Severfield (UK) Limited v Duro Felguera UK Limited

No Substantial Judicial Treatment

Court
Queen's Bench Division (Technology & Construction Court)

Judgment Date
24 November 2015

Case No: HT-2015-000303

High Court of Justice Queen's Bench Division Technology and Construction Court

[2015] EWHC 3352 (TCC), 2015 WL 7259194

Before: The Hon Mr Justice Coulson

Date: Tuesday 24th November 2015

Hearing date: 10 November 2015

Representation

Mr Alexander Hickey (instructed by Hawkswell Kilvington LLP) for the Claimant.
Mr Adrian Williamson QC (instructed by Freeths LLP) for the Defendant.

Judgment

The Hon. Mr Justice Coulson:

1. Introduction

1. Although this is not an adjudication enforcement case, it raises a number of issues, some of them novel, concerning the Housing Grants (Construction and Regeneration) Act 1996 (“the 1996 Act”). In particular, it highlights the potential difficulty of payment provisions under a contract concerned with both construction operations and operations which are excluded by the 1996 Act (sometimes referred to as a hybrid contract), and the particular consequences for such a contract of the notice provisions in sections 110, 110A, 110B and 111 of the Act, and the recent line of authority spelling out the consequences for an employer of failing to serve the notices required by those provisions.

2. In these proceedings, the claimant seeks around £1.4 million by way of summary judgment. They deny that it is of any relevance that, in June 2015, their claim for around £3 million, also pursued by way of summary judgment, and which included the £1.4 million, was refused by Stuart-Smith J. The claimant maintains that the first application failed because it sought to enforce an adjudicator's decision which may have included sums in respect of operations which were excluded by the 1996 Act. The claimant says that it was entitled to discontinue those original proceedings because they were, in effect, adjudication enforcement proceedings which could have led only to a finding that the award was valid or invalid, and would not have led to a detailed valuation of the claim itself. They say that they have now stripped out of their claim for payment any claims for excluded operations, such that, in these new proceedings, they are unarguably entitled to the sum of £1.4 million pursuant to the contract.

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3. The defendant argues that the claimant is playing fast and loose with the court's procedures and that these new proceedings are an abuse of process. The defendant also maintains that the new claim has deliberately not been made pursuant to the contract because, if it had been, it would have been met with the necessary employer's notices which would have ensured that no sums were immediately due. The defendant submits that the claimant is not entitled now to substitute the new claim for the old. There are also issues of fact, and the defendant has an additional argument in respect of its counterclaim which suggests that the claimant has already been overpaid.

4. Although I am no doubt as to the answer to this summary judgment application, I have not found all of the points easy. Without the considerable assistance of counsel, the debate would have taken considerably longer. I am very grateful to both of them.

2. Factual Background

5. By a contract in writing dated 13 August 2013, the defendant engaged the claimant to carry out the design, supply and erection of steel structures on a site in Carrington, Manchester. The project involved the construction of two power generation plants, each comprising several different structures. It is common ground now that some of this work comprised construction operations pursuant to s.105(1) of the 1996 Act, but that some of the works were not construction operations, because they related to power generation, and were therefore excluded from the provisions of the 1996 Act, pursuant to s.105(2) .

6. It is plain that the parties were unaware of this distinction at the time that they entered into the contract. Accordingly, they agreed a payment regime which, although entirely understandable, was not in accordance with Part II of the 1996 Act. The express payment provisions in the contract were as follows:

> **“9. Price**
>
> 9.1 The Initial Price of this Contract Is 5,221,145.00 GBP (FIVE MILLION TWO HUNDRED TWENTYONE THOUSAND ONE HUNDRED FORTY FIVE GBP). The final Price of this Contract will be the result of applying the measurements executed by BUYER to the unitary prices indicated In Appendix II. However once the ceiling limit represented by the initial price is reached, a change order will be needed for CONTRACTOR to continue with the performance of the Works and submit further Invoices.
>
> NOTES:
>
> • The final Price is based on the result of the measurements executed about constructive drawing including the weights of connections and bolts.
>
> • The previous unitary Prices should he applicable to the extensions of the Scope of this Contract and they will be based on toe measurements about drawing of Works really executed and agreed with the BUYER. Including the weights of connections and bolts.

9.2 Unless otherwise expressly stated In this Contract, the 'unitary prices are fixed and not subject to modification and include, among others, all the services, direct and indirect costs, industrial benefit, supplies of material, transport to the delivery she indicated in the Contract, packing, travel of the CONTRACTOR's own personnel, use of any equipment necessary for the completion of the Works in accordance with this Contract, including, without limitation, manufacturing and construction equipment both in the workshop and on Site, all the necessary insurances, rights and expenses, as well as all the taxes, duties, tariffs, charges and levies of any kind, or the timely and satisfactory execution of the Scope by the CONTRACTOR, with the sole exception of VAT. Consequently, the CONTRACTOR assumes the whole economic risk with regard to, but not limited to, any modification to the cost of the services and materials, construction equipment and goods, transport, duties, taxes, charges, social insurance, salary reviews or to any other aspect that affects the Scope and that may occur for any reason, unless expressly stipulated otherwise in the Contract.

If in the execution of the Works CONTRACTOR incurs direct loss and/or expenses for which he would not be reimbursed by a payment under any other provision of this Contract because the regular progress of the Works or any part of them has been materially affected by any act of default by the BUYER, the CONTRACTOR may submit a claim to the BUYER. If the CONTRACTOR makes such claim, save where this Contract excludes the operation of this clause, any amounts agreed by the parties of (the direct loss and/or expense thereby caused to the CONTRACTOR shall be taken into account in the calculation of the final Price or shall be recoverable from the BUYER as a debt; provided always that the CONTRACTOR shall:

• Make the claim in accordance to clause 31,

• In support of its claim submit to the BUYER upon request such information as is reasonably necessary to show that the regular progress has been affected.

• Submit to the BUYER such details of the loss and/or expense as the BUYER reasonably requests to enable that direct toss and/or expense to be ascertained and agreed.

…

11. Form of Payment and Invoicing

11.1 The Scope performed by the CONTRACTOR shall be invoiced in the following way:

Milestone	**% of Price**	**Description**
1	100%	By monthly certifications approved by BUYER. With the first invoice CONTRACTOR shall provide BUYER with the retention bond stated in clause 10, and where a certification includes supply of materials held off site the corresponding invoice shall be submitted along with a transfer of ownership as per Appendix VIII

11.2 One (1) original of all the invoices shall be sent to the BUYER's domicile indicated in this Contract, the invoices shall indicate the origin of the supply and the operation carried out to complete the same. The CONTRACTOR shall invoice independently the services performed as part of the Scope described in the present Contract. Payment shall be made on days 5, 15 and 25 of each month by Bank Transfer at 30 days from the reception of the invoice. No payment will be made in case of any nonconformity of the invoice.

11.3 Payments to be made by the BUYER to the CONTRACTOR in accordance with this Contract shall be subject to the CONTRACTOR complying with all its obligations according to the Contract. Furthermore, such payments shall in no case be deemed as the approval and acceptance of the Scope. Therefore, any payments to the CONTRACTOR of the invoices submitted merely constitute advanced payments of the Contract Price, the payment of which is conditional upon the final demonstration of the fitness of the Scope for the purpose foreseen in the Contract.

11.4 The BUYER is entitled to set off any payments owed to the CONTRACTOR with any amount owed by the CONTRACTOR to the BUYER under this Contract.

11.5 All Invoices must compulsorily make express mention of the Contract number, otherwise they will be returned to the CONTRACTOR.

Contract Nr. 8370100105

Internal Cost Code: 8370001-001/5010

The invoices shall be made out and sent to:

Duro Felguera UK Ltd

Carrington CCGT Construction Site

Manchester Road 132 – M31 4AY Manchester – UK

England company number: 7889106

VAT No. GB-137233135

For the attention of Ms. Gema Santos

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11.6 With the issuance of the first invoice CONTRACTOR shall submit the following information:

- Their names or the name of their business or company.
- Their UTR,
- The partner's name if they're a partnership.
- Their National Insurance number (if you know it) if they're a sole trader.
- The partner's UTR or National Insurance number If they're a partnership (or, if the partner's a company, that company's UTR or company registration number).
- Their company registration number if they're a company.

The failure of the CONTRACTOR to comply with the above mentioned obligation shall entitle the BUYER to withhold any payment that may be owed to the CONTRACTOR until the information has been effectively and correctly delivered."

7. In December 2014, the claimant made interim payment application 15, seeking a net sum of £3,782,591.12. Application 15 made no attempt to divide up the work between the operations included in, and the operations excluded by, s.105 . The defendant responded on 6 February 2015, dealing with both the December application and the application for January, and certified for payment just £361,351.39. That sum has been paid by the defendant to the claimant.

8. On the basis that, insofar as it related to construction operations within s.105 , application for payment 15 was to be treated as an application under the 1996 Act, it is agreed that the application became due for payment on 8 January 2015 and the final date for payment was 25 January 2015. The defendant failed to serve a valid payment notice by 13 January 2015 or a valid payless notice by 18 January 2015. The response of 6 February 2015 was out of time. Accordingly, the claimant argued that, pursuant to the relevant provisions of the 1996 Act, the sum notified in December 2014 was due and gave notice of adjudication.

9. The notice of adjudication was not in the full sum claimed in application 15 because, even at this early stage, the claimant recognised that their works related in part to construction operations within the 1996 Act and in part to construction operations outside the 1996 Act. The claimant sought to adjudicate only those claims for payment which they said arose out of construction operations under s.105(1)(a) . Hence the notice of adjudication identified the sum sought as £2,470,231.97

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plus VAT, which was less than the sum sought in application 15. The referral notice set out in detail how and why, on the claimant's case, all the claims for work that might fall outside the 1996 Act had been omitted.

10. In the subsequent adjudication, the defendant argued that the adjudicator did not have the necessary jurisdiction because much or at least part of the claim arose out of excluded operations. The adjudicator disagreed and awarded the full sum claimed to the claimant. The sum was not paid and the claimant issued enforcement proceedings (HT-2015–00215).

11. The claimant sought to enforce the adjudicator's decision by way of summary judgment. The matter came before Stuart-Smith J on 25 June 2015. In a clear extempore judgment ([2015] EWHC 2975 (TCC)), the judge refused the application. He found that it was arguable that the adjudicator had decided various aspects of the claim which related to excluded operations under the 1996 Act, and had therefore not had the necessary jurisdiction to reach his decision.

12. On 24 July 2015, the claimant's solicitors wrote a letter to the defendant's solicitors, setting out what they called "a revised claim for payment of some of the sums set out in the Application which takes into account all of Duro's concerns (the 'Revised Claim')". The letter ran to ten pages. It was extremely detailed and explained, by reference to various elements of the works, the precise basis of the Revised Claim. It also included a number of detailed spreadsheets. The claimant's solicitors put the Revised Claim in the sum of £1,445,495.78.

13. On 18 August 2015, the claimant's solicitors commenced these proceedings (HT-2015–00303). The sum claimed is £1,446,935.78 and is calculated almost exactly as set out in the letter of 24 July 2015. The following day, on 19 August 2015, the claimant discontinued the original proceedings (HT-2015–00215).

14. Despite the fact that the court cannot, on an application for summary judgment, engage in 'a mini-trial', the evidence before me filled three lever arch files. There was one witness statement in support of the application; one witness statement in response which exhibited another witness statement and written expert evidence from both an expert engineer and an expert quantity surveyor; two statements on behalf of the claimant in reply; and another statement by way of rejoinder. To the extent that it was relevant, and much of it was not, this material went to what I regard as the principal issue between the parties, namely whether the claimant was entitled to summary judgment on the new claim (what their solicitors called 'the Revised Claim', produced in July 2015), on the basis that it could be related back to interim application 15 in December 2014, thus allowing the claimant to take advantage of the admitted absence from the defendant of either a payment notice or a payless notice in January 2015.

3. Relevant Legal Principles

3.1 Construction Operations

15. The relevant parts of the 1996 Act dealing with what is within and what is outside the scope of Part II are sections 104 and 105 . They read as follows:

"104.— Construction contracts.

(1) In this Part a *"construction contract"* means an agreement with a person for any of the following —

(a) the carrying out of construction operations;

(b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;

(c) providing his own labour, or the labour of others, for the carrying out of construction operations.

(2) References in this Part to a construction contract include an agreement—

(a) to do architectural, design, or surveying work, or

(b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape,

in relation to construction operations…

(5) Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations. An agreement relates to construction operations so far as it makes provision of any kind within subsection (1) or (2).

105.— Meaning of "construction operations".

(1) In this Part *"construction operations"* means, subject as follows, operations of any of the following descriptions—

(a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);

(b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, [electronic communications apparatus], aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;

(c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;

(d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;

(e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;

(f) painting or decorating the internal or external surfaces of any building or structure.

(2) The following operations are not construction operations within the meaning of this Part—

(a) drilling for, or extraction of, oil or natural gas;

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(b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;

(c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is—

(i) nuclear processing, power generation, or water or effluent treatment, or

(ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;

(d) manufacture or delivery to site of—

(i) building or engineering components or equipment,

(ii) materials, plant or machinery, or

(iii) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems,

except under a contract which also provides for their installation;

(e) the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature."

16. In essence, there is a wide definition of construction contracts in s.104(1) and (2) ; this wide definition is then the subject of detailed exposition at s.105(1) , before becoming the subject of a number of equally wide exceptions (s.105(2)). If the contract is a hybrid contract, because it includes for both included and excluded operations, the inevitable result is a muddle. As I have said elsewhere, it is difficult not to feel instinctive sympathy with those who pointed out during the Parliamentary debates that these definitions were likely to lead to just the sort of disputes that the 1996 Act itself was designed to avoid. This case is a good example of such a dispute.

17. It is unnecessary to refer to the numerous authorities which grapple with the difficulties created by steelwork contracts in connection with power generation plants (s.105(2)(c)(i)). The two most recent cases are both decisions of Ramsey J. In *North Midland Construction PLC v AE and E Lentjes UK Limited [2009] EWHC 1371 (TCC); [2009] BLR 574* , he reviewed all of the authorities and concluded that a narrow construction was appropriate for s.105(2) . He said that on that basis, the intention was to exclude steelwork which formed an integral part of the machinery and which was directly and necessarily connected to the plant, and that other steelwork would come within construction operations to which the Act applied. In the second case, *Cleveland Bridge (UK) Limited v Whessoe-Volker Stevin Joint Venture [2010] EWHC 1076 (TCC); [2010] BLR 415* , he ruled that it was only the actual 'erection' of steel work which supported or provided access to plant and machinery which was excluded. All other aspects of the work were within the scope of the 1996 Act.

18. It should be noted that the results in these two cases were different. In North Midland , the judge's construction led him to conclude that both the enabling works and the civil works were construction operations to which the 1996 Act applied. The decision of the adjudicator was therefore enforced. By contrast, in Cleveland Bridge , the judge concluded that some significant and substantial work, involving piperacks and pipebridges, were excluded by s.105(2)(c)(ii) , with the result that the adjudicator had exceeded her jurisdiction by giving a decision in respect of all operations. Thus, at paragraph 104 of his judgment, Ramsey J said that the adjudicator did not have jurisdiction to deal with the whole of the dispute referred to her, but did have jurisdiction in relation to that part of the dispute which related to construction operations. Since the decision could not be severed, that finding was fatal to the enforceability of the adjudicator's decision in that case.

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19. Both North Midland and Cleveland Bridge were concerned with hybrid contracts. They were both concerned with the jurisdiction of the adjudicator. They were not directly concerned with one of the issues before me, namely the appropriate payment regime in a hybrid contract. However, by reference to s.104(5) of the 1996 Act, Ramsey J said in Cleveland Bridge :

> "63. It follows that the statute contemplated a position where one agreement related to both construction operations under section 105(1) and operations which were excluded by section 105(2) .
>
> 64. It also follows that the right to refer disputes to adjudication under section 108 , the entitlement to stage payments under section 109 , the provisions as to dates of payment under section 110 , the provisions as to notice of intention to withhold payment under section 111 , the right to suspend performance for non payment under Section 112 and the prohibition of conditional payment provisions under section 113 will only apply to the Subcontract in this case, insofar as the Subcontract relates to construction operations."

3.2 Payment Provisions

20. I have set out at paragraph 6 above the express terms relating to payment which the parties agreed. It is, however, common ground, that these provisions are not in accordance with Part II of the 1996 Act. The relevant provisions of the 1996 Act (as amended) are as follows:

> **"109— Entitlement to stage payments.**
>
> (1) A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless—
>
> (a) it is specified in the contract that the duration of the work is to be less than 45 days, or
>
> (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.
>
> (2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.
>
> (3) In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply…
>
> **110A Payment notices: contractual requirements**
>
> (1) A construction contract shall, in relation to every payment provided for by the contract—
>
> (a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or
>
> (b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.
>
> (2) A notice complies with this subsection if it specifies—

(a) in a case where the notice is given by the payer—

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

(ii) the basis on which that sum is calculated;

(b) in a case where the notice is given by a specified person—

(i) the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and

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

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

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

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

(5) If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme for Construction Contracts apply.

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

“payee” means the person to whom the payment is due;

“payer” means the person from whom the payment is due;

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

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

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

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

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

(b) notice is not given as so required.

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(2) Subject to subsection (4), the payee may give to the payer a notice complying with section 110A(3) at any time after the date on which the notice referred to in subsection (1)(a) was required by the contract to be given.

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

(4) If—

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

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

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

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

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

111 Requirement to pay notified sum

(1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.

(2) For the purposes of this section, the *"notified sum"* in relation to any payment provided for by a construction contract means—

(a) in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(b) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(c) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2) , the amount specified in that notice.

(3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.

(4) A notice under subsection (3) must specify—

(a) the sum that the payer considers to be due on the date the notice is served, and

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

It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.

(5) A notice under subsection (3)—

(a) must be given not later than the prescribed period before the final date for payment, and

(b) in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.

(6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).

(7) In subsection (5), *"prescribed period"* means—

(a) such period as the parties may agree, or

(b) in the absence of such agreement, the period provided by the Scheme for Construction Contracts.

(8) Subsection (9) applies where in respect of a payment—

(a) a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract (and no notice under subsection (3) is given), or

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

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

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

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

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

whichever is the later.

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

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

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

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

21. Beyond the passage to which I have referred in the judgment of Ramsey J in Cleveland Bridge (paragraph 19 above), there is no other authority which addresses the question of what payment provisions apply to a hybrid contract. At one point, it was apparent that Mr Hickey was itching to submit that the provisions in the 1996 Act ought to be incorporated wholesale, even in a hybrid contract, to apply to all the works. But it seems to me that, first, that submission would have run counter to s.104(5) , which expressly provides that the provisions in the Act apply "only so far as" they relate to construction operations; and secondly, ignores the fact that the parties have expressly agreed a different payment regime (paragraph 6 above). In my

view, the court must uphold that different regime in respect of all claims to payment in respect of works which are excluded by the 1996 Act.

22. This means that, under a hybrid contract such as this, there are two very different payment regimes. That is what Ramsey J indicated in Cleveland Bridge . Although I find that uncommercial, unsatisfactory and a recipe for confusion, it is the inevitable result of Parliament's desire to exclude what would otherwise have been obvious construction operations from the ambit of the 1996 Act.

3.3 Absence of Notices

23. Over the course of the last year there has been a flurry of cases in which Edwards-Stuart J has considered the situation in which a contractor has notified the sum due in a payment notice, and the employer has failed to serve either its own payment notice or a payless notice. Those cases include *Harding v Paice [2014] EWHC 3824 (TCC)* ; *ISG Construction v Seevic College [2014] EWHC 4007 (TCC)* ; and *Galliford Try Building Limited v Estura Limited [2015] EWHC 412 (TCC)* . In essence, these three cases are authority for the proposition that, if there is a valid payment notice from the contractor, and no employer's payment notice and/or payless notice, then the employer is liable to the contractor for the amount notified and the employer is not entitled to start a second adjudication to deal with the interim valuation itself. Harding v Paice was in some ways a slightly different case because, amongst other things, it was concerned with contractual provisions on termination. It is also the subject of an imminent appeal.

24. All of these cases concern the situation where the contractor is seeking to take advantage of the absence of any notices from the employer to claim, as of right, the sum originally notified. That approach is in accordance with the amended provisions of the 1996 Act. But because of the potentially draconian consequences, the TCC has made it plain that the contractor's original payment notice, from which its entitlement springs, must be clear and unambiguous. Thus:

(a) In *Caledonian Modular Limited v Mar City Developments Limited [2015] EWHC 1855 (TCC)* , at paragraph 37, I said:

> "…if contractors want the benefit of these provisions, they are obliged, in return, to set out their interim payment claims with proper clarity. If the employer is to be put at risk that a failure to serve a payless notice at the appropriate time during the payment period will render him liable in full for the amount claimed, he must be given reasonable notice that the payment period has been triggered in the first place.";

(b) In *Henia Investments v Beck Interiors Limited [2015] EWHC 2433 (TCC)* Akenhead J said:

> "…the document relied upon as an Interim Application … must be in substance, form and intent an Interim Application stating the sum considered by the Contractor as due at the relevant due date and it must be free from ambiguity. In this context, the Interim Application should be considered in the same light as a certificate. If there are to be potentially serious consequences flowing from it being an Interim Application, it must be clear that it is what it purports to be so that the parties know what to do about it and when."

25. With these principles in mind I then turn to the claimant's summary judgment application.

4. Analysis: the Sum Due and the Claim Now Made

4.1 Summary

26. I have concluded that the claimant is not entitled to summary judgment. The principal reason for that is, in my judgment, the claimant is not entitled to say that the claim now made is, to all intents and purposes, the interim payment claim 15 notified in December 2014. The claimant needs to be able to establish that proposition, in order to take advantage of the absence of a

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payment notice and a payless notice from the defendant in January 2015. If the claimant cannot relate the current claim back to the interim payment claim notified in December 2014, the claimant is not entitled to summary judgment because, on the defendant's case, nothing more is due (and in fact the claimant has been overpaid).

27. I reach that conclusion for a number of reasons. I first analyse the position on the assumption that the claimant is right, and that this new claim is not, as a matter of fact, a revision of the claim previously made (Section 4.2 below). I then go on to set out my view that, on analysis, the claim which the claimant's own solicitors described as “the Revised Claim” in July, is indeed just that, and therefore not capable in any event of relating back to the interim application in December 2014 (Section 4.3 below).

4.2 The Payment Notice Issue

28. The payment provisions incorporated from the 1996 Act (paragraph 20 above) contain the following ingredients:

(a) The payment notice has to set out the sum due;
(b) The payment notice has to set out the basis on which that sum is calculated;
(c) The payment notice must be set out with proper clarity and be free from ambiguity (see paragraph 24 above).

29. The issue is whether the payment notice of December 2014 was a payment notice in respect of the claim for £1.4 million now made. As noted, I consider that issue first on the assumption that the claimant is right and the new claim is not, as a matter of fact, a revised claim. Even on that basis, however, for the reasons noted below, I have concluded that the payment notice of December 2014 was not a notice in respect of the £1.4 million now claimed.

30. The notice of December 2014 identified the sum due as £3,782,591.12. Pursuant to the 1996 Act, the absence of a payment notice or a payless notice from the employer within the time frame required meant that, pursuant to s.111 , the defendant was liable to pay “the notified sum”. But the £1.4 million now claimed was not said to be the sum due, and was not the notified sum. One looks in vain for any reference in the payment notice of December 2014 to the sum of £1.4 million. The notice was therefore not a payment notice in respect of that claim and, as Mr Williamson QC put it, the claimant ‘cannot convert the sum notified by refining it later on’.

31. Mr Hickey sought, with typical invention, to get round that difficulty by saying that, because the application was supported by a spreadsheet with a number of line items, the ‘notified sum’ consisted of each of the sums in each line item, so that the claimant was entitled subsequently to rely on just some of the line items and ignore others. In my view that is not the purpose or intention of these provisions: it would make for unnecessary complexity to say that the notified sum was not the net total claimed, but each (or just some) of its individual components.

32. The whole point of the default provisions in the 1996 Act, by which an employer becomes liable for the sum notified, is to encourage simplicity and clarity. If x notifies y of a claim for £1,000, and y does not respond in the prescribed time to challenge that claim, £1,000 becomes due because it is the notified sum. Introducing the possibility of a partial claim for £675, by reference to a gloss put on an accompanying spreadsheet, would be to confuse the simple system of notification envisaged by the 1996 Act.

33. That interpretation is reinforced by a consideration of the next statutory requirement, that in order to be payment notice, the notice has to set out the basis on which the sum claimed has been calculated. Because the notice of December 2014 and the accompanying spreadsheet did not begin to address the complexities of what were and were not construction operations, interim payment claim 15 was for everything. There was therefore no explanation in the payment notice of the calculation of £1.4 million as being the minimum due in respect of construction operations within the 1996 Act. So it was not a payment notice in respect of the claim for £1.4 million for construction operations, because the basis for the calculation of that figure, let alone the figure itself, is nowhere explained or set out in interim payment application 15.

34. Thirdly, I have concluded that, in so far as it is now said that the notice of December 2014 is a payment notice for £1.4 million in respect of construction operations, such a claim is not at all clear or unambiguous from a perusal of either the notice or the accompanying spreadsheet. How could it be, when the claimant was claiming for everything, regardless of whether or not the works were construction operations within the Act? Because this was a hybrid contract, it was imperative that the claimant spell out the fact that, regardless of the position in relation to excluded operations, this was a payment notice (with all that that entailed) in respect of the claim for construction operations.

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35. This is not merely a technical point. It is quite clear that, up to December 2014, the parties had been progressing under the rather more old-fashioned payment provisions in the contract set out at paragraph 6 above. The relaxed attitude to valuation and payment is perhaps best exemplified by the defendant's email of 6 February 2015 (paragraph 7 above) in which the defendant acknowledged delay in dealing with the December 2014 application, but noted that, to make up for the delay, it had dealt much more promptly than it needed to with the January 2015 application. From the exchanges, it is clear that, up to that point, neither party had given any thought to the much more immediate and draconian timetable incorporated by the 1996 Act.

36. In those circumstances, it seems to me inequitable now to penalise the defendant for failing to respond within the limited time prescribed by the 1996 Act, in circumstances where the parties had been operating the contract in a different way, and when interim application 15 did not give any indication that it was a payment notice in respect of a specific part of the claim. If the claimant wanted to take advantage of the rights that it had under the 1996 Act, then it had to do so in an open way. The least that the claimant could have done was to spell out in the December 2014 notice how the claim was split and why it was that, in respect of the claim for construction operations, a very truncated timetable applied.

37. Accordingly, I consider that, even if the claimant is right, and the claim now made is merely a stripped-out version of the claim originally made, the payment notice of December 2014 did not clearly identify the £1.4 million as the sum due; it did not explain unambiguously how the sum of £1.4 million had been calculated; and was therefore not a claim which was indisputably due. It is not a claim which can avoid the consequences of the defendant's response of 6 February 2015, to the effect that nothing beyond the £361,351.39 was due.

4.3 Is This a Revised Claim?

38. In my judgment, the points made in Section 4.2 above apply *a fortiori* to the claim now made because I have concluded that, contrary to the claimant's case, it is at least arguable that this is a revised claim as a matter of fact. As such, in order to have any entitlement to payment, the claimant was obliged first to present the claim in a fresh payment notice, under the terms of the contract incorporated from the 1996 Act. I find that it has not done so because that would have led the defendant to serve the appropriate counter-notices.

39. There are a number of reasons why I have concluded that the new claim is, at least arguably, a revised claim and cannot therefore 'piggyback' on the notice of December 2014. When the new claim was put together by the claimant's solicitors in July 2015, they expressly referred to it as a revised claim. Moreover, they took ten careful pages to explain how and why it was, indeed, a revised claim. That explanation went far beyond simply identifying items that they had stripped out of the original claim. On the contrary, it argued all sorts of positions by reference to drawings and other material, and produced an entirely new variations spreadsheet. On their own case, therefore, it seems to me arguable that this was a revised claim.

40. Secondly, notwithstanding Mr Hickey's argument, noted above, that the 'notified sum' was each line item in application 15, he could not show that the £1.4 million was made up of particular line items. Some of the line items had changed.

41. Thirdly, the report of the defendant's expert QS, Mr Fitch, dated 30 October 2015, sets out why, in his analysis, this is a new claim. In addition to the point about the difficulty of being able to establish whether items are or are not construction operations, Mr Fitch said that the claimant has changed its approach to the variations claim and that, instead of using a percentage, as it did before, the claimant has adopted a specific allocation approach instead. That was not only a change but, as Mr Fitch points out a paragraph 2.4.11 of his report, "no calculation is provided to show how the amounts claimed in the summary judgment proceedings and the underlying new claim for variations has been calculated." He goes on to say at paragraph 2.4.16 that the specific allocation basis is "fundamentally different" to the approach taken previously.

42. Paragraph 3.4 of Mr Fitch's report deals with the changes to the basis of the quantum of the claim. There he not only refers to the specific allocation method now adopted, but also states that the effect of these changes is that there are no details to show how the allocation into off-site, erection, site works, logistics and preliminaries has been calculated.

43. In my view, Mr Fitch's report demonstrates that it is at least arguable that, as a matter of fact, this is a revised claim. For what it is worth, it is also arguable that three of the variations (45, 57 and 61) may be for excluded items. I had initially thought that this point may not be very strong because the engineering expert, Mr de Silva, is somewhat equivocal on the subject, but I do not think that an expert can be criticised for properly saying that the matter is, for example, "a grey area". These three variations are worth almost £300,000. It is a further indication that, not only is this arguably a revised claim, but it may also include elements which fall outside the remit of the 1996 Act.

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4.4 Conclusion

44. For the reasons set out above, I conclude that the claimant cannot rely on the December 2014 interim payment notice 15 in order to take advantage of the absence of a payment notice and a payless notice from the defendant in January 2015, in order to seek summary judgment on its revised claim of July 2015. Although there are other factors which I must touch on, and do so in the remaining sections of this Judgment, it is on this principal ground that I refuse the claimant's application for summary judgment.

5. Counterclaim

45. I now turn to deal with the counterclaim. I do so on the assumption that the analysis in Section 4 is wrong and the claimant is *prima facie* entitled to be paid the £1.4 million.

46. The evidence from the defendant as to the overall state of the account is set out in the statement of Mr Redondo dated 30 October 2015. In essence, he says that the overall value of the claimant's final account is £8,640,006.84 less £864,000.68 by way of liquidated damages and £1,549,549.08 by way of contra charges. That gives a net figure of £6,226,457.07. When that is compared to the £8,999,204.76 already paid to the claimant, Mr Redondo states that there is a counterclaim for overpayment in favour of the defendant of £2,772,747.69.

47. The general rule is that the payment of sums due under the payment provisions implied by operation of the 1996 Act cannot be avoided or reduced by operation of set-off: see *VHE Construction PLC v RBSTB Trust Co Ltd [2000] BLR 187* and *Balfour Beatty Construction Ltd v Serco Ltd [2004] EWHC 3336 (TCC)* . Although these (and many other cases concerned with set-off under the 1996 Act) are concerned with the enforcement of an adjudicator's decision, I am content to assume that they would also apply to the situation where there is a valid payment notice and no notices in response from the employer.

48. On the other hand, absent the 1996 Act, the existence of this counterclaim would on its own defeat the application for summary judgment. The set off provision under clause 11.4 (paragraph 6 above) would operate so as to prevent the payment of any sums to the claimant until both claim and counterclaim had been assessed. Although Mr Hickey argued that “the amount owed” meant a liquidated sum, it did not seem to me that that argument took the claimant anywhere, for two separate reasons. First, the majority of the counterclaim is made up of liquidated sums either by way of liquidated damages or specified contra charges. Secondly, as Mr Williamson QC noted, the set-off provision at paragraph 11.4 was not said to exclude any wider remedy of set-off, so the ordinary principles of equitable set-off would apply in any event. That would cover both liquidated and unliquidated sums.

49. So what happens where there is a hybrid contract, and the payment provisions derived from the 1996 Act produce one figure in favour of the contractor, and the payment provisions agreed by the parties (and which relate to at least part of the works) produces an arguable set-off and counterclaim?

50. Mr Hickey argued that, in accordance with the 1996 Act, the sum due to the contractor should be paid forthwith, whilst the set-off and counterclaim due to the defendant would have to be the subject of investigation and assessment. There is some force in that, because the paramount importance of cashflow is one of the main purposes of the 1996 Act. On the other hand, that could be potentially inequitable in a situation like the present case, because the claimant's entitlement has only arisen from the defendant's failure to serve a payment notice and a payless notice, under a payment regime which neither side had operated up to that point, and which only related to some parts of the claim.

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51. There is no authority on this point. It is one of the many complexities introduced by s.105 which, with great respect to the legislature, has never been thought through. In all the circumstances, had it been the critical issue on the summary judgment application, I would have given the defendant permission to defend on this ground too. I consider that it is arguable that a defendant in these circumstances, under a hybrid contract, should be entitled to deploy the set-off in full.

6. Abuse of Process

52. The defendant argued that these fresh proceedings were an abuse of process. Although on one view it is unnecessary for me to decide that point, because I am refusing summary judgment on other grounds, it does seem to me to matter, because the claimant submitted that, even if I refused summary judgment, I should set out a timetable for trial so that the valuation issues in the case can be finally assessed. That could not happen if I had struck out the proceedings as an abuse of process.

53. Mr Williamson QC's principal submission was that, following the judgment of Stuart-Smith J, the claimant could and should have proceeded with action HT-2015–00215 to trial, which would have resolved the issues between the parties. He said that it was an abuse for the claimant to abandon those proceedings, and noted that the defendant had been deprived of the opportunity to complain about the discontinuance because, by the time they had been discontinued, the fresh proceedings had started. In my view, on analysis, neither of these submissions is sustainable.

54. As to the first point, I think that Mr Hickey is right to say that, if the old proceedings had gone to trial, there was a very real risk that the claimant would have come away empty-handed. The issue would have been whether or not the adjudicator had decided claims that related to excluded operations. On the authority of Cleveland Bridge , if he had so decided, then his adjudication decision would have been invalid. It was not capable of severance. Thus the claimant would have faced an ‘all or nothing’ trial with the real risk that, because line items had indeed been addressed which concerned excluded operations, the decision would have been outside the adjudicator's jurisdiction.

55. Such a trial would therefore have been hobbled. It would not have addressed any of the underlying issues of valuation at all. It would have given rise to different issues to those raised in these fresh proceedings which, at trial, will simply be whether or not the claims made are justified under the terms of the contract.

56. As to Mr Williamson QC's second point, the relevant rules in the CPR relating to discontinuance are as follows:

> **“Right to discontinue claim**
>
> (1) A claimant may discontinue all or part of a claim at any time.
>
> (2) However –
>
> (a) a claimant must obtain the permission of the court if he wishes to discontinue all or part of a claim in relation to which –
>
> (i) the court has granted an interim injunction; or
>
> (ii) any party has given an undertaking to the court;

(b) where the claimant has received an interim payment in relation to a claim (whether voluntarily or pursuant to an order under Part 25), he may discontinue that claim only if –

(i) the defendant who made the interim payment consents in writing; or

(ii) the court gives permission;

(c) where there is more than one claimant, a claimant may not discontinue unless –

(i) every other claimant consents in writing; or

(ii) the court gives permission.

(3) Where there is more than one defendant, the claimant may discontinue all or part of a claim against all or any of the defendants…

(1) Where the claimant discontinues under rule 38.2(1) the defendant may apply to have the notice of discontinuance set aside.

(2) The defendant may not make an application under this rule more than 28 days after the date when the notice of discontinuance was served on him…

A claimant who discontinues a claim needs the permission of the court to make another claim against the same defendant if –

(a) he discontinued the claim after the defendant filed a defence; and

(b) the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim."

57. The claimant did not need the permission of the court to discontinue the old proceedings because the claim was discontinued before the defendant had filed a defence. Although, on the timing, the fresh proceedings had started by the time the claimant had discontinued the old, that would not have prevented the defendant from seeking to have the notice of discontinuance set aside had it so wished. Moreover, if any such application had been made by the defendant, the objection would have been dismissed on the grounds noted above, namely that the fresh proceedings will lead to a substantive result, whereas there was a risk that the old proceedings would not.

58. More widely, I do not consider that it is fair to say that the claimant has played fast and loose with the court process. Mr Williamson QC referred to *Castanho v Browne and Root (UK) Limited [1981] AC 557* , a case where a claimant discontinued in order to improve his chances of obtaining much greater sums by way of damages in Texas. Lord Scarman said at page 571G-H that "the court has inherent power to prevent a party from obtaining by the use of its process a collateral advantage which it would be unjust for him to retain." I respectfully agree with that.

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59. However, it seems to me that, in this case, the claimant has not sought a collateral advantage. The claimant simply wants a trial on the merits. For that reason alone, it is not unjust for these fresh proceedings to go to trial. I therefore reject the submission that these proceedings are an abuse of process. On receipt of this Judgment, I would urge the parties to agree a timetable to lead up to a trial that can deal with the real issues between them.

7. Conclusions

60. I refuse the application for summary judgment for the reasons set out in Section 4 above. Although the reasoning set out in Section 5 above is a further reason for refusing summary judgment, it has not been my principal focus.

61. For the reasons set out in Section 6 above, I reject the submission that these proceedings constitute an abuse of process.

62. I should add this. All of the difficulties here, in both the old and the new proceedings, can be traced back to s.105 of the 1996 Act and the legislature's desire to exclude certain industries from adjudication. A review of the debates in *Hansard* reveal that Parliament was aware of the difficulties that these exceptions would cause, but justified them on the grounds that (i) adjudication was seen as some form of 'punishment' for the construction industry from which (ii) the power generation and some other industries should be exempt, because 'they had managed their affairs reasonably well in the past'.

63. I consider that both of these underlying assumptions were, and remain, misconceived. Adjudication, both as proposed in the Bill and as something that has now been in operation for almost 20 years, is an effective and efficient dispute resolution process. Far from being a 'punishment', it has been generally regarded as a blessing by the construction industry. Furthermore, it is a blessing which needed then — and certainly needs now — to be conferred on all those industries (such as power generation) which are currently exempt. As this case demonstrates only too clearly, they too would benefit from the clarity and certainty brought by the 1996 Act.

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