructions was dealt with at clause 4.4, which required JSM to give written notice of any further drawing, specification or instruction that it might require.

PAYMENT TERMS

10. Clause 18 of the conditions of contract concerned payment. It provided:

"18.2 Where it is not stated in the Contract Agreement that interim and/or milestone payments will apply, the Contractor shall be entitled to payment on completion of the Works and the Contractor shall within 7 days of the Practical Completion Date for the Works issue a VAT invoice to WPD for the Contract Price less the Retention.

18.3 Where it is stated in the Contract Agreement that interim/milestone payments will apply, details of the interim/milestone payments shall be set out in the Contract

> Agreement. The Contractor shall, within 7 days of each interim payment date or milestone payment date stated in the Contract Agreement issue a VAT invoice to WPD for the relevant amount of the Contract Price less the Retention. Where it is stated in the Contract Agreement that interim/monthly payments are to apply but no further detail is provided in the Contract Agreement, the Contractor shall be entitled to interim monthly payments and the Contractor shall within 7 days of the end of the month following the month in which the Works Commencement Date occurs and at monthly intervals thereafter, issue a VAT invoice to WPD for the relevant amount of the Contract Price less the Retention …
>
> 18.5 Notwithstanding any interim/milestone payments set out in the Contract Agreement, the Contractor shall only be entitled to submit invoices for payment of the Contract Price in instalments commensurate with actual progress of the Works.
>
> 18.6 Payment shall become due 5 days after receipt by WPD of the relevant invoice and any supporting documents in accordance with Clause 18.4.
>
> 18.7 Not later than 5 days after payment has become due in accordance with Clause 18.6, WPD shall notify the Contractor of the sum that WPD considered to have been due at the payment due date in respect of the Contractor's invoice and the basis on which that amount is calculated.
>
> 18.8 The final date for payment by WPD to the Contractor of sums due shall be 57 days after the date on which payment becomes due."

11. After making provision for the service of Pay Less Notices, clause 18 continued:

> "18.12 *Payment of retention money*
>
> (a) Where it is stated in the Contract Agreement that Retention is to apply, one half of the Retention Money shall be certified by WPD and shall be paid to the Contractor, subject to receipt by WPD of an invoice for the amount of Retention certified, by the end of the month following the month in which the Practical Completion Date is achieved.
>
> (b) The final date for payment of the remainder of the Retention money to be paid to the Contractor is, subject always to receipt by WPD of an invoice for the remainder of Retention certified, by the end of the month following the month in which WPD issues the Defects Liability Certificate."

12. Since the contract agreement provided simply that interim payments would apply and specified retention of 5%:

    12.1 In the absence of contrary provision, the default machinery at clause 18.3 applied. JSM was therefore entitled to raise invoices within 7 days of the end

of the month following the month in which works commenced, and monthly thereafter.

12.2 By clauses 18.3 and 18.5, each monthly invoice was limited to the proportion of the unpaid contract price commensurate with actual progress less the agreed 5% retention.

THE PAYMENT APPLICATIONS

13. During the course of the works, JSM raised eleven applications for payment. Its eleventh application, which was issued on 8 December 2017, sought payment of £1,563,038.52. Such application took the total invoiced during the works to £5,344,444.52; some 34% more than the original tender price. The application was calculated on the basis of the unpaid proportion of the tender price together with the claimed value of variations and other adjustments.

14. Western Power disputed application 11. The dispute was referred to adjudication and led to a decision in JSM's favour in the reduced sum of £201,896.63 on the basis of Western Power's alternative case that any entitlement should be based upon a remeasurement. JSM does not, however, pursue its case on the basis of application 11.

15. On 4 July 2019, JSM issued what it described as its final application (number 12) in the sum of £1,832,649.91. Such sum was calculated not on the basis of the tender price but a re-measurement of the works:

Value of the Works upon re-measurement	4,471,914.96
Add variations	692,607.12
Gross value of the Works	5,164,522.08
Less retention at 1.5%	(77,467.83)
Net value after retention	5,087,054.25
Add interest	83,589.00
Add additional costs incurred due to variations and instructions	83,370.59
Add additional costs incurred by WPD's failure to issue extensions of time	95,172.54
Add additional costs incurred in carrying out the remeasurement due to WPD's failure properly to measure and/or remeasure	161,324.51
Total	5,510,510.89
Less previously paid	(3,983,302.63)

Net sum payable	1,527,208.26
VAT	305,441.65
Application 12	**£1,832,649.91**

THIS CLAIM

16. By this claim, JSM seeks payment of its final account in the sum of £1,359,762.58 plus damages of £161,324.51 and interest. Although at first blush this appears to be a reformulation of the final account submitted in July 2019, the two can easily be reconciled once one strips out the interest and VAT from the invoice but adds the retention monies that JSM alleges fell due shortly before the date of the claim.

17. JSM pleads that the contract works were disrupted by unforeseen obstructions and conditions by reason of Western Power's failure to procure or carry out adequate ground investigations. In consequence, it alleges that Western Power's design of the works, and in particular its definition of the "Main Route" in the Invitation to Tender, was incomplete and incorrect. JSM argues therefore that the parties contracted prematurely when the design and definition of the Main Route were insufficiently developed. Thus, it contends that the employer was in breach of its obligation pursuant to clause 3.7 to provide instructions, drawings or other information necessary for the proper and adequate construction and completion of the works so that the design of the works in the Invitation to Tender did not align "in any material respect" with the works as constructed.

18. Further, JSM pleads that:

    18.1 Western Power failed to provide a contract commencement date or a contract period; and

    18.2 the Pricing Schedule provided only for an incomplete and inaccurate design such that "as a pricing mechanism [it] has only limited application to pricing the works as constructed."

19. JSM then pleads a number of implied terms:

    19.1 At paragraph 8 of its Particulars of Claim, JSM pleads:

    > "(1) the period for completion of the Works as constructed was to be a reasonable time, pursuant to a term implied by section 14 of the Supply of Goods and Services Act 1982. A reasonable time for completion of the works as constructed was from 16 January 2017 to 27 November 2017;
    >
    > (2) the Claimant is entitled to a reasonable sum for the Works as constructed, pursuant to a term implied by section 15 of the Supply of Goods and Services Act 1982. A reasonable sum, based on a remeasure, using contract rates in the Pricing Schedule where applicable, but otherwise applying the principles set out in CESMM 4, and taking into account sums already paid by the

Defendant gives a balance due to the Claimant of £1,359,762.58, which it hereby claims, along with damages of £161,324.51, and interest."

19.2 At paragraphs 38-39, JSM pleads that since Western Power was both the employer and contracted on the basis that it would value and certify any claimed variations, it owed a duty to act fairly, impartially, reasonably, and not arbitrarily, capriciously, perversely or irrationally.

19.3 At paragraphs 46-52, JSM pleads that Western Power was "required" promptly to certify practical completion.

19.4 At paragraphs 53-54, JSM pleads:

> "53. The Contract is a construction contract for the purposes of the Housing Grants, Construction & Regeneration Act 1996 ('the Act'). Section 110 of the Act requires every construction contract to which the Act applies to provide an adequate mechanism for determining 'what payments become due under the contract, and when'. Although the Contract provides for interim (stage) payments … there is no provision in the Contract for a final payment for the completed Works.
>
> 54. In these circumstances a term or terms are implied into the Contract pursuant to paragraphs 3, 5 and/or 7 and 8(1) of Part II of the Scheme for Construction Contracts ('the Scheme').
>
> 3. Where the parties to a construction contract fail to provide an adequate mechanism for determining either what payments become due under the contract, or when they become due for payment, or both, the relevant provisions of paragraphs 4 to 7 shall apply...
>
> 5. The final payment payable under a relevant construction contract, namely the payment of an amount equal to the difference (if any) between:
>
> (a) the contract price, and
>
> (b) the aggregate of any instalment or stage or periodic payments which have become due under the contract,
>
> shall become due on the expiry of:
>
> (a) 30 days following completion of the work, or
>
> (b) the making of a claim by the payee,
>
> whichever is the later...
>
> 7. Any other payment under a construction contract shall become due
>
> (a) on the expiry of 7 days following the completion of the work to which the payment relates, or
>
> (b) the making of a claim by the payee,
>
> whichever is the later.

> 8. (1) Where the parties to a construction contract fail to provide a final date for payment in relation to any sum which becomes due under a construction contract, the provisions of this paragraph shall apply.
>
> (2) The final date for the making of any payment of a kind mentioned in paragraphs 2, 5, 6 or 7 shall be 17 days from the date that the payment becomes due."

THE APPLICATION

20. By an application dated 19 May 2020, Western Power seeks to strike out the claim pursuant to r.3.4(2)(a) of the Civil Procedure Rules 1998; alternatively it seeks summary judgment on the claim pursuant to Part 24. The application is supported by two witness statements by Western Power's solicitor, Daniel Cashmore, and opposed by two statements by JSM's solicitor, Donald Pugh, and one from its Operations Manager, Gerry Garvin. Much of the witness evidence argues points of law that should properly form the basis of submissions rather than evidence. Nevertheless, the statements helpfully explain the factual background to this claim. Further, Mr Cashmore's two statements make plain that the sole issue upon this application is whether or not there was an implied term pursuant to s.110 of the Housing Grants, Construction & Regeneration Act 1996 such that JSM was entitled to make application 12.

ARGUMENT

21. Gaynor Chambers, who appears for Western Power, argues that the contract was a lump-sum contract under which JSM's entitlement was to raise interim monthly invoices commensurate with the actual progress of the works against the contract price and the price of any extras or variations. She accepts that there was no express term entitling JSM to raise a final account but argues that the absence of such a term did not render the payment regime inadequate within the meaning of s.110 of the 1996 Act such that paragraph 5 of the Scheme was to be implied into the parties' contract. Indeed, she submits that there is nothing in ss.109-110 that requires the parties to agree a final payment provision, and points to the example of the NEC3 contract which does not itself contain a final account provision. Accordingly, Ms Chambers argues, there was no implied term entitling JSM to raise a final invoice and the claim is bound to fail.

22. Sebastian Pigott, who appears for JSM, submits that it is properly arguable that the payment regime under the contract was inadequate in that there was no provision for a final account and that therefore a term falls to be implied by s.110 of the Act. He argues that provisions as to a final account are key and customarily to be found in standard form construction contracts. While accepting that there is no final account provision in NEC3, Mr Pigott notes that such a provision was introduced in NEC4. In any event, he submits that questions as to the adequacy of a payment mechanism are issues of fact and not law and that, since the factual matrix is disputed, the issue can only be properly determined at trial. Further, he argues that the default paragraphs set out in the Scheme are an exemplar of what is required by

s.110(1)(a). The absence of any such provision is, he submits, a good indicator that the contract is unlikely to comply with the section.

23. Mr Pigott further submits that the absence of a final account clause renders the mechanism particularly inadequate where the contract does not prescribe a valuation method for interim valuations under clause 18.7 and does not require the employer, as the valuer or certifier, to review, revise or correct errors in its interim valuations. Since adjustments and corrections can only be achieved through adjudication or litigation, the mechanism is, he argues, inadequate. In support of such submission, Mr Pigott relies on the Scottish case of Maxi Construction Management Ltd v. Mortons Rolls Ltd (2001) Scot (D) 12/8, at [28].

DISCUSSION

THE PROPER APPROACH TO THIS APPLICATION

Striking out: no reasonable grounds for bringing the claim

24. The court may strike out Particulars of Claim pursuant to r.3.4(2)(a) if it appears that the pleading "discloses no reasonable grounds for bringing the claim." The principles are not controversial:

    24.1 The whole or part of a statement of case may be struck out pursuant to r.3.4(2)(a) if it does not disclose a ground of claim or defence known to law (e.g. Price Meats Ltd v. Barclays Bank plc [2000] 2 All E.R. (Comm) 346) or where the court is otherwise certain that the claim or defence is bound to fail (Harris v. Bolt Burdon [2000] C.P. Rep 70; Hughes v Colin Richards & Co. [2004] EWCA Civ 266, [2004] P.N.L.R. 35).

    24.2 As Clarke LJ (as he then was) observed in Royal Brompton Hospital NHS Trust v. Hammond [2001] EWCA Civ 550, at [108], the focus in applications under r.3.4(2)(a) is upon the statement of case rather than the evidence. In that respect, the approach differs from applications for summary judgment under Part 24. Accordingly, on this application, the court must assume the truth of the Claimant's pleaded case.

    24.3 The hurdle is, as one would expect, high. Striking out is an exceptional course and most cases should simply be defended on their merits. The court must be certain that the case is hopeless before it can be struck out under r.3.4(2)(a).

25. In the course of her oral submissions, Ms Chambers also argued that the claim should be struck out as an abuse. No application was, however, made under r.3.4(2)(b) and it would not, in my judgment, be fair to allow the matter to be argued on such basis without proper notice.

Summary judgment

26. Rule 24.2 provides that, on a defendant's application for summary judgment, the court may give judgment on the whole of the claim or on a particular issue if it considers that "the claimant has no real prospect of succeeding on the claim or issue" and there is "no other compelling reason why the case or issue should be disposed

of at a trial." The principles were helpfully summarised by Lewison J (as he then was) in Easyair Ltd v. Opal Telecom Ltd [2009] EWHC 339 (Ch), at [15]:

> "i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: Swain v. Hillman [2001] 1 All E.R. 91.
>
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v. Patel [2003] EWCA Civ 472 at [8].
>
> iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v. Hillman.
>
> iv) This does not mean that the court must take at face value any without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v. Patel at [10].
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond …
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] F.S.R. 3.
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the

question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

27. While applications to strike out under r.3.4(2)(a) and for summary judgment have in common the core assertion that the other party cannot succeed on its pleaded case, there is of course a difference in approach. Whereas the focus of the enquiry under r.3.4 is upon the pleading, Part 24 requires analysis of the evidence. That said, the court should be wary of any invitation to weigh competing evidence and make findings upon the papers. Summary judgment is only to be given in clear cases.

HOUSING GRANTS, CONSTRUCTION & REGENERATION ACT 1996

28. Sections 109-110 of the 1996 Act provide:

> "109 **Entitlement to stage payments**
>
> (1) A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless–
>
> (a) it is specified in the contract that the duration of the work is to be less than 45 days, or
>
> (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.
>
> (2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.
>
> (3) In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.
>
> 110 **Dates for payment**
>
> (1) Every construction contract shall-
>
> (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
>
> (b) provide for a final date for payment in relation to any sum which becomes due.
>
> The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment …
>
> (3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1), the relevant provisions of the Scheme for Construction Contracts apply."

29. Section 114(4) provides that where any provisions of the statutory scheme apply, they have effect as implied terms of the contract.

Stage payments

30. In the fourth edition of his work Coulson on Construction Adjudication, Sir Peter explained, at para. 3.02:

> "At the heart of these provisions is the attempt to ensure that every construction contract contains a transparent and straightforward mechanism for the payment to the contractor of interim payments on account (sometimes called instalments or progress payments)."

31. Section 109 is directly concerned with stage or interim payments. Here the contract plainly complied with the section by agreeing monthly interim payments. Further, in compliance with s.110(1)(b), the contract clearly identified the dates when payments would fall due:

    31.1 Clause 18.8 specified when the monthly stage payments fell due.

    31.2 Clause 18.12 specified when the retention monies fell due for payment.

32. I reject Mr Pigott's submission that the payment mechanism was inadequate in this case because the contract did not prescribe a valuation method for interim valuations under clause 18.7 or require Western Power as the valuer or certifier to review, revise or correct errors in its interim valuations. The Scottish case on which he relies - Maxi Construction Management Ltd v. Mortons Rolls Ltd (2001) Scot (D) 12/8 - concerned a very different contract in which, unusually, the parties were required to agree the valuation of the works before any claim for payment could be made. Such contract did not, for the reasons explained by Lord Macfadyen at [28], provide an adequate mechanism for determining when payments became due under the contract.

33. Ms Chambers relies on Grove Developments Ltd v. Balfour Beatty Regional Construction Ltd [2016] EWHC 168 (TCC), [2016] Bus L.R. 480 in which the parties contracted on the basis of the JCT Design & Build Contract with bespoke amendments including a schedule of twenty-three monthly interim payment dates ending on the contractual date of practical completion. Works continued after such date and the contractor sued upon its twenty-fourth application for interim payment. At trial, Stuart Smith J (as he then was) found that the contractor had no contractual right to make the twenty-fourth or any subsequent application for payment. Further, the judge held that the contract complied with the requirements of ss.109-110 of the 1996 Act. The Court of Appeal, by a majority, upheld the judge and dismissed the appeal, which is reported at [2016] EWCA Civ 990, [2017] 1 W.L.R. 1893.

34. Jackson LJ rejected the contractor's principal argument at [39]:

> "I reject this submission for three reasons. First, the express words used make it clear that the parties were only agreeing a regime of interim payments up to the contractual date for practical completion ….. Secondly, it is impossible to deduce from the hybrid arrangement what would be the dates for valuations, payment notices, pay less notices and payments after July 2015. These were

> essential matters for the reasons previously stated. Thirdly, this is a classic case of a party making a bad bargain. The court will not, and indeed cannot, use the canons of construction to rescue one party from the consequences of what that party has clearly agreed."

35. In Grove, there was, however, a contractual entitlement to a final account and the issue was simply as to the contractor's right to raise a further interim application. It is authority that could be properly relied upon to defend a claim for a further interim payment, but does not directly assist as to the adequacy of a payment mechanism that does not make provision for a final account.

Final payments

36. I reject Mr Pigott's submission that the scheme provides a model of what is required by s.110(1)(a) such that the absence of any provision, or a like provision, indicates that the contract in question is unlikely to comply with the subsection. That is to put the matter the wrong way around. The threshold question is to consider whether the contract provides an adequate mechanism for determining what payments become due under the contract, and when. If it does then it passes muster under s.110(1)(a) and there is no question of implying the default terms in the scheme upon that ground. This point was well made by Dominique Rawley QC and her fellow authors at para. 12-18 of their Construction Adjudication & Payments Handbook:

> "Of course, this is not the only type of payment mechanism which will satisfy the test, and parties should not rely entirely on differences between the Scheme's provisions and those of the contract in order to demonstrate inadequacy in the latter. The only binding obligation is to comply with the terms of the Act, which is drafted in far less prescriptive terms than the Scheme. The lack of one or all of the [elements of the Scheme] will not necessarily be fatal."

37. Equally, I do not accept Ms Chambers' submission that ss.109-110 are solely concerned with interim payments. Section 109 is plainly concerned with interim or stage payments, but s.110 is not so limited. Section 110(1)(a) requires the court to take a holistic view of the overall mechanism for payments under a contract and to ask whether such mechanism is adequate for determining what payments become due under the contract, and when. In CIMC MBS Ltd v. Bennett (Construction) Ltd [2019] EWCA Civ 1515, [2019] 4 W.L.R. 155, Coulson LJ observed at [18]:

> "The purpose of these provisions is clear: to ensure that every construction contract contained a transparent and straightforward mechanism for payment to the contractor by way of stage payments, ending with the final payment, all to be made pursuant to a clear contractual timetable. I would venture to suggest that it was not designed to invalidate a particular type of stage payment or instalment regime; it was simply intended to ensure that there was such a regime in place which met certain minimum standards."

38. Mr Pigott seizes on the reference to a final payment. I accept that in many construction contracts the parties agree that interim invoices can be submitted in

respect of the then estimated value of the works but that the question of the true value of the works should be determined at the time of the final account. Henry Boot Construction Ltd v. Alstom Combined Cycles Ltd [2005] EWCA Civ 814, [2005] 1 W.L.R. 3850 was such a case. On the basis of the terms of the contract in that case, Dyson LJ (as he then was) summarised the position at the interim stage, at [24] and [56]:

> "24. Thus what the engineer has to certify and Alstom to pay is not the true final value of the work in fact done and materials in fact supplied etc, but what in the opinion of the engineer is due on the basis of the monthly statement. If Boot omits an item of work from the statement, even if the work has been done, the engineer is not obliged to include its value in the certificate ….
>
> 56. In my view, the cause of action in respect of an engineer's failure to include a sum in an interim certificate is not the same as the cause of action in respect of the failure to include a sum in the final certificate, even if the two sums happen to be the same. This is because interim certificates are no more than provisional estimates of the sum to which Boot is entitled by way of instalment payments."

39. Likewise, in Secretary of State for Transport v. Birse-Farr Joint Venture (1993) 62 B.L.R. 45, Hobhouse J (as he then was) observed, at p.53:

> "Certification may be a complex exercise involving an exercise of judgment and an investigation and assessment of potentially complex and voluminous material. An assessment by an engineer of the appropriate interim payment may have a margin of error either way. It may be subsequently established that it was too generous to the contractor just as it may subsequently be established that the contractor was entitled to more. Further the sum certified may be made up from a large number of constituent figures, some of which may likewise be assessed favourably to one party or the other. It may be that a contractor can say that under a certain heading he did not have certified as high a figure as can later be seen to be appropriate but that under another heading he has to accept that the figures certified can be shown to have been an over-certification. At the interim stage it cannot always be a wholly exact science. Its purpose is not to produce a final determination of the remuneration to which the contractor is entitled but is to provide a fair system of monthly progress payments to be made to the contractor."

40. These observations as to the nature and effect of the interim or stage payments are not statements of law applicable to all construction contracts, but rather observations as to the nature of the payment regimes in those particular cases. Ms Chambers is, however, right to submit that there is nothing in ss.109-110 that necessarily requires the parties to make separate provision for a final account. The question is broader, namely whether the payment mechanism is adequate for determining what payments become due under the contract, and when. Indeed, I do not take Coulson LJ, in the quote set out at paragraph 37 above, as saying that a payment mechanism will necessarily only be adequate in the event that it includes provision for a final account. In a simple contract, the parties might agree a fixed price of £1 million payable by five equal stage payments. The fifth stage payment

might properly be described as the final payment without it requiring any complex exercise of measurement or valuation. In such a case, I consider that the contract might well provide an adequate mechanism for identifying what was payable without a separate process for valuing and submitting the final account.

41. In my judgment, s.110(1)(a) requires the court to exercise a value judgment in assessing whether the payment mechanism is adequate for determining what payments become due under the particular contract, and when. This is, as Sheriff O'Carroll identified in the unreported Scottish case of Mair v. Mohammed Arshad (2007), essentially a question of fact to which the answer will vary depending upon the circumstances and other terms of the contract. As the sheriff explained, at [21]:

> "What will be adequate in some cases will be inadequate in others. Large complex construction operations will no doubt require complex highly structured mechanisms. Equally, simple, straightforward construction operations may be satisfactorily served by a very simple mechanism. I do not accept that I can determine as a matter of law whether the contractual mechanism in this case is adequate, whether by reference to the scheme or otherwise. The adequacy of the mechanism is a question of fact …"

42. In this case, it is properly arguable that the contract was essentially for a fixed price plus variations that could be claimed pursuant to clauses 8.3 and 17 and which would be valued against the rates and prices agreed in Sections A-C and Schedules 2-4 of the Pricing Schedule. If this is the correct analysis then it is equally arguable that a simple payment mechanism that provided for monthly stage payments throughout the works that were commensurate with the progress actually made might well be adequate for establishing what payments were due. Such mechanism might put the parties under considerable pressure in valuing variations or extra costs payable by reason of unforeseen conditions, but would have the considerable advantage of ensuring early payment. Even if the mechanism is inconvenient, the purpose of the Act is not to save a party from an imprudent deal.

43. That said, the court is rightly not invited to determine the fact-sensitive dispute as to the alleged inadequacy or inaccuracy of Western Power's design and the question as to which party bore the risk of any such design defects. Consequently, I am not asked to and cannot rule upon the issue of whether a term might be implied allowing JSM to claim a reasonable sum for the works, or as to whether JSM is right that the Pricing Schedule is inadequate to allow one to value the works. In view of these outstanding factual and legal disputes, I am satisfied that the court cannot be certain that the question of adequacy can only be answered in one way such that JSM's claim to be entitled to make a final application for payment is hopeless, or such that the court can say that JSM has no realistic prospect of success.

44. Accordingly, I dismiss the application to strike-out the claim, or alternatively to enter summary judgment in favour of Western Power. Finally I regret the time that it has taken me to hand down judgment in this case. Unfortunately I had to undergo surgery during the long vacation and only returned recently to court.