Neutral Citation Number: [2016] EWHC 222 (TCC)

Case No: HT-2015-000428

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2016

Before :

MR JUSTICE EDWARDS-STUART

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Between :

MANOR ASSET LIMITED	**Claimant**
- and -	
DEMOLITION SERVICES LIMITED	**Defendant**

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- -

Mr Jonathan Lewis (instructed by **Brecher**) for the **Claimant**
Mr Martin Hirst (instructed by **Bates Solicitors**) for the **Defendant**

Hearing date: 26th January 2016

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Judgment

1. On 8 December 2015 an adjudicator made a decision in which he ordered Manor Asset Ltd ("MAL") to pay £72,500 plus VAT to Demolition Services Ltd ("DSL"), together with certain other sums in relation to interest and his fees and expenses. In Part 8 proceedings brought on 18 December 2015 MAL seeks a declaration that the Decision is unenforceable on the grounds of breaches of natural justice and, in addition, a declaration as to the final date for payment of DSL's invoice dated 23 October 2015.

2. DSL has responded by seeking summary judgment to enforce the Decision.

3. The parties entered into a contract for demolition works at a site known as Manor Mill in Hull. The contract was in the form of the JCT Minor Works Building Contract with Contractor's Design 2011 with certain bespoke amendments. The contract was made on 13 April 2015.

4. By an amendment made on 13 August 2015, Section 4 of the contract, which dealt with the provisions for payment, was amended so as to provide for payment of a percentage of the contract value on the achievement of certain milestones. The true construction of that amendment is at the heart of the dispute. The terms of the amendment are set out at paragraph 13 below.

5. On 23 October 2015 DSL issued an invoice for 60% of the price asserting that it had achieved the first milestone in accordance with the terms of the amendment. That invoice was sent by both e-mail (timed at 13:30) and post.

6. On 28 October 2015 MAL issued what it contends was a valid pay less notice in which the amount stated to be due was £1,500. The pay less notice contained the following statement by MAL:

> "Our assessment of the works undertaken for financial purposes is as follows: Demolition completed . . . 60%"

7. On 6 November 2015 DSL referred a dispute to adjudication. The dispute was about the non-payment of DSL's invoice of 23 October 2015. DSL claimed that it should have been paid within 72 hours of receipt of that invoice, namely on or by 26 October 2015. It contended that the pay less notice issued by MAL was invalid.

8. Following examination of some photographs which had been taken on site during a visit made by one of MAL's directors on 27 October 2015, MAL asserted in the adjudication that DSL had not achieved the first milestone on 23 October 2015 after all. The adjudicator decided that DSL had achieved the milestone, but MAL contends that his decision is flawed and invalid because he did not take its evidence into account. That, it contends, was a breach of natural justice.

9. At the hearing MAL was represented by Mr Jonathan Lewis, instructed by Brecher Solicitors (who did not act for MAL in the adjudication), and DSL was represented by Mr Martin Hirst, instructed by Bates Solicitors. Having reflected briefly on the issues after the hearing, the following day I invited counsel to address me on one point in relation to the construction of the amendment, which they both did.

The provisions of the contract (as originally made)

10. Before turning to what the adjudicator decided, I will set out the relevant provisions of the contract - as it was originally made and then as it was amended - and then the relevant statutory provisions.

11. In its original form, Section 4, headed "payment", contained the following provisions:

"**Interim payments to completion**

4.3 The due dates for interim payments to the Contractor shall be the dates occurring at intervals of 4 weeks calculated from the Date for Commencement of the Works. Not later than 5 days after the due date the Architect/Contract administrator shall issue an interim certificate for a sum equal to the percentage stated in the Contract particulars of what he considers to be the total value as at the due date of:

. . .

less the total of sums stated as due to the Contractor previous interim certificates . . . The final date for payment of the certified sum shall be 21 days from the due date.[1]

Interim payments on and after practical completion

4.4 . . .

Payment - amount and notices

4.5 .1 Subject to any notice given by the Employer under clause 4.5.4, the sum to be paid by the Employer on or before the final date for payment under clause 4.3 or 4.4 shall be the sum stated as due in the interim certificate.

.2 If an interim certificate is not issued in accordance with clause 4.3 4.4, the Contractor may at any time after the 5 day period referred to in those clauses give a payment notice to the Employer, with a copy to the[2] Architect/Contract

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[1] In the Schedule of Amendments 21 days was substituted as the period in place of the 14 days in the original contract wording.

[2] The reference to the notice being sent to the Employer, with a copy to the Architect/Contract Administrator was also added by amendment.

Administrator stating the sum that the Contractor considers to be or have been due to him at the due date on the basis on which that sum has been calculated. In that event, the sum to be paid by the Employer shall, subject to notice subsequently given by him under clause 5.4, be the sum stated as due in the Contractor's payment notice.

. . .

.4 If the Employer intends to pay less than the sum stated as due from him in the interim certificate or, where applicable, the Contractor's payment notice, he shall not later than 5 days before the final date for payment give the contractor that notice of intention stating the sum that he considers to be due to the Contractor at the data gives notice under this clause 4.5 and the basis on which that sum has been calculated. Where the Employer gives that notice, the payment to be made on or before the final date for payment shall not be less than the amount stated as due in his notice.

. . .

Failure to pay amount due

4.6 If the Employer fails to pay a sum, or any part of it, due to the Contractor under clause 4.5[3] by the final date for its payment, the Employer shall, in addition to any unpaid amount that should probably have been paid, basic Contractor simple interest on that amount . . ."

12. I now turn to the amendment.

The amendment

13. This was made by a one page document signed on behalf of both parties on 13 August 2015. As I have already mentioned, by the amendment the parties agreed to change the basis on which interim payments were to be made by substituting percentage payments on achievement of a series of milestones in place of interim payments at four week intervals. The amendment was in the following terms:

CONTRACT AMENDMENTS

Section 4 Payment

Interim payments up to practical completion

Shall be amended as follows:

Payment Milestones

60% of contract value paid when demolition passes the black line as illustrated on image below, less the 20% paid to date. Payment to be made within 72 hours of receipt of invoice, issued when the milestone is achieved.

75% of contract value paid when demolition reaches slab top, less the amount paid by this milestone.

90% of contract value paid when crashing is complete, less the amount paid by this milestone.

100% of contract value paid at PC, less payments made.

Below this text there was a photograph of the site with a black line running more or less horizontally across the photograph. Below that image the document was signed by two directors on behalf of each party.

[3] The reference to clause 4.5 was inserted by amendment in place of a reference to clause 4.3 or 4.4.

14. Although this amendment referred to the Part of Section 4 entitled "Interim payments to practical completion", for the reasons that I give later in this judgment it will be apparent that it must also have consequential effects on some of the other payment provisions in the contract, together with the provisions in relation to payment notices.

The provisions of the Housing Grants, Construction and Regeneration Act 1996 (as amended) ("the Act")

15. The effect of the relevant provisions of the Act is crucial to the interpretation of the amendment. It is therefore necessary to set out the relevant provisions of the Act in full. They are as follows:

"**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 in the final date for payment.

110A Payment notices: contractual requirements

(1) A construction contract shall, in relation to every payment provided for by the contract—

(a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or

(b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.

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

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

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

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

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

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

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

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

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

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

(4) For the purposes of this section, it is immaterial that the sum referred to in subsection (2)(a) or (b) or (3)(a) may be zero.

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

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

"payee" means the person to whom the payment is due;

"payer" means the person from whom the payment is due;

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

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

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

. . .

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."

(12) In section 112 of that Act (right to suspend performance for non-payment)—

(a) in subsection (1), for the words from "Where" to "given" substitute " Where the requirement in section 111(1) applies in relation to any sum but is not complied with, ";

(b) in subsection (3), for "the amount due" substitute " the sum referred to in subsection (1) ".

The adjudicator's Decision

The achievement of the first milestone

16. The adjudicator concluded that DSL had achieved the first milestone on 23 October 2015 and that MAL failed to serve its pay less notice in time. He decided that the pay less notice should have been served by 18 October 2015, in other words before the first milestone had been reached. In fact, the adjudicator made an error because, on his own reasoning, the pay less notice should have been issued by 21 October 2015. However, either way a notice served on 28 October 2015 would have been out of time.

17. As I have already mentioned, there was an issue as to whether or not DSL had in fact achieved the first milestone on 23 October 2015. MAL submits that the adjudicator failed to take into account, properly or at all, the evidence on this issue presented by MAL. This was evidence, given in a witness statement, that during a site visit on 27 October 2015 photographs of the work had been taken and that, although during the site visit MAL's director concluded that the first milestone had been achieved, subsequent analysis of the photographs taken during the site visit[4] showed, according to MAL, that the milestone had not in fact been achieved.

18. Mr Lewis accepted in argument that the material before the adjudicator on this issue comprised three elements. First, DSL's assertion that the milestone had been achieved (amongst other things, by its submission of the invoice on 23 October 2015). Second, the statement in MAL's notice of 28 October 2015 that the demolition was 60% complete. Third, MAL's evidence that its subsequent examination of the photographs showed that in fact the demolition had not reached the black line and so the first milestone had not been achieved.

19. If the first two elements had stood alone, there would have been no dispute about whether or not the milestone had been achieved. If that was the position, one would have expected the adjudicator to have said so. He would not have made a finding about it, and still less given a reason for that finding, unless he had understood that the matter was in dispute. If he knew that it was not in dispute, he would, like any other tribunal, simply have recorded the fact that it was common ground that the first milestone had been achieved.

20. In fact, what he said, at paragraph 10.1.21 of his Decision, was this:

> "I am satisfied on the balance of probabilities that at 23 October 2015 Demolition Services had passed below the line shown on the photograph incorporated in the Parties' Contract and therefore the milestone had been achieved. Demolition Services was therefore entitled to raise its invoice."

In the following paragraph he gave his reason for reaching this conclusion, which was that MAL had made no suggestion in its "pay less" notice dated 28 October 2015 that DSL had not achieved the milestone as at 23 October 2015. Rather the adjudicator

[4] It appears that this analysis of the photographic evidence did not take place until after the dispute had been referred to adjudication 10 days later.

observed that it was noticeable that MAL valued the work completed as being 60% at that point.

21. It is perfectly correct, as Mr Lewis says, that the adjudicator did not mention MAL's evidence about the analysis of the photographs. Of course, for the sake of clarity, he should have done. But since there was no other evidence in support of the submission that the first milestone had not been achieved, the adjudicator must have taken it into account because if he had simply overlooked that evidence he would not thought that there was anything to decide. One does not decide a point and then given a reason for that decision unless there is a point in issue that needs to be decided. In these circumstances, it seems to me inconceivable that the adjudicator did not take into account MAL's evidence about the state of the work as at 23 October 2015.

22. I should mention that at paragraph 5.1 of the Decision the adjudicator listed all the written submissions that had been made to him which he said he had considered fully when making his decision. Whilst I accept to some extent Mr Lewis's submission that this statement is formulaic, I do not consider that it is appropriate simply to dismiss it outright. In any event, the evidence of fact before the adjudicator was largely confined to the issue about the achievement of the milestone and so it is hard to see how he could have overlooked that evidence when considering the issue about the state of the work. I should mention also, perhaps, that the adjudicator thought that he was not required to provide reasons for his decision, because neither party had asked him to do so; however, he said that he had provided reasons "*to the extent I consider necessary*" (paragraph 7.2). This indicates that the adjudicator never had it in mind that his Decision should be fully reasoned. In fact, I understood the terms of the contract to require the adjudicator to give reasons, but what matters in the context of natural justice is what he actually said to the parties.

23. In these circumstances, I am quite unpersuaded that the adjudicator did not take into account MAL's evidence in relation to the analysis of the photographs. In my view, MAL has not come anywhere near showing that there was a breach of natural justice under this head.

24. I therefore turn to what the adjudicator decided in relation to the payment provisions, because MAL submits that there was a further breach of natural justice here because the adjudicator did not give the parties any indication of his proposed finding with the result that neither party was able to address him properly on it.

The payment provisions

25. The adjudicator decided that the final date for payment was 26 October 2015, being 72 hours after MAL had received the invoice (see paragraph 10.2.5). He noted that MAL's position was that the payment provisions made by the amendment (to the extent that there were any) did not comply with the requirements of the Act, with the result that they should be replaced wholly or in part by the relevant provisions of the Scheme for Construction Contracts ("the Scheme").

26. The adjudicator concluded that the provisions of the amendment were compliant with the requirements of section 110 of the Act in terms of providing the date when the sum would become due, being - according to the adjudicator - the date when the milestone was achieved and DSL had issued its invoice (paragraph 10.1.13).

27. He then went on to consider the requirements in relation to the issue of payment notices. He concluded that the amended payment provisions complied with section 110A of the Act (see paragraph 10.1.15), with the result that DSL's invoice dated 23 October 2015 was a valid payee's notice.

28. The adjudicator then set out sub-sections 111(1) to (7) of the Act in full. In the following paragraph, 10.1.17, he concluded as follows:

> "Clause 4.5.4 of the Parties' Contract expressly permits Manor Asset to issue a payless notice not later than five days before the final date for payment of a payment application by Demolition Services. Manor Asset was therefore obliged to issue any payless notice it wished to rely on not later than 18 October 2015."

29. As I have already said, in fixing the date of 18 October 2015, the adjudicator made a mistake: it was inconsistent with his conclusion about the final date for payment at paragraph 10.2.5. So, on the adjudicator's reckoning, as corrected, the date for service of a pay less notice by MAL would have been 21 October 2015, not 18 October. However, this error makes no difference to the result, because whether the date was 18 October or 21 October, a notice served on 28 October 2015 was clearly too late.

30. At paragraph 20 of his skeleton argument, Mr Lewis made the following submission:

> "However, it is possible to establish from paragraph 10.1.17 of his Decision that he concluded that the final date for payment of the Invoice was 23 October 2015. In the Defendant's witness statement served in response to this Claim it is asserted that the Adjudicator decided that the final date for payment was 72 hours after the Invoice was raised and reliance is placed on paragraphs 10.1.13 and 10.1.15 of the Adjudicator's Decision (see paragraph 21 of Mr Wray's witness statement). This assertion is surprising and unsustainable and the paragraphs relied on failed to provide any support to it at all."

31. Although I can understand why this submission was made, having regard to what the adjudicator said in paragraph 10.1.17, I do not agree that this is an accurate summary of what the adjudicator actually decided. At paragraph 10.1.13 the adjudicator said that the due date for payment was when the relevant milestone "*was achieved and Demolition Services issued its invoice*". As I have already mentioned, the adjudicator concluded that the final date for payment was 72 hours from the date of DSL's invoice, namely 26 October 2015 (paragraph 10.2.5 of the Decision).

32. In the light of the submissions put before him, I consider that there was nothing either unusual or unexpected about either of these conclusions. Some of MAL's submissions about the breach of natural justice are premised on the assertion that the adjudicator concluded that the final date for payment was the same date as the date of the invoice and that was also the due date. Building on this premise the first complaint in relation to the breach of natural justice is that the adjudicator gave no warning that he was proposing to decide that the final date for payment was the same as the due date (see paragraph 21 of Mr Lewis's skeleton).

33. Since, for the reasons set out above, I do not consider that this is what the adjudicator did decide, this part of the complaint falls away.

34. The second part of the complaint in relation to the breach of natural justice is that the adjudicator gave no warning that he was proposing to decide that the pay less notice had to be given before the date of DSL's invoice and he thereby "*prevented MAL from making any submissions as to the consequence of such an approach*" (paragraph 23 (iii) (c) of Mr Lewis's skeleton).

35. Whilst the first part of this submission may well be correct (in that there appears to have been no warning from the adjudicator of his intended approach), in my view the second part is not. MAL made it very clear that the consequence of requiring a pay less notice to be served not later than five days before the final date for payment (if that is taken as

being 72 hours after receipt of DSL's invoice) was that it would be impossible for MAL to comply with such a requirement (see paragraph 5.2 and 5.6 - 5.8 of MAL's Response). The clear premise underlying these submissions was that a pay less notice could not be issued prior to the payee's notice.

36. The reality is, as Mr Lewis's skeleton argument acknowledged, that the adjudicator failed to appreciate (or ignored) the fact that service of a pay less notice prior to the payee's notice was not permitted under the Act. It is true that MAL's voluminous submissions in the adjudication did not (so far as I can see) refer expressly to section 111(5)(b) of the Act. However, the adjudicator was aware of it because he set it out in full in paragraph 10.1.16 of his Decision.

37. In these circumstances, it seems difficult for MAL to say that it was deprived of the opportunity to, still less prevented from, making all relevant submissions as to the timing of the issue of a pay less notice. Its "Jurisdictional Challenge and Response" served in the adjudication ran to over 25 closely typed pages. Almost every possible permutation of payment due dates and final date for payment was considered. If anything, the problem was that the adjudicator was presented with far too many submissions, not too few. The scattergun approach always carries with it the risk of obfuscation, not clarification.

38. On balance, I have reached the conclusion that MAL did have a proper opportunity to put its submissions on the timing of the pay less notice - and that in effect it did so - and that there was no breach of natural justice by the adjudicator. But, if I am wrong about this, I will have to consider the extent to which the issue to which the breach went was of actual or potential importance to the outcome of the resolution of the dispute (see Akenhead J in *ABB Ltd v Bam Nuttall Ltd* [2013] BLR 529, at [48], following his own previous decision in *Cantillon Ltd v Urvasco Ltd* [2008] BLR 250). In particular, in *ABB Ltd v Bam Nuttall Ltd*, at [38], Akenhead J said this:

> "The next issue is to consider how much a part this reference to or reliance by the adjudicator upon a clause which had never been argued by or put to the parties played in his decision and decision making process. The court should be slow to speculate upon what the adjudicator would, should or could have done or decided if he had not referred to or relied upon such a clause. The reasons are obvious, namely that the court cannot know or determine what the adjudicator would have done in those circumstances save by reference to the wording of the decision itself and the court should not try to substitute its own views for what the adjudicator should have done because the parties in this case and otherwise Parliament by the Housing Grants, Construction and Regeneration Act 1996 has decided that it is adjudicators who should be making the decision. The court is not some appellate tribunal which can revise the decision. This is in contra-distinction to the Arbitration Act which has very specific provisions enabling the court to vary arbitral awards in certain circumstances."

39. However, this particular case is different because MAL has asked the court to determine the issue in relation to the final date for payment. If on determining this issue the court were to conclude that the adjudicator was wrong and that a correct construction of the relevant provisions would have produced a different result, then if there had been a breach of natural justice it would clearly be material. By contrast, if the court were to conclude that the adjudicator was right or, alternatively, that his conclusions that the final date for payment was 26 October 2015 and that no valid pay less notice had been served by MAL were correct - albeit for the wrong reasons, then any breach of natural justice would have been immaterial in the sense that it would not have affected the outcome.

40. This, therefore, leads me on to the issue raised by the last declaration sought, namely when was the final date for payment following the meeting of the amendment on 13 August 2015. However, before I do so I must consider the law as to the correct approach to the construction of the contract and the implication of terms.

The authorities

41. Until quite recently the statements of Lord Hoffmann about the construction of contracts and the implications of terms, when giving the judgment of the Board in the Privy Council decision of *Attorney General of Belize v Belize Telecom* [2009] 1 WLR 1988, were regarded as authoritative. However, they gave rise to some differences of interpretation. They were regarded in some quarters as having changed the law by having watered down the meaning of the phrase "*necessary to give business efficacy to the contract*". But before I turn to that question, in the context of the point which arises in this case, it is worth quoting at some length what Lord Hoffmann actually said, at [16] to [27]:

> "16. Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see Investors *Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.
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> 17. The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.
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> 18. In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.
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> 19. The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority. In *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 609 Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:
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>> "[T]he court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves.

> If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."

20. More recently, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn said:

> "If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting."

21. It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must "go without saying", it must be "necessary to give business efficacy to the contract" and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

22. There are dangers in treating these alternative formulations of the question as if they had a life of their own. Take, for example, the question of whether the implied term is "necessary to give business efficacy" to the contract. That formulation serves to underline two important points. The first, conveyed by the use of the word "business", is that in considering what the instrument would have meant to a reasonable person who had knowledge of the relevant background, one assumes the notional reader will take into account the practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will consider whether a different construction would frustrate the apparent business purpose of the parties. That was the basis upon which Equitable *Life Assurance Society v Hyman* [2002] 1 AC 408 was decided. The second, conveyed by the use of the word "necessary", is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.

23. The danger lies, however, in detaching the phrase "necessary to give business efficacy" from the basic process of construction of the instrument. It is frequently the case that a contract may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean. Lord Steyn made this point in the *Equitable Life* case (at p. 459) when he said that in that case an implication was necessary "to give effect to the reasonable expectations of the parties."

24. The same point had been made many years earlier by Bowen LJ in his well known formulation in *The Moorcock* (1889) 14 PD 64, 68:

> "In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men"

25. Likewise, the requirement that the implied term must "go without saying" is no more than another way of saying that, although the instrument does not expressly say so, that is what a reasonable person would understand it to mean. Any attempt to make more of this requirement runs the risk of diverting attention from the objectivity which informs the whole process of construction into speculation about what the actual parties to the contract or authors (or supposed authors) of the instrument would have thought about the proposed implication. The imaginary conversation with an officious bystander in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227 is celebrated throughout the common law world. Like the phrase "necessary to give business efficacy", it vividly emphasises the need for the court to be satisfied that the proposed implication spells out what the contact would reasonably be understood to mean. But it carries the danger of barren argument over how the actual parties would have reacted to the proposed amendment. That, in the Board's opinion, is irrelevant. Likewise, it is not necessary that the need for the implied term should be obvious in the sense of being immediately apparent, even upon a superficial consideration of the terms of the contract and the relevant background. The need for an implied term not infrequently arises when the draftsman of a complicated instrument has omitted to make express provision for some event because he has not fully thought through the contingencies which might arise, even though it is obvious after a careful consideration of the express terms and the background that only one answer would be consistent with the rest of the instrument. In such circumstances, the fact that the actual parties might have said to the officious bystander "Could you please explain that again?" does not matter.

26. In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 282-283 Lord Simon of Glaisdale, giving the advice of the majority of the Board, said that it was "not … necessary to review exhaustively the authorities on the implication of a term in a contract" but that the following conditions ("which may overlap") must be satisfied:

> "(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying' (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract".

27. The Board considers that this list is best regarded, not as series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so. The Board has already discussed the significance of "necessary to give business efficacy" and "goes without saying". As for the other formulations, the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying that a reasonable man would not have understood that to be what the instrument meant."

42. However, this approach by Lord Hoffmann to the construction and the implications of terms was revisited recently in the judgments of the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72, to which Mr Lewis referred me in his supplementary submission. At [26] to [30] of his judgment, Lord Neuberger, with whom Lords Sumption and Hodge agreed, said:

> "26. I accept that both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract. However, Lord Hoffmann's analysis in *Belize*

Telecom could obscure the fact that construing the words used and implying additional words are different processes governed by different rules.

27. Of course, it is fair to say that the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication. However, that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing words, as the words to be implied are *ex hypothesi* not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context.

28. In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term. This appeal is just such a case. Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied. Having said that, I accept Lord Carnwath's point in para 71 to the extent that in some cases it could conceivably be appropriate to reconsider the interpretation of the express terms of a contract once one has decided whether to imply a term, but, even if that is right, it does not alter the fact that the express terms of a contract must be interpreted before one can consider any question of implication.

29. In any event, the process of implication involves a rather different exercise from that of construction. As Sir Thomas Bingham trenchantly explained in *Philips* at p 481:

> "The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, *ex hypothesi*, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power."

30. It is of some interest to see how implication was dealt with in the recent case in this court of *Aberdeen City Council v Stewart Milne Group Ltd* 2012 SLT 205. At para 20, Lord Hope described the implication of a term into the contract in that case as "the product of the way I would interpret this contract". And at para 33, Lord Clarke said that the point at issue should be resolved "by holding that such a term should be implied rather than by a process of interpretation". He added that "[t]he result is of course the same".”

43. Lord Neuberger then went on to consider the observations of Lord Hoffmann in the *Belize Telecom* case. He concluded by saying that those observations should be treated as a “*characteristically inspired discussion rather than authoritative guidance on the law of implied terms*”.

44. Lord Carnwath took a slightly different approach. He started with the *Belize Telecom* case on the basis that it represented “*the most modern treatment at the highest level*” of the topic (at [58]). He went on to reject emphatically the submission that it involved

any watering down of the traditional tests for the implication of terms (at [59]), a point with which Lord Clarke agreed (at [77]). Lord Carnwath said that whilst he accepted that more stringent rules applied to the process of implication, it could be a useful discipline to remind oneself that "*the object remains to discover what the parties have agreed or (in Lady Hale's words)"must have intended" to agree"* (at [69]).

45. I shall therefore approach Lord Hoffmann's observations in *Belize Telecom* in the light of the qualifications made by Lord Neuberger in *Marks & Spencer*. However, the overriding point to be borne in mind is that before implying any term the court must conclude that the implication of that term is necessary in order to give business efficacy to the contract or, to put it another way, it is necessary to imply the term in order to make the contract work as the parties must have intended.

The submissions of the parties in relation to the final date for payment

46. Mr Lewis submitted, at paragraphs 29-31 of his skeleton argument, that:

> "29. Section 110A of the Act imposes a requirement that every construction contract requires the payer or payee to give notice not later than 5 days after the payment due date of the amount it considers due for payment.
> 30. Prior to the Variation Agreement, that requirement was satisfied by clause 4.3 and the issue of an interim certificate. Clause 4.3 was effectively removed by the Variation Agreement.
> 31. If it is correct (and it appears to now be common ground) that the Variation Agreement, nevertheless, satisfied the requirement imposed by Section 110A of the Act, namely that it required the payee (DSL) to give a notice (the Invoice) to the payer or a specified person not later than five days after the payment due date of the amount it considered to be due for payment, the question that arises is when (if at all) the Variation Agreement provided the final date for payment of that amount and the date by which MAL was required to serve any payless notice."

47. However, Mr Lewis submitted also that, if the final date for payment is 72 hours after receipt of the invoice, MAL cannot serve a valid pay less notice because neither the period imposed by clause 4.5.4 of the Contract, being not less than 5 days before the final date for payment, nor the corresponding 7 days imposed by the Scheme can be met (this is exactly the same point that MAL made in the adjudication).

48. In these circumstances, Mr Lewis submitted, at paragraph 36 of his skeleton, that the preferred solution was:

> "to construe the Variation Agreement so that the due date is not the date of the receipt of the Invoice but 72 hours after that date. The final date for payment would then either be as originally prescribed by the Contract (21 days after the due date pursuant to clauses 4.5.2 or 4.5.3) or 17 days after the due date if it were to be decided that these clauses have been amended out of the Contract and the Scheme prescribed the final date for payment."

49. However, in his supplementary submissions Mr Lewis submitted that whilst section 110A requires the payer/payee to give notice of the amount it considers due for payment not later than 5 days after the payment due date, this does not prevent such a notice being given prior to the due date. He relied on the words "*the sum that the payee considers <u>to be or to have been</u> due*" (his emphasis) in sub-section 110A(3). I am not sure that he is right about this, because the notice might be served on the due date itself, in which case the use of the present tense, rather than the past tense, would be grammatically appropriate. However, in my judgment this does not matter because, leaving aside the problem presented by the difficulty of knowing in advance of the due date the precise sum that will be due on that date, the position in this case is clear: the

amendment states that the invoice (the notice) is to be "*issued when the milestone is achieved*", not when it is about to be achieved. Issue of the invoice prior to the milestone is not something that the amendment permits.

50. Thus in the context of the present case the sequence of events that the Act requires is: a payment due date, service by the contractor of a notice stating the sum due within five days thereafter, service of a pay less notice (if required) by the employer not later than the "prescribed period" prior to the final date for payment and, finally, payment (of the sum stated in the last notice) on the final date for payment.

51. The difficulty with Mr Lewis's construction is that if the payment due date is 72 hours after submission of the invoice, the first two steps are reversed. As I have explained, the amendment does not permit the issue of the invoice prior to achievement of the milestone, which is why in this case the sequence of events has to be as I have set it out above.

52. Further, since on Mr Lewis's construction the due date is triggered by the issue of the notice (being 72 hours after it), there is no room for a requirement to serve the notice after the due date. The only way round this would be to imply a requirement for the same notice to be given a second time: that does not make any sense. Mr Lewis, quite sensibly, does not go so far as to suggest that.

53. Mr Hirst's submission fares no better. He submitted that the 5 day period in clause 4.5.4 survived the amendment, with the result that any pay less notice in respect of the sum stated in the invoice dated 23 October 2015 should have been issued by MAL not later than 21 October 2015 (see paragraph 26 of his skeleton). This is clearly unworkable, not least because it contravenes the prohibition in section 111(5)(b) of the Act on giving a pay less notice before the notice by reference to which the notified sum is determined. Mr Hirst was not able to provide a satisfactory answer to this point.

54. Section 111(7) provides that the "prescribed period" means either such period as the parties may agree or, in the absence of such agreement, the period provided by the Scheme, which is 7 days. If, therefore, there has been no agreement as to the prescribed period, then it is 7 days. But this simply produces the same result - in practical terms - as that contended for by Mr Hirst because it also contravenes the Act.

55. Thus the court is presented with the unusual situation in which neither side's construction of the agreement produces a result that complies with both the express terms of the amendment and with the Act.

The true construction of the amendment

56. It seems to me that it goes without saying that the hypothetical reasonable person described in the authorities would expect the amendment to be lawful and, if there was more than one way of reading it, would read it in a way that did not infringe any relevant legislation or which would undermine the purpose of the contract. Mr Lewis effectively accepted this, because his skeleton argument he said, at paragraph 36.1:

> "It is a principle of construction that where a contract is capable of having two alternative meanings, one of which is lawful and the other unlawful, the former interpretation is to be preferred. This is based on a proposition that the parties are unlikely to have intended to agree to something unlawful or that the court should lean against an interpretation that produces unreasonable consequences."

57. Mr Lewis cited authority for this proposition, namely Lewison on The Interpretation of Contracts, 6th edition, at paragraph 7.11. The authorities there cited clearly support the proposition, which I accept as correct.

58. The words "*Payment to be made within 72 hours of receipt of invoice*" are, to my mind, clear and unequivocal: they cannot reasonably be construed to mean payment at some later (unspecified) date. It seems to me that, unless there is a compelling reason to give them any other meaning, then they must be understood as referring to "the final date for payment" within the meaning of the Act. The adjudicator came to the same conclusion: see paragraph 10.2.5 of his Decision.

59. Similarly, I regard the amendment as making it clear that the payment of the relevant percentage of the contract value mentioned becomes due on the achievement of the event described: in the case of the first milestone, "*when demolition passes the black line*". An invoice for 60% of the contract value is to be issued when that milestone is achieved. I can see no warrant for treating the date of issue of the invoice as the date when the sum becomes due, because the invoice is to be issued once the milestone has been achieved and the sum has become due. However, for practical purposes, in the present case nothing turns on this because both events occurred on the same day.

60. Construed in this way, the amendment is compliant with sub-sections 110(1) and 110A(1) of the Act because the invoice to be issued by DSL is the notice that complies with section 110A(1)(b). Although the amendment does not say in terms that the invoice must be given not later than 5 days after the milestone is achieved, the amendment does say that it has to be issued on completion of the milestone (ie. straight away, and therefore within 5 days). Similarly, an invoice stating the relevant percentage of the contract value due following achievement of the milestone (and the sum paid to date) would comply with section 110A(3). No further explanation would be necessary or possible.

61. The "notified sum", for the purposes of section 100A(3), is clearly the percentage amount stated in the invoice, which must then be paid (to the extent not already paid) on or before the final date for payment: see section 111(1).

62. So far, I regard this is fairly straightforward. The potential difficulty is presented by the provisions of the Act relating to pay less notices, which the payer is entitled to give pursuant to section 111(3) of the Act. By sub-section (5) the pay less notice must be given "not later than the prescribed period before the final date for payment" but not before the notice by reference to which the notified sum is determined. In my opinion, that notice is obviously DSL's invoice.

63. As I have already mentioned, the Act makes it clear that the pay less notice cannot be issued before the invoice to which it relates. That is why the adjudicator was wrong to find that MAL should have issued a pay less notice before 23 October 2015.

64. The core of the problem is the absence of any express agreement as to "the prescribed period". As I have already pointed out, if the amendment is treated as a situation in which there has been an absence of such agreement, then the result is one that is prohibited by the Act because the pay less notice would have to be given before the issue of DSL's notice to which it relates.

65. The only solution to this problem that I can identify is the one that I mentioned to counsel both at and following the hearing, namely that when making the amendment the parties impliedly agreed that the prescribed period was to be reduced to nil. Thus MAL could issue a pay less notice at any time before the final date for payment: that is to say, within the 72 hour period between receipt of the invoice and the final date for payment 72 hours later.

66. The question that now arises is whether or not this is a solution that it is open to the court to adopt. This is a case where nothing was said expressly about the prescribed

period. As Mr Lewis points out, if the conclusion of the court is that the parties reached no agreement about the prescribed period, then the period is the 7 days provided by the Scheme. But although nothing was said expressly, did the parties impliedly reach such an agreement?

67. I have rejected Mr Lewis's argument that the amendment (and possibly the Act also), permitted the issue of DSL's notice prior to the due date for payment, and I have also rejected the submission that the final date for payment was some date other than 72 hours following receipt of the invoice. This is, therefore, a situation where the amendment does not expressly provide for what is to happen in relation to pay less notices.

68. By parity of reasoning with Lord Hoffmann's observations in the *Belize Telecom* case, in this situation the most usual inference would be that no provision in relation to pay less notices was intended (because if the parties had intended something to happen, the amendment would have said so).

69. But on that reasoning the parties will have reached no agreement about the prescribed period, with the result that it is 7 days and the amendment falls foul of the Act for the reasons already discussed. In my view, it is most unlikely that the parties could have intended this.

70. Accordingly, in my judgment this is one of those cases where, to adapt Lord Hoffmann's words, the reasonable person in the position of the parties would understand the amendment to mean something else. He or she would consider that the only meaning consistent with the other provisions of the contract, read against the relevant background (in particular, the provisions of the Act), is that something is to happen.

71. Faced with a stark choice between rendering the amendment wholly ineffective or enabling it to work, the parties must surely have intended the latter (a proposition which, as I have said, is one for which Mr Lewis contends). The only way in which it can be made to work, whether by so construing the contract or implying a term, is to say that the prescribed period was to be nil - thus enabling MAL to serve a pay less notice at any time within 72 hours after receipt of the invoice. In my judgment such an agreement is necessary and it is not inequitable: if DSL wanted prompt payment within 72 hours of its invoice, it could not reasonably object to a corresponding reduction in the prescribed period.

72. I therefore declare that, as a result of the amendment, the final date for payment is 72 hours after receipt by MAL of DSL's invoice following achievement of a milestone. Two other conclusions necessarily follow from the reasoning that leads to this conclusion: first, the due date for payment is the date when the milestone is achieved and, second, the parties are to be taken to have agreed by necessary implication that the "prescribed period" for the service by MAL of any pay less notice is nil (in other words, it can be served at any time between receipt of DSL's invoice and the expiry of the 72 hours following such receipt).

The consequences of my conclusions

73. There is a further problem, which I canvassed briefly with the parties during argument. That is this. Subsection 108(3) of the Act provides as follows:

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

74. The dispute that was referred to the adjudicator was about the validity of the notice served by MAL on 28 October 2015 and whether or not DSL had achieved the first milestone on 23 October 2015. This in turn necessarily involved considering the date on which payment became due, the final date for payment and the prescribed period for service of a pay less notice.

75. In making the declaration set out at paragraph 72 above the court has not resolved the entirety of the dispute, because the declaration does not determine the question of whether or not the first milestone was achieved. Without also deciding that issue, the court cannot finally determine the dispute.

76. For the purpose of this judgment it is not necessary for me to decide whether or not the declaration that I have made must be "read down" into the adjudicator's Decision. In my judgment it is sufficient that I have concluded that the decision reached by the adjudicator that MAL's notice of 28 October 2015 was not a valid pay less notice was correct, albeit for the wrong reasons. Accordingly whether or not the adjudicator gave MAL a proper opportunity to put its case in relation to the timing of a pay less notice and, in particular, whether such a notice could be issued before the payment due date, becomes irrelevant because, now that the court has decided the point, the ultimate outcome on this issue would have been no different.

77. I must emphasise that this conclusion is only possible because this is a case where the court was specifically asked to make a declaration in relation to the final date for payment. Unless and until the Court of Appeal decides that the declaration that I have made is wrong, it is final and binding on the parties. Accordingly, MAL cannot now say that it was in any way prejudiced by the adjudicator's failure (if failure it was) to give it any warning of his proposed decision in relation to the timing of the service of a pay less notice.

The disposal of the applications

78. For the reasons that I have now given, MAL's challenges to the validity of the Decision fail. DSL is entitled to summary judgment.

79. In relation to the Part 8 claim, I will make a declaration in the terms set out in paragraph 72 above.

80. I will, if necessary, hear counsel for the parties in relation to costs or any other matters arising out of this judgment that cannot be agreed.