Neutral Citation Number: [2022] EWHC 24 (Ch)

Case No: 721 of 2016

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF FARRAR CONSTRUCTION LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

The Combined Court Centre
1 Oxford Row
Leeds
LS1 3BG

Date: 14/01/2022

Before :

THE HON. MR JUSTICE FANCOURT
Vice-Chancellor of the County Palatine of Lancaster

- -

Between :

LEVI SOLICITORS LLP	**Applicant**
- and -	
(1) DAVID FREDERICK WILSON	**Respondents**
(2) JKR PROPERTY DEVELOPMENT LIMITED	

- -
- -

Neil Berragan (instructed by **Levi Solicitors LLP**) for the **Applicant**
Amie Boothman (instructed by **Carrick Read Solicitors LLP**) for the **First Respondent**
Cristín Toman (instructed by **Addlestone Keane Solicitors**) for the **Second Respondent**

Hearing date: 2 December 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

The Vice-Chancellor :

Introduction

1. This is an application by Levi Solicitors LLP ("Levi"), as creditor of the company Farrar Construction Limited ("the Company"), for relief in relation to a proof of debt of the Second Respondent, JKR Property Development Limited ("JKR"). The proof was admitted by the First Respondent, David Wilson, who is the supervisor of the Company's Company Voluntary Arrangement ("CVA"), No. 721 of 2016. The CVA proposal was approved by the creditors at a meeting on 1 September 2016 and filed in court.

2. The proof of JKR relates to a JCT minor works fixed price building contract signed on 20 June 2014, under which JKR was the employer and the Company was the contractor.

3. JKR claimed that it substantially overpaid the Company and that, following the issue of a final certificate by the contract administrator (in the form of "Interim Report No 8 - Final" dated 20 December 2019), a sum of £125,921.70 was repayable to JKR, and, further, that the Company owed JKR £30,000 in liquidated damages for delayed completion of the works.

4. Levi is the major creditor of the Company and submitted a proof of over £760,000 as long ago as 30 August 2016.

5. Levi's case is that the supervisor, Mr Wilson, was wrong to have admitted the proof of JKR in the sum of £185,921.07, as he did. By the application, it seeks a direction from the court that JKR's proof should be rejected on the ground that it is not sufficiently established, and further directions to the supervisor in that regard.

6. The reason for the delay in the progress of the CVA is that in January 2017 the Company and its principal director, Mr Farrar, issued proceedings against JKR claiming that JKR held the property to which the minor works contract related on trust for itself and the Company equally. The claim was rejected by HHJ Raeside QC in November 2017 and the Company's appeal against that decision was rejected by the Court of Appeal in November 2019.

7. The contract administrator, Greenoak Development Consultancy Limited, acting by its director, Mr Tate, also considered that the final certificate under the contract should await the outcome of the legal proceedings. It was therefore only on 20 December 2019 that he issued the so-called eighth interim and final valuation, in which the final cost of the works done was certified as £430,921.71 (ex VAT) and the eighth valuation was in the sum of £80,619.66 (ex VAT). It stated that the total payments to date (presumably meaning before the eighth certificate) were £350,302.05 but made no reference to the fixed price of £305,000.

8. Mr Wilson has made a short witness statement in response to the application of Levi, to provide the relevant facts as he saw them when he made his decision on the proof. However, although represented at the hearing, he takes a neutral position on the outcome of the application.

9. As originally brought, Levi's challenge to the decision to admit JKR's proof was that it was unclear how a claim to £185,921.70 could be made, given the history of the works; and that in any event it should have been brought, if it was to be brought at all, by way of a counterclaim to the Company's proceedings against JKR.

10. Until a second skeleton argument of Levi was filed on 29 November 2021, three days before the hearing, these remained grounds on which admission of the proof was opposed by Levi. However, they have now been abandoned as grounds. Levi has also abandoned an argument that JKR's claim to repayment is statute-barred.

11. After the first witness statement in support of the application, the issues proliferated, first as a result of the filing of evidence by JKR and evidence in response from Levi, and then in skeleton arguments prepared for the originally scheduled hearing on 1 November 2021. That hearing was adjourned and there were then supplementary, non-sequential skeleton arguments filed by each side raising further points.

The Issues

12. In light of the confusion about the issues, I made a direction that the parties must agree and file a list of the issues required to be decided on the application. The List of Issues agreed and filed included one issue on the incidence of the burden of proof relating to JKR's proof; six issues of interpretation of the JCT contract; and three issues said to arise under Part II of the Housing Grants, Construction and Regeneration Act 1996, as amended ("the 1996 Act"). The List of Issues is set out in a schedule to this judgment. For reasons that will appear, it is unnecessary to decide each numbered Issue.

13. What is no longer in issue is that the amount for which the proof was admitted by Mr Wilson is on any view wrong. Mr Wilson now accepts that the proof was overstated by £30,000. Further, Levi and JKR now agree that only one month's liquidated damages, at £3,000, can be claimed on the true interpretation of the contract. So the amount in which JKR contends that the proof should have been admitted is now £128,921.70.

14. As regards that amount, Levi now contends that:

    i) The insolvency terms of the contract applied as from 1 September 2016, when the creditors of the Company approved the CVA, so that JKR can only claim repayment of sums paid to the Company if the procedure in c.6.7 of the standard terms of the contract was followed. Levi says that it was not followed and so no sum is due from the Company to JKR.

    ii) Alternatively, since JKR advances its claim on the basis of the eighth interim and final valuation, JKR has failed to satisfy the contractual requirements of c.4.8 of the standard terms of the contract because a final certificate is a strict condition of liability under cl. 4.8 and no valid certificate has been issued.

15. JKR contends that c.4.8 applies and was complied with, and that it also has a statutory right under s.110B of the 1996 Act to payment, following a payment notice given under s.110B(2) (in the form of the proof of debt); alternatively, that in any event it has a contingent claim, dependent only on service of a valid notice under s.110B(2), which it can serve at any time and therefore it is to be treated as a creditor of the Company in the adjusted amount now claimed.

16. JKR's skeleton arguments also raised a procedural question, namely whether the application is to be regarded as made under s.7(3) of the Insolvency Act 1986 or under rule 4.83 of the Insolvency Rules 1986, or both. It was argued by JKR that a more onerous test applies under s.7(3) and that before the court will interfere with a supervisor's decision it has to be satisfied that no proper supervisor correctly directing themselves could have reached the conclusion that they did about JKR's proof.

17. This issue was not, however, included on the agreed List of Issues. Ms Cristín Toman, on behalf of JKR, sought to add it as an additional issue for decision towards the end of her oral submissions, following Mr Neil Berragan's submissions on behalf of Levi. I refused permission to add that issue at such a late stage. The purpose of the List of Issues was to define and bring clarity to the matters in dispute. The only relevant issue raised in the List of Issues was on whom the burden lay of proving that JKR does or does not have a valid claim. That is a separate point from what test applies. I therefore proceed on the basis that the only issue here is about the burden of proof. (In any event, had it been necessary to decide it, the answer seems clear that, formally, the application has to be made under s.7(3) of the Act, because the Insolvency Rules 1986 are no longer in force; but nevertheless, by the terms of the CVA, the creditors have agreed *inter se* and with the Company that rules 4.73 to 4.94 of the 1986 Rules shall be deemed to apply under the CVA, and so the test that is appropriate under those Rules should be applied (with the necessary amendments to apply them to the case of a CVA) in determining this application.)

18. Under rule 4.83(2), a creditor who is dissatisfied with a liquidator's decision on another creditor's proof may apply to the court for the decision to be reversed or varied. On such an application, the court conducts a rehearing rather than a review of the liquidator's decision. The court is not confined to addressing the matter on the basis of the evidence that the liquidator had. The court's task is to examine all relevant evidence and decide whether, on balance, the claim against the company is established, and if so in what amount: Re a Company (no. 004539 of 1993) [1995] BCC 116 at 120, per Blackburne J.

19. Where the challenge is made by the creditor whose proof has been rejected, it is clearly established that the burden of proving that the claim is established lies on that creditor: McCarthy v Tann [2015] EWHC 2049 (Ch) at [13]; Re JPF Clarke (Construction) Limited [2020] BPIR 194 at [24]. No authority has established on whom the burden of proof lies where one creditor challenges the admission of the proof of another creditor. Ms Toman said that the burden should lie on the applicant who makes the application, which is seeking to disturb a decision taken by a supervisor in a quasi-judicial capacity; Mr Berragan submitted that the burden lies on the creditor seeking to have their proof admitted to establish their claim.

20. In my judgment, Mr Berragan must be right. The rationale for a re-hearing on such an application is that the matter should be considered afresh in the light of any fuller evidence available to the court. The correctness of the supervisor's decision is not the issue: the issue is whether the disputed proof is established and the amount of the proof. If the matter is considered afresh, it must logically be for the creditor asserting the claim to prove it. I do not see why the fact that the claim was admitted by the supervisor and challenged by a rival creditor makes a difference if there is a re-hearing of the relevant creditor's claim. Any abuse of the procedure by a rival creditor can be controlled by the court by summary disposal of an improper application. If there is a *bona fide*

challenge to the admission of a proof and a re-hearing in consequence, the proving creditor should have to make good their claim. The legal burden and the evidential burden will then coincide.

The JCT Minor Works Contract and the relevant facts

21. The contract was signed on 14 June 2014 in JCT Minor Works (2011) form, though (as is common) the works had in fact begun well before then. The Articles of Agreement specify a contract sum of £305,000 (ex VAT) and the Particulars exclude any arbitration agreement, and specify: a completion date of 30 November 2014; liquidated damages at the monthly rate of £3,000 after nine months after the completion date; a rectification period of 12 months; and a period of 3 months from the date of practical completion for the supply of documentation for the final certificate, for the purpose of c.4.8 of the standard conditions. Conditions 4.3 and 4.4 provide machinery and a requirement for certification of interim payments within 5 days of specified due dates up to the expiry of the rectification period. Condition 4.8 provides similar machinery for the final certificate. There were no variations of the standard conditions, save that the arbitration terms were excluded.

22. Under the standard conditions, a party to the contract becomes "Insolvent" if it enters administration, on the appointment of a receiver, on the passing of a resolution for voluntary winding-up without a declaration of solvency, or on the making of a winding-up order. A party also becomes Insolvent if: "he enters into an arrangement, compromise or composition in satisfaction of his debts (excluding a scheme of arrangement as a solvent company for the purposes of amalgamation or reconstruction)" (c.6.1.4.1). It is beyond dispute in the context of c.6 that this condition applies to both individual and corporate parties.

23. The other conditions that are directly material to the issues on this application are the following:

> "4.8 Final certificate and payment
>
> 4.8.1 Within the period stated in the Contract Particulars the Contractor shall supply to the Architect/Contract Administrator all documentation reasonably required for computation of the final payment and the due date for the final payment shall be 28 days after the date of receipt of the documentation or, if later, the date specified in the certificate under clause 2.11. Not later than 5 days after the due date the Architect/Contract Administrator shall issue a final certificate certifying the sum that he considers due to the Contractor or to the employer, as the case may be. The final certificate shall state the basis on which that sum has been calculated.
>
> 4.8.2 The final date for payment of the final payment (if any) shall be 14 days from its due date.

4.8.3 If the Party by whom the final payment is stated to be payable ("the payer") intends to pay less than the certified sum, he shall not later than 5 days before the final date for payment give the other Party notice of that intention, stating the sum that he considers to be due to the other Party at the date of the notice and the basis on which that sum has been calculated. Where such notice is given the final payment to be made on or before the final date for payment shall not be less than the amount stated as due in the notice.

4.8.4 If the final certificate is not issued in accordance with clause 4.8.1:

.1 the Contractor may give a payment notice to the Employer with a copy to the Architect/Contract Administrator stating what the Contractor considers to be the amount of the final payment due to him under this Contract and the basis on which the sum has been calculated and, subject to any notice given under clause 4.8.4.3, the final payment shall be that amount;

.2 if the Contractor gives a payment notice under clause 4.8.4.1, the final date for payment of the sum specified in it shall for all purposes be regarded as postponed by the same number of days as the number of days after expiry of the 5 day period referred to in clause 4.8.1 that the Contractor's payment notice is given;

.3 if the Employer intends to pay less than the sum specified in the Contractor's payment notice, he shall not later than five days before the final date for payment give the Contractor notice of that intention in accordance with clause 4.8.3 and the payments to be made on or before the final date for payment shall not be less than the amount stated as due in the Employer's notice.

4.8.5 Where the payer does not give a notice under clause 4.8.3 or 4.8.4.3 he shall pay the other Party the sums stated as due to the other Party in the final certificate or in the Contractor's notice under clause 4.8.4.1 as the case may be.

……

6.3.1 The provisions of clauses 6.4 to 6.7 are without prejudice to any other rights and remedies of the Employer... ;

……

6.5.1 If the Contractor is Insolvent, the Employer may at any time by notice to the Contractor terminate the Contractor's employment under this Contract.

6.5.2 As from the date the Contractor becomes Insolvent, whether or not the Employer has given such notice of termination:

.1 clauses 6.7.2 to 6.7.4 shall apply as if such notice had been given;

.2 the Contractor's obligations under Article 1 and these Conditions to carry out and complete the Works shall be suspended; and

.3 the Employer may take reasonable measures to ensure that the site, the Works and Site Materials are adequately protected and that such Site Materials are retained on site; the Contractor shall allow and shall not hinder or delay the taking of those measures.

……

6.7 If the Contractor's employment is terminated under clause 6.4, 6.5 or 6.6:

.1 the Employer may employ and pay other persons to carry out and complete the Works, and he and they may enter upon and take possession of the site and the Works and (subject to obtaining any necessary third party consents) may use all temporary buildings, plant, tools, equipment and Site Materials for those purposes;

.2 no further sums shall become due to the Contractor under this Contract other than any amount that may become due to him under clause 6.7.4 and the Employer need not pay any sum that has already become due either:

.1 insofar as the Employer has given or gives a notice under clause 4.5.4; or

.2 if the Contractor, after the last date upon which such notice could have been given by the Employer in respect of that sum, has become insolvent within the meaning of clauses 6.1.1 to 6.1.3;

.3 following the completion of the Works and the making good of defects in them (or of Instructions otherwise, as referred to in clause 2.10), an account of the following shall within 3 months thereafter be set out in a certificate issued by the Architect/Contract Administrator or a statement prepared by the Employer:

.1 the amount of expenses properly incurred by the Employer, including those incurred pursuant to clause 6.7.1 and, where applicable, clause 6.5.2.3, and of any

> direct loss and/or damage caused to the Employer and for which the Contractor is liable, whether arising as a result of the termination or otherwise;
>
> .2 the amount of payments made to the Contractor; and
>
> .3 the total amount which would have been payable for the Works in accordance with this Contract;
>
> .4 If the sum of the amounts stated under clauses 6.7.3.1 and 6.7.3.2 exceeds the amount stated under clause 6.7.3.3, the difference shall be a debt payable by the Contractor to the Employer or, if that sum is less, by the Employer to the Contractor. "

24. By virtue of c.4.8 and the content of the Particulars, the due date for the final payment under the contract would have been 28 days after the issue of a certificate of making good defects, if there was one; otherwise, 28 days after supply of the documents reasonably required in order to compute the final payment - which themselves were to be supplied within 3 months of practical completion of the works.

25. Mr Tate certified interim payments that were due between 2 April 2014 and 17 July 2014. By the date of the fourth interim certificate, it was apparent that the Company was not paying its sub-contractor, Rotherforth Building Limited ("Rotherforth"). The contract was then varied in writing on 24 July 2014 in the following terms:

> "Payments from and including Valuation 5 dated 17 July 2014 are to be paid direct to the principal sub-contractor, Rotherforth Builders Ltd, The Kemps, Church Street, Brotherton WF11 9HE, VAT Reg number 933968087.
>
> All other terms and conditions remain the same."

As is common ground, the effect of this variation was to entitle JKR, as employer, to pay sums certified and otherwise due to the Company directly to Rotherforth, in discharge of JKR's liability under the contract to pay the Company. The variation did not vary the fixed price or provide any different mechanism for repayment to JKR of any assessed overpayment at the end of the contract.

26. Further interim payments were then certified and paid between 18 August 2014 and 24 September 2014 and practical completion was eventually certified on 30 September 2015. Documents to enable the final payment to be computed were therefore due to be sent by 30 December 2015. There is no evidence to suggest that any necessary documents were not sent. Before the expiry of the defects period (on 30 September 2016) and long before the Interim Report No.8 was issued by Mr Tate (on 20 December 2019), the Company became Insolvent within the meaning of the conditions of the Contract, on 1 September 2016. There is no evidence of a certificate of making good of defects being issued by Mr Tate, though the eighth and final interim valuation refers to snagging works having been done.

27. The eighth and final interim valuation, when provided, did not certify any sum that was due to JKR as employer. It stated the amounts of previous valuations, the additional value of work done since the seventh interim valuation, and the total cost of the works. It makes no reference to the fixed price sum in the Contract. It is, on its face, a valuation that appears to justify a further payment of £80,619.66 plus VAT to the Company. It certainly does not certify a repayment due from the Company to JKR in the sum of £125,921.70, nor does it provide the means of computing that sum. The facts are however not in dispute (at least now) that, as a result of the non-payment of Rotherforth, the contract variation and the payments made by JKR to Rotherforth, JKR overpaid the Company by £125,921.70 by reference to the fixed price of the contract.

The main issues for determination

28. The following questions of law arise on the undisputed facts:

    i) Did c.6.5 and c.6.7 of the contract apply with effect from 1 September 2016 to the exclusion of c.4.8?

    ii) If so, is timely provision of a certificate from Mr Tate or a statement from JKR under c.6.7.3 a condition precedent to any debt arising under c.6.7.4?

    iii) If not, is timely provision of a certificate under c.4.8.1 a condition precedent to JKR's right to claim repayment of £125,921.70?

    iv) In either case, does s.110B of the 1996 Act create a freestanding right for JKR to be paid that or any sum, or does JKR have a claim in any event?

29. As the argument developed, it became clear that it is JKR's case is that it has a right irrespective of any certificate or statement under the contract to claim repayment; alternatively that its entitlement is still governed by c.4.8 and that the eighth and final interim valuation was a certificate within the meaning of that condition; alternatively that if the certificate was out of time under c.4.8 or c.6.7, it has a right under s.110B to give a payment notice.

30. Levi's case is that c.4.8 ceased to apply on the making of the CVA and that c.6.7 applies instead, but that any liability of the Company to repay JKR was conditional on a certificate or statement being given within the time specified by c.6.7, and none was. It submits that s.110B has no application in the context of c.6.7 because it was the payee (JKR) who failed to give a statement that was within its control to give.

The authorities and statutory provisions

31. Both parties relied on the decision of the Court of Appeal in Henry Boot Construction Ltd v Alstom Combined Cycles Ltd [2005] EWCA Civ 814; [2005] 1 WLR 3850. In that case, the contract was for civil engineering works on the ICE standard conditions (6th ed.). The contract contained elaborate terms requiring the engineer to certify interim payments due, submit a statement of final account after the defects correction certificate was issued, and then within a specified period issue a final certificate stating

the amount finally due under the contract. The issue was whether a judge-arbitrator had been correct to conclude that claims by the contractor were statute-barred. Whether they were statute-barred depended on whether the right to payment arose when the works were done or shortly thereafter, or only when the engineer certified that payments were due (or should have so certified but failed to do so).

32. Dyson LJ, with whom Sir Andrew Morritt V-C and Thomas LJ agreed, held that the certificates were a condition precedent to liability to pay an interim payment or the balance due upon a final account, but that that did not mean that the absence of a certificate precluded a contractor from seeking to arbitrate (or litigate) the issue of what was properly due.

33. Given the reliance that Ms Toman places on the decision, it is material to note that the argument of the respondent was that the certificates were merely the opinion of what is due to the contractor and were irrelevant to the accrual of the cause of action. It submitted that "the entitlement to payment exists independently of the exercise of that machinery by the engineer because in this contract the engineer does not create rights for the contractor; rather he recognises or determines what Boot's rights are at any given time …".

34. Dyson LJ rejected that argument and held that, on the true construction of the contract, certificates were a condition precedent to entitlement to payment under the contract. He continued, at [23]:

> "By 'condition precedent' I mean that the right to payment arises when a certificate is issued or ought to be issued, and not earlier. It does not, however, follow from the fact that a certificate is a condition precedent that the absence of a certificate is a bar to the right to payment. This is because the decision of the engineer in relation to certification is not conclusive of the rights of the parties, unless they have clearly so provided. If the engineer's decision is not binding, it can be reviewed by an arbitrator (if there is an arbitration clause which permits such a review) or by the court. If the arbitrator or the court decides that the engineer ought to have issued a certificate which he refused to issue, or to have included a larger sum in a certificate which he did issue, they can, and ordinarily will, hold that the contractor is entitled to payment as if such certificate had been issued and award or give judgment for the appropriate sum: see further paras 40-45 below. It is convenient to make such an award or to enter such a monetary judgement in order to avoid the risk of further proceedings in the event that the employer does not pay. For the reasons that follow, I consider that the right to payment arises when a certificate is issued or ought to be issued, and not when the work is done (although the doing of the work is itself a condition precedent to the right to a certificate.)"

35. In paragraphs 40-45 of his judgement, Dyson LJ reviewed earlier case law on the jurisdiction of an arbitrator or the court to determine the true sum due. He held that, contrary to the submissions of the respondent, this was consistent with the conclusion that appropriate certification was a condition precedent to payment, but that if a

certificate had wrongly not been given, or was given in a wrong amount, an arbitrator or the court had jurisdiction to review it.

36. This decision is not authority for the proposition, as Ms Toman submitted, that a debt exists independently of the certification process in the contract, and that the true amount of liability is the amount due irrespective of certification. On the contrary, it establishes that, in such a contract, a certificate is a condition precedent to liability, but that failure to issue a certificate does not (absent express provision) disable an arbitrator or the court from determining what is due. The authorities Dyson LJ referred to were all cases of an architect or engineer refusing to issue a certificate in favour of a contractor, which the court later held should have been issued.

37. The inter-relationship between the payment and insolvency provisions of a building contract and the statutory rights conferred by Part II of the 1996 Act, as originally enacted, was considered by the House of Lords in Melville Dundas Ltd v George Wimpey UK Ltd [2007] UKHL 18; [2007] 1 WLR 1136. In that case the contract was in JCT 1998 standard form, reflecting the provisions of the 1996 Act for interim payments and adjudication. The contractor applied for an interim payment under the terms of the contract, the final date for payment of which was 16 May 2003. On 22 May 2003, administrative receivers were appointed over the contractor. The contract permitted the employer in those circumstances to terminate the employment of the contractor, which it did. Condition 27.6.5.1 provided that, in such circumstances:

> " … the provisions of this contract which require any further payment or any release or further release of retention to the contractor shall not apply …."

and the contract made provision for an account to be taken on completion of the works by or on behalf of the employer. The question was whether that condition, correctly construed, applied to a payment that had fallen due before the termination or only to payments falling due after termination; and if the former, whether it was inconsistent with s.111 of the 1996 Act, which then provided:

> "(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment. The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of that section."

38. Their Lordships unanimously held for the employer on the true interpretation of the contract and, by a bare majority, held that the specific insolvency termination provisions of the contract were not inconsistent with the statute. The reasoning of the majority (Lords Hoffmann, Hope and Walker of Gestingthorpe) was, in essence, that parties were free in principle to agree that payments otherwise due would not be payable to an insolvent contractor, given that such clauses were intended to avoid unfairness to the employer and give effect to insolvency set-off; and that the relevant provisions of Part II of the 1996 Act were not intended to invalidate contractual terms such as c. 27.6.5.1. The minority (Lords Neuberger of Abbotsbury and Mance) considered that s. 111 could not be given such a restrictive interpretation.

39. In part as a result of the different opinions and criticism expressed by their Lordships, Part II of the 1996 Act was substantially amended by Part 8 of the Local Democracy, Economic Development and Construction Act 2009, sections 143 and 144 of which amended s.110 of the 1996 Act, inserted new sections 110A and 110B, and substituted a new section 111.

40. Section 110(1) requires every construction contract to provide an adequate mechanism for determining what payments become due, and when, and to provide a final date for payment in relation to each such payment. The length of the period between the "date on which a sum becomes due" (later referred to in the Act as the "payment due date") and the "final date for payment" is left to the parties to agree.

41. Section 110A requires there to be given by the payer or a specified person, or by the payee, no later than 5 days after the payment due date a notice specifying the sum considered to be due at the payment due date, and the basis on which it is calculated. Subsection (2) states what a notice given by the payer or a specified person must specify, and subsection (3) states what a notice given by the payee must specify. The sum specified may be zero. In these statutory provisions, "payee" means the person to whom the payment is due, "payer" the person from whom the payment is due, and "specified person" means a person specified in or determined in accordance with the provisions of the contract. These statutory provisions therefore deliberately avoid the assumption that, as will usually be the case, the employer is the payer and the contractor the payee: they apply regardless of the direction in which the payment is to be made. However, a contract complies with the requirements of the section if it includes a requirement for the payer or the specified person to give a compliant notice, whether or not it also provides for the payee to give notice.

42. The potential gap left in consequence is filled by s.110B, which provides, so far as material:

> "(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.
>
> (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.
>
> ……
>
> (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 this 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)."

43. Section 111, as amended, provides, so far as material

> "(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.
>
> ……
>
> (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."

44. Section 111(5)(a) prescribes the time within which a payer's "pay less" notice must be given, before the final date for payment. Section 113(2) to (5) specify the types of

insolvency that fall within the terms of Section 111(10) and have the consequence that the statutory requirement in s.111(1) to pay by the final date for payment does not apply. Materially, these types of insolvency do not include an individual voluntary arrangement or a company voluntary arrangement, so the exception provided by subsection (10) would not in any event apply in the case of the Company's CVA. Subject to that, the insolvency exception in the statutory scheme works by negativing the obligation to pay a payment that has become due, but only where the insolvency event occurs after the latest time at which a pay less notice can be served. It therefore operates on the basis that, where the payer can still give a pay less notice in relation to a payment that has been quantified, they can be expected to do so.

45. The amended statutory provisions therefore provide the means for the payee to serve a notice triggering a payment liability. They do so where the contract places responsibility on the payer or a specified person to give a notice specifying the sum considered to be due at the payment due date (and the basis on which it is calculated) not later than 5 days after the payment due date. The paradigm case in which the right in s.110B(2) for the payee to give such a notice is exercisable will be where the contract provides the payer or a specified person but not the payee with such a right. But the statutory right for the payee to give notice is not limited to such a case. It also applies if the contract does confer a right on the payee as well as on the payer or the specified person to give a notice, though the statutory right is not separately exercisable if the payee has given notice before the date on which the payer or specified person is required to give their notice: s.110B(4). Thus, even if the contract permits or requires the payee, within a limited time *after* the payer's or specified person's notice was required to be given, to give their own notice in the event that the payer or specified person does not do so, the statutory right applies to confer on the payee an equivalent right that is unlimited in time: s.110B(2).

46. So far as potential conflict with insolvency terms of the contract is concerned, the statutory scheme gives effect to the outcome in the Melville Dundas case, where the insolvency occurred after the date for serving a pay less notice had passed, but it goes no further. Thus, if a payment is due and the insolvency event precedes the last date for giving a pay less notice, the payer must either pay in full or give a pay less notice. Whether a payment that falls due after, rather than before, the date of an insolvency event is payable is, in the first place, a question of interpretation of the contract. There is then a question of whether any of the provisions of the 1996 Act applies on the particular facts of the case.

47. The effect of standard conditions substantially identical to those in issue in this case was considered by the Court of Appeal in Wilson and Sharp Investments Ltd v Harbour View Developments Ltd [2015] EWCA Civ 1030. In that case, the contracts were on the JCT ICD (2011) form, in which conditions 8.5 and 8.7 were the equivalent of conditions 6.5 and 6.7 in the contract in issue here. The contracts in that case were made after the amendments to the 1996 Act had come into force. The contractor gave notice of intention to terminate for non-payment of certified sums (in respect of which no pay less notices had been served), following which the employer terminated the contract for repudiatory breach. It was common ground that, by one means or another (it being unnecessary to decide which), the contracts had already been terminated before the contractor went into creditors' voluntary liquidation.

48. The issue in the case was whether the terms of c. 8.7 of the contracts, which provided that no further sum should become due to the contractor otherwise than pursuant to its provisions, applied in a case where the contracts had been terminated before the event of insolvency for other reasons.

49. Gloster LJ, with whom McCombe LJ and Sir Colin Rimer agreed, decided that it did. She said (so far as the judgment is material to this case):

> "48. … I have no doubt that, on the true construction of the contracts, the judge was wrong to conclude clauses 8.5.3 and 8.7.3 could have no application if the contract had already been terminated prior to the insolvency. My reasons may be summarised as follows.
>
> 49. First, it is clear that the provisions of clause 8.7.3 are intended to operate *after* termination of the contract. Indeed the entire scheme of clauses 8.7 and 8.8 are directed at setting out the respective rights and obligations of both parties *after* the contractor's employment under the contract has been terminated by the employer and necessarily the contract has come to an end …
>
> 50. Second, clause 8.5 ("Insolvency of Contractor") has a wider ambit than simply conferring a right of termination on the employer in the event of the contractor's insolvency. Thus clause 8.5.2 imposes an obligation on the contractor immediately to notify the employer if the contractor makes any proposal, gives notice of any meeting, or becomes the subject of any proceedings or appointment relating to insolvency, to enable the employer to decide on its options. And, most importantly, clause 8.5.3 *expressly* states that clause 8.7.3 applies as from the date when the contractor becomes insolvent "whether or not the Employer has given such notice of termination" - i.e. a termination notice under clause 8.5 based on the contractor's insolvency. Contrary to the judge's view, therefore, I see no necessity, or basis, for the implication of what would have to be an implied term that clauses 8.5.3 and 8.7.3 have no operation in circumstances where the employer has already terminated the contract of employment, as it is entitled to do (pursuant to the saving provisions of clause 8.3.1), on the grounds of repudiatory breach (as opposed to pursuant to the express termination provisions contained in 8.4, 8.5 or 8.6), but do apply in circumstances where either:
>
> (i) the employer has not served any notice of termination; or
>
> (ii) the employer has already served a notice of termination under clauses 8.4, 8.5 or 8.6.
>
> In other words, given that clause 8.7.3 necessarily applies after termination in circumstances where the contractor's employment has already been terminated under clause 8.4 or 8.6, and can apply irrespective of whether the contract has already been terminated on

the grounds of the contractor's insolvency under clause 8.5, I see no logical basis for the implication of a term that clauses 8.5.3 and 8.7.3 are not operative in circumstances where the contract has already been terminated by the employer on the grounds of repudiatory breach on the part of the contractor.

51. Third, the provisions of section 111(10) of the [1996 Act] do not restrict the non-application of section 111(1) to the situation where the contract has in fact been terminated by reason of the contractor's insolvency or where the contractor is still capable of termination pursuant to its provisions. Thus in my judgment there is no factual matrix justification to construe the contractual provisions of the contracts in a narrow fashion in order to reflect the provisions of the [1996 Act].

52. Fourth, as Miss Lee submitted, Lord Hoffmann's reasoning in *Melville Dundas Ltd* (albeit a case where the contract had been determined following the appointment of an administrative receiver) for upholding the contractual clause which permitted the employer to withhold any further payment following the insolvency event was based upon: (1) general principles of freedom of contract; (2) the nature of the provisional obligation to make payment; and (3) the alteration of the rights between the parties that arises on the insolvency of the contractor by reason of the rules of insolvency set-off. There is nothing in Lord Hoffmann's line of reasoning which would suggest that the provisions of the contracts should be construed narrowly to restrict their application to situations where the contract is still in full operation or could still be terminated for insolvency of the contractor…

53. Fifth, contrary to the submissions of Mr Darton, the obligation to pay under an interim certificate is a *payment* obligation. The fact that an employer is not obliged, in the event of the contractor's insolvency, to make an instalment payment does not mean that the employer is *discharged* from all *liability* to make such payments as may be due upon the taking of the final account. All that clause 8.7.3, as applied by 8.5.3.1, does is to excuse the contractor [*sic*] from its interim *payment* obligations under the terms of clause 4.7 and 4.8. The contractor [*sic*] nonetheless remains liable to pay the sums which may be due under clauses 8.7.4 to 8.7.5 and 8.8, if any, once an account has been taken. As Lord Hoffmann explained in *Melville Dundas*, instalment payments are "in their nature provisional liabilities". Nor am I persuaded by Mr Darton's submission that preservation of a contractor's cash flow, or the potential for an employer to drag out payment under interim certificates, thereby potentially pushing a contractor into insolvency, requires a construction of the clauses of the contracts that is contrary to the words actually used … Moreover, there is nothing in section 111 that requires such a conclusion, as that for which Mr Darton contends."

Although the judgment of Gloster LJ does not set out conditions 4.7 and 4.8 of the JCT ICD (2011) form, they are the equivalent of conditions 4.3 and 4.4 of the JCT Minor Works (2011) form, providing for certification and payment of interim payments. The two references in para 53 of the judgment to the contractor's obligations, identified above, are clearly meant to be references to the employer's obligations, not the contractor's.

50. The effect of the decision in *Wilson and Sharp* is that the provisions in the JCT form for determining finally the account between the employer and the contractor in the event of the insolvency of the contractor apply to the exclusion of liability for accrued interim payments already determined under the payment terms of the contract, and that that remains the case even where the employer has elected to terminate the contract for repudiatory breach before the insolvency provisions came into effect. The employer's alternative remedies for breach of contract, which had accrued on termination, therefore did not displace the effect of these insolvency terms of the contract, even in a case where the employer had elected to terminate the contract for other reasons.

51. The final authority of some relevance is Ziggurat (Claremont Place) LLP v HCC International Insurance Company plc [2017] EWHC 3286 (TCC), a decision of Coulson J. The case concerned liability under a performance bond, but liability depended on whether the contractor was liable under c. 8.7 of the standard conditions, which were materially identical to the terms of c.6.7 of this contract. As in the *Wilson and Sharp* case, the contract was terminated for default shortly before the contractor's insolvency.

52. Coulson J stated, at [50], that the provisions for taking an account upon an insolvency event were "designed – amongst other things – to ensure that, no matter what could be argued about prior events, the insolvency of the contractor gave rise to a clear and certain process which culminates in the notification of a debt pursuant to clause 8.7.5". That clause is the equivalent of c. 6.7.4 of the Contract.

53. Coulson J then considered whether the debt notified under the machinery of clause 8.7.5 was conclusive as to the amount of the surety's liability. It was pointed out in argument that clause 8.7 did not contain any words suggesting that the amount of the debt so determined was conclusive. The Judge said at [60]:

> "It is only necessary to consider what the position would have been under the building contract to see that, as a matter of principle, the debt figure can be challenged by the defendant. Let us assume that the debt was asserted by [the contract administrator], and that [the contractor] had then produced a 20 page critique of the accounting and quantity surveying methodology that had been adopted, in order to demonstrate that only 20% of the sum asserted was actually due. [The contractor] could not be shut out from advancing that defence. There is nothing in the contract to say that they could not challenge the figure, and there are no provisions which indicate that, as soon as the figure was asserted, it was due and payable in the amount asserted, without any ability to challenge. And if [the contractor] could have made that challenge, then so too can the defendant."

Analysis

54. The principles emerging from these authorities can be summarised as follows:

i) It is a question of construction of the contract whether provision of a certificate (or statement) in accordance with its express terms is a condition precedent to liability.

ii) The amount so certified must be paid but is not conclusive and can be challenged later by arbitration or in court proceedings – but that does not mean that liability exists irrespective of certification, where it is required by the contract.

iii) If a certificate or statement is a condition precedent, the payer cannot in an arbitration or proceedings to establish the true amount of liability rely on the absence of a certificate or statement that should have been but was not provided.

iv) Subject to s.111 of the 1996 Act, the parties to a construction contract are free to agree that, in the event of insolvency of the contractor, a payment otherwise due to the contractor will not be payable. Full effect is to be given to such a provision according to its terms.

v) There can therefore be no objection to the parties agreeing that, upon insolvency, payments that have not yet become due will not be payable and that instead an account will be taken at the conclusion of the works -- whether they have effectually done so is a question of interpretation of their contract.

vi) The purpose of the standard insolvency terms in the relevant JCT 2011 forms is to provide a separate procedure to determine the balance of account between the employer and the insolvent contractor following termination of the contract and completion of the works.

Question 1: Did c.6.5 and c.6.7 of the contract apply with effect from 1 September 2016 to the exclusion of c.4.8?

55. The terms and scheme of the standard conditions of the JCT Minor Works (2011) form, incorporated into the contract, are indistinguishable from the terms and scheme of the JCT ICD (2011) form that was considered in the *Wilson and Sharp* case. Both standard forms were drafted with the amended provisions of Part II of the 1996 Act in mind. So far as interpretation of the standard conditions as terms of the contract is concerned, neither party suggested that any facts as at 20 June 2014 relating to the making of the contract had a material impact on the true interpretation of the conditions. There were no bespoke variations. Further, the variation of the contract made in writing on 24 July 2014 - which preceded the CVA proposal - did not have any significance or effect beyond authorising direct payment to the sub-contractor, as a means of ensuring that the works were able to continue.

56. Conditions 6.5 and 6.7.2 to 6.7.4 of the contract apply in the event of insolvency of the Company, even if JKR does not elect to terminate the contract, and they apply in such cases as if notice of termination had been given: c. 6.5.2, c. 6.5.2.1. Their application is automatic and they provide a different scheme under which (a) no further sum is payable to the contractor under the Contract except under that scheme, and (b) a final account following completion of the works and making good of defects is to be set out in a certificate of the contract administrator or a statement of the employer. The

certificate or statement results in a debt due from one party to the other. The certificate or statement is to be provided within 3 months from completion of the works and making good of defects.

57. Although the parties could in principle agree otherwise by an *ad hoc* variation of the contract, if they do not do so further work by the Company and further interim or final certificates under c.4.3 to c.4.8 of the standard conditions of the contract are excluded. The scheme in c.6.5 and c.6.7 is inconsistent with the continuation of the regular payment terms of the contract and can be seen to be a substitute for the continued operation of c.4.3 to c.4.8. As Gloster LJ explained in *Wilson and Sharp*, the scheme is intended to apply following termination of the primary obligations of the contract. The words of c.6.3.1 preserving other remedies of the employer (cited in para 56 above) do not mean that, notwithstanding the CVA, JKR can unilaterally decide to keep the contract alive and exclude the provisions of c. 6.5 and c.6.7. They mean only that the rights and remedy provided by those conditions do not exclusively state the rights and remedies that JKR has as a result of breach and termination of the contract.

58. The terms of c. 6.7 are, in my judgment, a practical means of deciding what if anything is payable at the time of the Insolvency and then quantifying any financial claims that either party may have in relation to the works done and the works remaining to be done. Only the employer and the nominated person are given the right to serve the account after the conclusion of the works. The contractor is given no such right. Two conclusions arise from this. First, these insolvency conditions are principally for the benefit of the employer, as it will usually be the case, when the contractor defaults or becomes insolvent, that the balance of payment due will be in favour of the employer. Second, the account given by the employer or nominated person cannot be conclusive. It is not stated to be final and conclusive, and in a case where a balance is due to the contractor (e.g. because the employer was able to withhold a large interim payment that had accrued due shortly before the insolvency event under c.6.7.2.1 or c.6.7.2), the contractor cannot be deprived of the balance due because the employer has not provided the final account. In any event, the contractor may dispute the expenses certified to have been incurred by the employer in finishing the works and making good defects.

59. There is therefore no opportunity (given the termination or deemed termination of the contract) or need (given the terms of c. 6.7) for the interim payment provisions of c.4.3 and c.4.4 or the final payment provisions of c.4.8 of the standard conditions of the contract to apply further. The terms of c.6.7 provide a substituted means of determining what sum is due to either party. As with c.4.4 and c.4.8, the sum certified (or stated) is not finally conclusive. As a matter of interpretation of the contract, it is clear that the scheme for payment provided by c.4.3 to c.4.8 cannot apply once there has been an event of Insolvency, as defined in the Contract, unless the parties agree otherwise.

60. There is no suggestion in this case that, following the CVA on 1 September 2016, the parties agreed that the contract would be further varied so that the standard payment provisions would continue to apply. It appears that Mr Tate either considered wrongly that they did continue to apply, or that he considered that what the parties needed was a statement of the final value of the works that had been done. Mr Tate's eighth interim and final valuation is not the certified account required by c.6.7.3 of the contract, nor did JKR provide any such statement of account.

61. The answer to Question 1 is therefore that the terms of c.6.5 and c.6.7 applied with effect from 1 September 2016 to the exclusion of c.4.8.

Question 2: Is timely provision of a certificate from Mr Tate or a statement from JKR under c.6.7.3 a condition precedent to any debt arising under c.6.7.4?

Question 4: Does s.110B of the 1996 Act create a freestanding right for JKR to be paid that or any sum, or does JKR have a claim in any event?

62. It is convenient to address these two questions together, given that Question 3 does not arise in view of my decision on Question 1.

63. Part II of the 1996 Act, as amended ("Part II"), has the following effect, so far as relevant to this case:

    i) a construction contract must include machinery for determining what payments become due and when, and provide a final date for payment of any sum that becomes due;

    ii) to that end, a contract must require a notice to be given by one party to the other no later than 5 days after the due date for each payment, so that payment will be made by the final date for payment;

    iii) payments so notified must (subject to a timely pay less notice) be paid, but the parties may agree that a payment shall not be payable in the event of insolvency of the payee (save where a pay less notice can still be served).

64. Part II, as amended, does not require each party to be given a right to serve a payment notice, but the JCT 2011 Minor Works form in fact does so, entitling the contractor to serve a payment notice if notice is not given by the contract administrator by 5 days after any due date: c. 4.5.2. If the contractor gives notice of the amount due, the employer may give a "pay less" notice no later than 5 days before the final date for payment, which is then postponed according to the time that elapsed between the last day for the contract administrator's notice and the day of the contractor's notice. Similar rights and a similar timetable exist in relation to the final certificate.

65. The time limits stated in these conditions are clearly intended to be strict, so that the sum payable is determined at least 5 days before the specified final date for payment. The contractor's right to give its own payment notice arises immediately upon the time for the contract administrator's certificate having passed. The scheme for timely payment would not work if the certificates could be served late, or if a pay less notice could be given late. Under the scheme, a contractor's notice can be given at any time, following default by the contract administrator, and the final date for payment is then recalculated once the notice is given. Whatever sum is specified as payable can be challenged later.

66. Does the conclusion that these time limits are strict apply in relation to the time limited for a certificate or statement of account under c.6.7.3? In other words, has JKR lost its

right to a repayment because it did not give a statement of account within 3 months from the end of the defects period?

67. Condition 6.7.3 states that an account of the specified amounts "shall within 3 months [following completion of the works and making good of defects] be set out in a certificate ... or a statement …" These provisions apply both on termination of the contract for default (or corruption) and upon Insolvency. It cannot therefore be said that they are driven solely by considerations of insolvency law or procedure. They are intended to crystallise, at an early stage, the payments due following termination of the contract (actual or deemed) and completion of the programme of works.

68. Mr Berragan submitted that JKR was now out of time to give the Company a statement pursuant to c.6.7.3. He said that the last date for a certificate or statement was 30 December 2016: 3 months after the end of the 12-month defects remediation period, following practical completion on 30 September 2015. He said that there was a relatively long period of 3 months provided by the contract specifically for the account to be prepared, which was ample, and that if 3 months was not a strict time limit then the limit had no purpose in the contract and was meaningless.

69. Ms Toman submitted that a late statement or notice could be given by JKR as employer/payee, either under the contract or under s.110B(2) of the 1996 Act, and that such a statement or notice either had been given or could still be given by JKR. If a statement can still be given, it matters not whether Mr Tate's eighth interim and final certificate is a sufficient certificate for this purpose (which it clearly is not) or whether JKR's proof of debt is a sufficient statement under c.6.7.3 (which is doubtful, as it was given to Mr Wilson, who is not the Company's agent, and it does not purport to be a statement under c.6.7.3). That is because JKR will be at least a contingent creditor entitled to prove for the amount that is now undisputed, as Levi has withdrawn its argument that any claim is statute-barred. The terms of the CVA proposal that were agreed by the creditors provide for admission by the supervisor of contingent claims.

70. It would be a very surprising conclusion to reach that an account that might result in a substantial payment being due and payable for the benefit of the creditors of an insolvent contractor could not take place if the employer and contract administrator were late in certifying (or stating) the amount to be paid. The contractor would be unlikely, in most cases, to know the amounts to be specified under c.6.7.3.1 and so could not itself provide the account. That is doubtless why, in comparison with the conditions relating to interim and final payments, the contract does not give the contractor the right to prepare a statement in default under c.6.7.3.

71. This demonstrates that the absence of a timely account cannot have been intended to be conclusive as against the contractor on the question of whether any sum was due to either party. The contractor must be able to bring a claim for any sum properly due, and the court could, if appropriate, determine the amount. Even where the balance of account falls in favour of the employer, it may still be appropriate to determine the amount of the liability: see Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25; [2021] 1 All ER 697. The 3-month time limit in c.6.7.3 therefore cannot have been intended to prevent a later claim by a contractor to any sum properly due to it.

72. In my judgment, a contractor could not rely on s.110B(2) of Part II for the right to serve its own payment notice because that section does not apply to the type of account provided for in c.6.7.3. For s.110B(2) to apply, there must be default by the payer or the specified person in giving a payment notice within 5 days of a payment due date. That is a date on which the contract provides for a payment to become due: s.110A(6). Condition 6.7.3 does not specify a payment due date: it only specifies a date by which an account is to be provided. This is not merely a matter of semantics: the c.6.7.3 scheme is different from the scheme for interim and final payments within a specified time of a due date for payment that is specified in the contract. Section 110B is directed at this scheme for interim and final payment terms of a construction contract, where a payment that is due to the payee is unquantified. It does not apply to terms such as c.6.7.3 that deal with the balance of account following termination or deemed termination of the contract and completion of the works by another person.

73. The remaining questions, therefore, are whether JKR, as employer and intended payee, is itself prevented from giving a statement of account now, some years out of time (a question of interpretation of the contract); or alternatively can give a statutory s.110B(2) notice as payee, or sue in any event for repayment of the overpayment and damages without having operated the c.6.7.3 machinery.

74. In my judgment, JKR cannot as payee give a notice under s.110B(2) of the 1996 Act that would entitle it to claim repayment of the sum overpaid. As explained in para 71 above, s.110B does not apply because there is no payment due date within the meaning of Part II. Further, using the language of s.110B and assuming that JKR is otherwise entitled to a repayment, c.6.7.3 requires the payee or a specified person (JKR or Mr Tate) to give the payer (the Company) an account. The trigger for the s.110B(2) right is a failure by the payer or the nominated person to give a payment notice, but here the failure is that of the payee, JKR.

75. There is nothing in the language of c.6.7.3 to indicate that the 3 months' time limit is intended to be a strict one. Nor is there anything in the way that c.6.7.3 interacts with other provisions of the contract to suggest that the parties must have intended it to be strict, unlike in relation to the time limits specified in c.4.4 and c.4.8. On the contrary, it is evident that the parties cannot have intended it to be strict so far as the Company's rights are concerned, and it is not beyond reasonable contemplation that Mr Tate might have been unable, even within the generous period of 3 months, to put a figure on any direct loss or damage suffered by JKR as a result of termination or deemed termination of the Contract, or otherwise.

76. Is there then any reason why the draftsman should be understood to have intended that the time limit should be a strict one, regardless of the circumstances in which c.6.7.3 came to apply? It might be said that, in respect of an Insolvency event, it would be beneficial to both parties to have the net balance quantified at an early stage. The determination of a net balance is clearly the purpose of the condition, but the stay on further payments to the Company and the provision of the account is primarily for the benefit of JKR. The condition confers that benefit by providing JKR with the right to state an account. This does not explain why it is essential, in any circumstances, that the account be provided no later than 3 months after the end of the defects period. Further, as previously explained, c.6.7.3 also applies in cases of default that are not Insolvency events.

77. Mr Berragan's argument was that, unless 3 months means 3 months and not a day longer, there is no purpose served by specifying 3 months, and so it must have been intended to be strict. That is a 'bootstraps' argument and I am unable to accept it. As the judgment of Dyson LJ in *Henry Boot* explains, the passing of the time prescribed by a contract for a certificate to be given has the effect that the contractor is entitled to say that it should by that time have been provided. Apart from starting the running of the limitation period, it entitles the intended recipient of the certificate to refer the matter to arbitration or start proceedings on the basis that the employer has failed to do what it should have done. In many cases where c.6.7.3 applies, the final balance can be expected to be in favour of the employer, but it will not necessarily be so (see the example given in para 57 above). Even a defaulting contractor may be owed money or need to have the exact amount of its liability determined. The fact that, in this case, the amount of the debt is undisputed and is owed by the Company makes no difference to the true interpretation of the contract.

78. A further point in favour of the conclusion that the time limit is not strict is Levi's acceptance in its written argument that there would, at common law, be an implied right for an employer to claim back from its contractor any overpayment established upon taking the final account. As he rightly said, if that principle rests on the basis of implying a term into a contract, it would not be possible to imply such a term if it was inconsistent with the express terms of the contract. Equally, if the claim were in unjust enrichment, a term of a contract providing a conditional right to repayment might preclude such a claim. If c.6.7.3 imposes a strict time limit (in effect) for advancing any such claim, the common law right to bring the same claim at a later time would have been excluded. There being no obvious reason why the time limited by c.6.7.3 must be strictly enforced, it seems to me to be unlikely that the draftsman of the standard conditions, which were intended to be of general application in contracts of this kind, meant to exclude a recognised common law right of this nature. I consider that more explicit language would have been used if the time limit had been intended to be strict.

79. I therefore conclude that the time specified in c.6.7.3 of the standard conditions in the Contract is not a strict time limit. Absent a contractual variation or estoppel (neither of which is argued to arise here), JKR would be entitled to provide a statement of the account and claim the balance at any time before the expiry of the limitation period. It is therefore a contingent creditor, as I do not consider that either the eighth interim and final valuation or JKR's proof of debt sent to Mr Wilson is an employer's statement complying with the terms of c.6.7.3. As such, and there being no further dispute about the amount of the claim, JKR's proof should be accepted by Mr Wilson in the revised amount of £128,921.70.

The remaining issues

80. In view of the conclusions that I have reached, it is unnecessary to decide Question 3 above, which would only arise if I considered that c.4.8 could still apply to determine JKR's rights following the Insolvency of the Company. It being unnecessary to decide it, and it being a question of interpretation and therefore one of law, I shall not lengthen this judgment by expressing my *obiter* conclusion on that question.

81. As previously stated, the List of Issues raised other questions that, in the event, it is unnecessary for me to decide.

SCHEDULE

Agreed List of Issues

1. Who bears the burden of proof on the application: is it the Applicant or the Second Respondent?

Interpretation of the JCT contract

2. Is service within 5 days after the due date for the final payment a condition precedent to the validity of a final certificate under clause 4.8.1?

3. If not, did Mr Tate's certificate dated 20 December 2019 ("Mr Tate's Final Certificate") qualify as a final certificate for the purposes of clause 4.8.1?

4. Did clause 6.7 supersede clause 4.8 on the insolvency of the Company?

5. Is service within 3 months of completion of the works and making good the defects a condition precedent to the validity of a certificate pursuant to clause 6.7.3 of the contract?

6. If not, did Mr Tate's Final Certificate qualify as a certificate for the purposes of clause 6.7.3?

7. Was JKR entitled to repayment of the sum of £125,921.70 in the absence of a valid and effective certificate under either clause 4.8 or clause 6.7?

HGCRA 1996

8. Does JKR have a statutory right to payment under Section 110B of the Housing Grants, Construction and Regeneration Act 1996 ('the 1996 Act"), if there is no right to payment under the contract?

9. If so, was JKR's Proof of Debt a payment notice for the purposes of Section 110B(2) of the 1996 Act?

10. If not, was JKR entitled to prove as a contingent creditor?