

JUDGMENT : HIS HONOUR JUDGE PETER COULSON .QC. TCC. 17th July 2007

A. INTRODUCTION

1. This application under CPR Part 24 raises a point of principle arising out of the recent decision of the House of Lords in *Melville Dundas Ltd. (in Receivership) & Ors. v George Wimpey (UK) Ltd. & Anr.* [2007] UKHL 18, [2007] 1 WLR, 1136. It also raises a separate issue of construction arising from the JCT Standard Form of Building Contract, 1998 edition. The essential debate between the parties is whether an employer, who has not paid sums due to the contractor under the contract, can prevent the contractor from enforcing its right to payment of those sums by relying on its subsequent determination of the contractor's employment under that contract.
2. I propose to deal with this application by setting out the factual background (Section B below); noting the issues which I have to decide (Section C below); setting out the decision in *Melville Dundas* (Section D below); analysing how the principles to be derived from *Melville Dundas* apply to this case (Section E below); and then going on to consider the separate point of construction which did not arise in that case (Section F below). I should acknowledge at the outset the considerable assistance I have derived from the written and oral submissions of Miss Garrett for the Claimant and Mr. Coplin for the Defendant. I am very grateful to both of them.

B. THE FACTUAL BACKGROUND

3. The Defendants Mr. and Mrs. Mark Johnston own a house at 12 Egerton Place, London SW3 2EF ("the Property"). On 30th November, 2005 the Defendants engaged the Claimant, Pierce Design International Ltd., to carry out construction works at the property. The contract incorporated the JCT Standard Form of Building Contract (With Contractor's Design), 1998 edition, incorporating Amendments 1 to 5. These conditions were also subjected to certain home-made amendments. The employer's agent was named as Mr. Andrew Wells of the Potter Raper Partnership. The contractual date for completion was 21st November, 2006.
4. For present purposes there are two parts of the JCT contract which are relevant - the interim payment regime and the provisions relating to determination. I set out each in full below.

(a) Interim Payments

5. The relevant provisions of the contract as amended are those set out below:
 - (i) Clause 30.3.1 provided that: "*The Contractor shall make applications for interim payment as follows: ...*
30.3.1.2 *Where Alternative B applies, Applications for Interim Payment shall be made on the dates provided for in Alternative B in Appendix 2 and which dates shall continue up to the day named in the Employer's statement of Practical Completion or to within one month thereafter ...*"
 - (ii) Clause 30.3.3 provided that: "*Not later than 5 days after the receipt of an Application for Payment the Employer shall give a written notice to the Contractor specifying the amount of payment proposed to be made in respect of that Application, the basis on which such amount is calculated, and to what the amount relates, and, subject to clause 30.3.4, shall pay the amount proposed no later than the final date for payment.*"
 - (iii) Clause 30.3.4 provided that: "*Not later than 5 days before the final date for payment of an amount, due pursuant to clause 30.3.3 the employer may give a written notice to the Contractor which shall specify any amount proposed to be withheld and/or deducted from that due amount, the ground or grounds for such withholding and/or deduction and the amount of withholding and/or deduction attributable to each ground.*"
 - (iv) Clause 30.3.5 provided that: "*Where the employer does not give any written notice pursuant to Clause 30.3.3 and/or to Clause 30.3.4 the Employer shall pay the Contractor the amount stated in the application for interim payment.*"
 - (v) Clause 30.3.6 provided that: "*The final date for payment of an amount due in an Interim Payment shall be 14 days from the date of receipt by the Employer of the Contractor's Application for Interim Payment.*"
 - (vi) Clause 30.3.7 provided that: "*If the Employer fails properly to pay the amount or any part thereof due to the Contractor by the final date for its payment, the Employer shall pay to the Contractor in addition to the amount not properly paid simple interest thereon for the period until such payment is made. Payment of such simple interest should be treated as a debt due to the Contractor by the Employer. The rate of interest payable shall be 3 per cent over the base rate of the Bank of England which is current at the date that payment by the Employer became overdue...*"
 - (vii) Clause 30.3.8 provided that: "*Without prejudice to any other rights and remedies which the Contractor may possess, if the Employer shall, subject to any notice issued pursuant to Clause 30.3.4, fail, to pay the contractor in full by the final date of the payment as required by the Conditions, and such failure shall continue for seven days after the Contractor has given to the Employer written notice of its intention to suspend performance of his obligations under this Contract to the Employer, and the ground or grounds on which it is intended to suspend performance, then the Contractor may suspend such performance of his obligations under the Contract to the Employer until payment in full occurs ...*"
6. In short, there was a contract regime pursuant to which each interim payment due to the contractor/claimant was in the sum valued by the employer's agent pursuant to Clause 30.3.3, subject thereafter only to any withholding notice issued under Clause 30.3.4. This basic regime plainly satisfied the requirements of Sections 110 and 111 of the Housing Grants Construction & Regeneration Act 1996 ("the 1996 Act").

(b) Determination

7. The relevant provisions of the contract as amended in respect of determination were those set out below:
- (i) Clause 27.2.1 provided that: *"If before the date of practical completion the Contractor shall make a default in any one or more of the following respects:
 - 1.1 without reasonable cause he wholly or substantially suspends the carrying out of the design or construction of the works; or
 - 1.2 he fails to proceed regularly and diligently with the performance of his obligations under this contract ..."*
 - (ii) Clause 27.2.2 provided that: *"If the Contractor continues a specified default for 14 days from receipt of the notice under Clause 27.2.1 then the Employer may on, or within 10 days from, the expiry of the 14 days by a further notice to the Contractor determine the employment of the contractor under this Contract. Such a determination shall take effect on the date of receipt of such further notice."*
 - (iii) Clause 27.6 provided that: *"In the event of the determination of the employment of the contractor under Clause 27.2 ...
 - 27.6.1 For the purposes referred to in clause 5.5 the Contractor shall within 14 days provide the Employer with two copies of and the Employer may retain, all drawings, details, plans, specifications, schedules and other work referred to in clause 5.6 which have been prepared before the date of determination (whether in the course of preparation or completed);
 - 27.6.2 The Employer may employ and pay other persons to carry out and complete the design and construction of the Works and/or make good defects of the kind referred to in clause 16 and he or they may enter upon the site and the Works and use all temporary buildings, plants, tools, equipment and Site Materials and may purchase all materials and goods necessary for the carrying out and completion of the Works and/or the making good of defects as aforesaid ...
 - 27.6.5.1 Subject to clauses 27.5.3 and 27.6.5.2 the provisions of this Contract which require any further payment or any release or further release of retention to the Contractor shall not apply provided that clause 27.6.5.1 shall not be construed so as to prevent the enforcement by the Contractor of any rights under this Contract in respect of amounts properly due to be paid by the Employer to the Contractor which the Employer has unreasonably not paid and which, where clause 27.3.4 applies, have accrued 28 days or more before the date when under clause 27.3.4 the Employer could first give notice to determine the employment of the Contractor or where clause 27.3.4 does not apply, which have accrued 28 days or more before the date of determination of the employment of the Contractor.
 - 27.6.5.2 Upon the completion of the design and construction of the Works and the making good of defects as referred to in clause 27.6.2 (but subject, where relevant, to the exercise of the right under clause 16.2 and/or clause 16.3 of the Employer not to require defects of the kind referred to in clause 16 to be made good) then within a reasonable time thereafter an account in respect of the matters referred to in Clause 27.6.6 shall be set out in a statement prepared by the Employer."*
8. As noted below, it is Clause 27.6.5.1 which was at the heart of the speeches in *Melville Dundas* and it is at the heart of the issues before me.
9. During the contract the Defendants failed to make interim payments to the Claimant in accordance with Clause 30.3.3. The particular defaults were as follows:
- (a) Interim Valuation 4**

The Defendants' agent issued interim valuation 4 on 9th March, 2006 in the net sum of £61,218.66 plus VAT (£3,060.93). The Defendants paid late the sum of £61,218.66 and never paid the remaining £3,060.93. There was no withholding notice under Clause 30.3.4.
 - (h) Interim Valuation 8**

The Defendants' agent issued interim valuation 8 on 10th July, 2006 in the net sum of £122,766.36 plus VAT (£6,138.32). The Defendants paid the sum of £110,806.04, leaving an unpaid balance of £18,098.64 which has never been paid. There was no withholding notice under Clause 30.3.4.
 - (c) Interim Valuation 9**

The Defendant's agent issued interim valuation 9 on 11th August, 2006 in the net slop of £121,319.56 plus VAT (£6,065.98). The Defendants paid the sum of £110,414.91, leaving an unpaid balance of £16,970.63. On 24th September, 2006 the Defendants paid a further £9,619.89 leaving the sum of £7,350.74 outstanding. That sum has never been paid. There was no withholding notice under Clause 30.3.4.
 - (d) Interim Valuation 10**

The Defendants' agent issued interim valuation 10 on 13th September, 2006 in the net sum of £175,567.06 plus VAT (£8,778.35). The Defendants paid the sum of £163,060.76, leaving an unpaid balance of £21,284.65 which has never been paid. There was no withholding notice under Clause 30.3.4.
 - (e) Interim Valuation 12**

The Defendants' agent issued interim valuation 12 on 4th November, 2006 in the net sum of £185,901.68 plus VAT (£9,295.09). The Defendants paid the sum of £151,531.33, leaving an unpaid balance of £43,665.44 which has never been paid. There was no withholding notice under Clause 30.3.4.

10. The unpaid sums noted above total £93,460.33. That sum, together with interest, comprises the Claimant's claim in these proceedings in respect of which they now seek summary judgment pursuant to CPR Part 24.
11. It is clear that, certainly once the contract moved into 2007, difficulties began to emerge. The works were not completed by the contract completion date. There were also complaints by the Defendants about defects and incomplete works. The Defendants served a notice of default on 7th March, 2007 pursuant to Clause 27.2.1 of the JCT Conditions, notifying the Claimant that it was not proceeding regularly and diligently with the work. The Defendants allege that the default was not remedied and, on 30th March, 2007 they purported to determine the employment of the Claimant. The validity of that determination is disputed.
12. Accordingly, the present position is that, following the notice of determination, the Defendants have a number of cross-claims, most notably their claim for the costs of completing the works and their claim for liquidated damages. Each of these claims over-tops the sums claimed by the Claimant in these proceedings.

C. THE ISSUES

- 13: There are two issues for me to decide. The first is whether, on the facts of this case, Clause 27.6.5.1 falls outside Section 111 of the 1996 Act, because it purports to allow sums to be withheld without the serving of a withholding notice. That issue in turn depends entirely on the application of the decision of the House of Lords in **Melville Dundas**. If the clause fails to comply with the Act, Section 111 would apply instead, and the Claimant would be entitled to summary judgment.
14. The second issue is whether, assuming Clause 27.6.5.1 is in accordance with Section 111, the proviso in Clause 27.6.5.1 operates to prevent the Defendants from resisting the Claimant's application for the sums due under the contract on the basis that those sums have been "unreasonably not paid" by the Defendants. This is a matter of construction of the Clause and was not an issue that arose on the facts of **Melville Dundas**.

D. THE DECISION IN MELVILLE DUNDAS

15. In **Melville Dundas** the final date for payment of an interim sum due to the contractor was 16 May. The amount due was not paid. A withholding notice (which would have had to have been served by 11th May in order to be effective under the contract) was not served. On 22nd May, administrative receivers of the Claimant, were appointed by their bank and, on 30th May, the employer determined the contract pursuant to Clause 27.3.4. The question was whether Clause 27.6.5.1 operated to avoid the employer's contractual obligation to pay the interim figure that should have been paid by no later than 16th May. The Outer House of the Court of Session had decided that the clause did have that effect. The Inner House reversed that decision. The House of Lords, by a majority of three to two, reinstated the Lord Ordinary's decision and the Claimant's claim for the sum due was dismissed.
16. The principal issue for their Lordships was whether Clause 27.6.5.1 fell foul of Sections 110 and 111 of the 1996 Act because it allowed the employer not to pay a sum which was due, despite the absence of a withholding notice. The majority concluded that it did not. I accept Miss Garrett's submission that, broadly speaking, there were two particular factors which led to that conclusion: the particular problems created by the insolvency of a contractor; and the fact that it was impossible for the employer to issue a withholding notice before 16th May, because the administrators were not appointed until 22nd May, and the contract was not determined until 30th May.
17. As to the importance of the insolvency point,¹ Lord Hoffmann said at paragraph 13 of his speech
*"A provision such as clause 27.6.5.1, which gives the employer a limited right to retain funds by way of security for his cross claims, seems to me a reasonable compromise between discouraging employers from retaining interim payments against the possibility that a contractor who is performing a contract might become insolvent at some future date (which may well be self-fulfilling) and allowing the interim payment system to be used for a purpose for which it was never intended, namely to improve the position of an insolvent contractor's secured and unsecured creditors against the employer. Mr. Howie said that to allow the employer any security in the form of an unpaid instalment payment would be to allow him to profit from his own wrong. But the security arises not from the terms of the contract but from the law of bankruptcy set-off. As Chadwick LJ pointed out in **Bouygues UK Ltd v Dahl-Jensen UK Ltd** [2000] BLR, 522, any creditor who owes a debt to an insolvent company, no matter how long overdue, may set off that debt in full against his own claim in the liquidation."*
18. As to the importance of the impossibility point, at paragraph 20 of his speech Lord Hoffmann said,
"In the case of clause 27.6.5.1 the contractor will have been given notice of why the payment was being withheld because he would have received a notice of determination. But the retrospective operation of the clause means that he will not have received it within the time stipulated in the statute. It seems to me, however, that it would be absurd to impute to Parliament an intention to nullify clauses like 27.6.5.1, not by express provision in the statute, but by the device of providing a notice requirement with which the employer can never comply. Section 111 must be construed in a way which is compatible with the operation of Clause 27.6.5.1."

Lord Hoffmann's conclusion at paragraph 22 reiterated the impossibility of serving a withholding notice on the facts of the case:

¹ Although, in **Melville Dundas**, administrative receivers had been appointed rather than liquidators, Lord Hoffmann noted in paragraph 14 of his speech that "it is common to treat such an appointment as evidence of insolvency ... and it is admitted that in this case the contractors were in fact heavily insolvent."

"The problem arises because I very much doubt whether Parliament, in enacting section 111(1), took into account that parties would enter into contracts under which the, ground for withholding a payment might arise after the final date for payment. One cannot therefore find an answer in a close examination of the language of the section. I would prefer simply to say 'lex non cogit ad impossibilia' and that on this ground section 111(1) should be construed as not applying to a lawful ground for withholding payment of which it was, in the nature of things, not possible for notice to have been given within the statutory time frame. That may not be particularly elegant, but the alternative is to hold that the parties' substantive freedom of contract has been indirectly curtailed by a mere piece of machinery, the operation of which would serve no practical purpose. This I find even less attractive."

19. Lord Hope of Craighead gave a short speech in which, save for one point, he agreed with Lord Hoffmann. Lord Walker expressly agreed with Lord Hoffmann. Lord Mance and Lord Neuberger of Abbotsbury dissented. At paragraph 77 of his speech Lord Neuberger said,

"In addition, it seems to me that it would cut across the purpose of section 111(1) if what appeared to be a final date for payment, with its concomitant prohibition on refusal to pay, could somehow be retrospectively vitiated simply because the contract has been brought to an end. If, as I see it, the purpose of sections 110 and 111 is to assist the cashflow for contractors and sub-contractors, then it seems to me that it would be inconsistent with the way in which section 111(1) is expressed and also with its purpose, if it ceased effectively to be effective on the determination of the contract, at least in a case such as this, where determination occurs after the final date for payment had passed."

I am aware that many commentators take the view that Lord Neuberger's approach is more in line with the oft-stated purpose of the 1996 Act: to improve and maintain cashflow to contractors and sub-contractors. But, as I reminded Miss Garrett during the course of her submissions, that was not the view of the majority.

20. I should add one further point about the decision in *Melville Dundas*. It does not appear that the case of *KNS Industrial Services (Birmingham) Ltd. v Sindall Ltd.* [2001] 17 Const.L.J., 178, a decision of His Honour Judge Humphrey Lloyd, Q.C. was cited to the House of Lords. Although the determination clause under consideration in *KNS* was in different terms, and the factual background was also different, the point at issue was the same, and the Judge reached a similar conclusion. He indicated that Section 111 did not apply to the determination clause in that case, which was part of what he called "the typical self-contained code" applicable when the contractor is in default and there has been a determination of the contract.
21. As noted above, the decision in *Melville Dundas* has excited much comment in the world of construction adjudication. There is a fear that, taken to its logical conclusion, the decision might allow an employer to refuse to pay the sums due under the contract, and then determine the contractor's employment at the last moment, thereby providing him with a defence to any claim for those sums, irrespective of the fact that there had been no withholding notices. The Department of Trade & Industry, in their second Consultation Report of June 2007, which deals with proposed amendments to the 1996 Act, suggest that there is now a potential uncertainty as to whether Section 111 applies in circumstances where the contract is determined. The Report states that, as a matter of policy, Section 111 should continue to apply in all cases, including where the contract is determined, save for where the payee (the contractor) is insolvent.

E. DOES CLAUSE 27.6.5.1 ON THE FACTS OF THE PRESENT CASE FALL FOUL OF SECTION 111 OF THE 1996 ACT?

22. Miss Garrett submitted that their Lordships' conclusion as to the proper operation of Clause 27.6.5.1 should be limited to the facts of *Melville Dundas* and that therefore, absent the insolvency of the contractor and/or the impossibility of serving withholding notices, which she maintained was the situation in the present case, the clause fell foul of Section 111 of the 1996 Act and should therefore be struck down. The principal difficulty with this argument, as Mr. Coplin forcefully pointed out, was that the House of Lords have considered this very clause and concluded, albeit by a majority, that it was not at odds with Section 111. I am bound by that decision. It is not for me to endeavour to restrict the clear consequences of the decision in *Melville Dundas*.
23. In addition, I should say that I am not attracted to an argument which seeks to suggest that, on one set of facts, a clause in a standard form contract complies with the 1996 Act whilst, on another set of facts, it does not. That seems to me to be a recipe for uncertainty and endless dispute. I consider that a clause of this type either complies with the Act or it does not. If compliance turns on minute factual gradations, then all the commercial certainty that is usually provided by the use of a standard form of contract will be lost. Accordingly, I decline to embark on the voyage of discovery into the factual differences between this case and *Melville Dundas*, on which Miss Garrett was so keen to send me.
24. I should make one final point on this first issue. When Miss Garrett submitted that the *Melville Dundas* decision should be restricted on its facts, she relied (amongst other things) on the DTI's second Consultation Report to which I have previously referred. But, it seems to me that, in truth, the document is against her, because it sets out what the DTI would like to achieve by way of amendment (i.e. making it clear that Section 111 still applies in all cases save for insolvency), and their concern that, at present, the decision in *Melville Dundas* may go wider than that.
25. For these reasons therefore, I consider that, the House of Lords having ruled that Clause 27.6.5.1 complies with Section 111 of the 1996 Act, that is the end of the matter. The first basis for the Claimant's CPR Part 24 application must therefore fail.

F. HOW SHOULD THE PROVISO TO CLAUSE 27.6.5.1 BE OPERATED?

26. The proviso to Clause 27.6.5.1 prevents an employer from relying on the Clause as a defence to a contractor's enforcement of any rights "in respect of amounts properly due to be paid by the Employer to the Contractor which the Employer has unreasonably not paid and ... which have accrued 28 days or more before the date of determination of the employment of the Contractor".
27. On behalf of the Claimant, Miss Garrett submits that the interim payments identified in paragraphs 8 and 9 above were properly due to be paid at various dates in 2006, and that the Defendants have unreasonably not paid those sums because there were no appropriate withholding notices under Clause 30.3.4. She therefore says that, in reliance on the proviso, the Claimant should recover the sums claimed. On behalf of the Defendants, Mr. Coplin contends that the clause must be construed by reference to what is, or is not, reasonable now - not some months ago - and that the existence of the detailed cross-claims means that I cannot decide whether or not the proviso has been triggered without undertaking a thorough investigation of the facts, at a full trial of all the issues.
28. The proviso was not the subject of any detailed analysis by their Lordships in *Melville Dundas* because in that case the contractor's right to the sum claimed had accrued less than 28 days before the determination. At paragraph 28 of his speech, Lord Hope of Craighead made a general reference to the proviso in these terms:
"The purpose of the proviso is to strike a balance between the contractor and the employer. The contractor's interest lies in enforcing the payment of sums which were already due before the determination. The employer's interest lies in retaining sums already due so that they can be set off against sums which he can properly claim. against the contractor in consequence of the determination of his employment under the contract. Thus, the purpose of the clause read as a whole is to bring the contractor's right to enforced payment of any sums which have not already been paid to him by the employer to an end, except to the extent which the proviso permits, pending the making up of an account under clause 27.6.5.2."
- Neither counsel were able to refer me to any other authority in which this proviso has been the subject of any consideration by the courts. It did not arise in *KNS*.
29. In my judgment, as a matter of construction, the proviso breaks down into three questions, each of which has to be answered in the affirmative before it can be triggered by the contractor. The questions are:
- (a) Were/are there amounts properly due to be paid by the employer to the contractor?
 - (b) Did the contractor's rights to those amounts accrue 28 days or more before, the date of determination (in this case, 30th March, 2007)?
 - (c) If so, has the employer "unreasonably not paid" those amounts?
- I deal with each element in turn below.
- (a) Amounts properly due to be aid**
30. I take as my starting point the fact that the Defendants failed to pay the amounts properly due to the Claimant under Clause 30.3.3, and that the Defendants were therefore in breach of contract in not paying those sums. As Mr. Coplin fairly conceded, if the Claimant's application for summary judgment had been heard at, say, the end of November 2006, he would have been able to offer no defence to the claims made. In my judgment, this part of the proviso is not concerned with withholding notices. It is solely concerned with whether there are sums properly due under Clause 30.3.3. In this case there plainly were. The first part of the proviso is therefore made out.
- (b) Accrual**
31. It is common ground that the Claimant's right to the sums due accrued more than 28 days before the determination. Indeed, their rights accrued many months before 30th March, 2007. The second part of the proviso is therefore also made out.
- (c) Unreasonably Not Paid**
32. Under the terms of this contract the non-payment of the sums due under Clause 30.3.3 can only be justified if there is a withholding notice under Clause 30.3.4. If there is a withholding notice the sum identified under Clause 30.3.3 no longer becomes due under the contract. It is reduced (or extinguished altogether) by the figure in the withholding notice. Thus, so it seems to me, as a matter of construction of Clause 27.6.5.1 in the context of the contract as a whole, a sum due by way of an interim payment under Clause 30.3.3 would reasonably have not been paid by the employer if there was a valid withholding notice in respect of that sum under Clause 30.3.4. Conversely, if there was no withholding notice, the sum would unreasonably have not been paid by the employer. That is the position here. As a matter of simple interpretation, therefore, I consider that prima facie the third and final part of the proviso has also been made out by the Claimant. What are the arguments in favour of a different construction?
33. Mr. Coplin submitted that what is unreasonable has to be looked at now, not when the sums became payable, so that all the Defendants' cross-claims must be taken into account and investigated in detail before the court could decide if the sums due under Clause 30.3.3 were 'unreasonably not paid'. There are, so it seems to me, a number of grave difficulties with that interpretation.
34. First, I consider it unusual and unattractive for a party to a contract to say, in effect, "I was in breach of contract, but the other side did nothing about it, and now this clause permits me to ignore my default by reference to

subsequent events". It amounts to an attempt by the employer to escape the obvious consequences of his breach. I consider that it would take clear words to permit such a construction of a clause like this. I do not find those words in the proviso to Clause 27.6.5.1.

35. Secondly, the proviso is plainly designed to give a limited benefit to the contractor: to allow him, even where there has been a determination, to recover sums promptly, if it can be shown that the employer has been unreasonable in not paying those sums. On Mr. Coplin's construction there would be no such benefit because, if the employer could rely on all its cross-claims which existed at the date of determination, then what becomes necessary is the detailed accounting exercise envisaged under Clause 27.6.5.2. In other words, if the test of unreasonableness in the proviso of Clause 27.6.5.1 involves a consideration of all current claims and cross-claims, the proviso is adding nothing at all to Clause 27.6.5.2, and is of no benefit whatsoever to the contractor. Indeed, it is rendered redundant. If, on the other hand, the proviso is intended to offer (as I believe it was) a short-cut to payment for the contractor, but only in certain limited circumstances, then my construction at paragraph 32 above is entirely in accordance with that intention.
36. Thirdly, since there will always be a cross-claim for the cost consequences of the determination (usually the cost of completing the work), Mr. Coplin's construction means that, wherever there has been a determination, an employer can rely on the cross-claim to justify non-payment of sums that should have been paid months earlier, and to defeat the effect of the proviso to Clause 27.6.5.1. Again, the proviso would never operate. Again, as a matter of construction of the clause, that seems to me to be an unjustifiable interpretation.
37. Fourthly, Mr. Coplin's approach would mean that what was an unarguable claim for sums due one week would be a claim with a complete defence the next, thus penalising a contractor who failed to commence adjudication proceedings or to suspend work the moment an amount fell due and there was no withholding notice. That would only serve to encourage contractors to suspend work or commence adjudication proceedings as a matter of routine, for fear of the consequences if they did not. That is a construction which I would wish to avoid if there was another available construction which would not have such an unfortunate and un-commercial effect. In contrast, I believe that the construction set out in paragraph 32 above achieves a fair and commercially balanced result.
38. Finally, just stepping back from the detail for a moment, it seems to me that, if the proviso is to be construed in the way that I have set out in paragraph 32 above, it has the additional benefit of meeting head-on many of the concerns which have been expressed about the approach adopted in *Melville Dundas*, to the effect that the decision might allow an unscrupulous employer to use determination as a way of avoiding his responsibility to make interim payments. Indeed, provided that the sum has been due and *'unreasonably not paid'* more than twenty-eight days before the determination then, on my interpretation of the proviso, it would satisfy precisely. Lord Hoffmann's point, at paragraph 13 of his speech, that employers should be *"discouraged from retaining interim payments against the possibility that a contractor who is performing the contract might become insolvent at some future date (which may well be self-fulfilling)"*. My construction would, so it seems to me, also be in accordance with the underlying purpose of the 1996 Act. Furthermore, in circumstances like these, where there is no evidence whatsoever to suggest that the Claimant/contractor is or might be insolvent, my construction of the proviso does not and cannot cause any permanent prejudice to the Defendants. It is not a determination of their rights. All it does is to require them to pay, on an interim basis, the sums which, pursuant to the contract, they ought to have paid months ago.
39. Of course, because the Claimant in this case is not insolvent, I do not need to consider the possible tension between, on the one hand, the clear effect of the proviso as I have construed it, and on the other, the possible risk that the position of the insolvent contractor's secured or unsecured creditors will be improved (as against the employer) if payments are made in accordance with its terms. But, in truth, it seems to me that *Bouygues v Dahl-Jensen* provides a complete answer to that point. As Chadwick LJ explains in that case, an insolvent contractor is not entitled to enforce its right to any further sums following its insolvency. Thus, if the contractor is insolvent, the *"enforcement"* identified in the proviso to Clause 27.6.5.1 would be *"prevented"* in any event.
40. For all these reasons, despite the clear way in which he put his case, I reject Mr. Coplin's construction of the proviso. In my judgment, for the reason that I have given, the natural meaning of the words used provides that a sum due, which has unreasonably not been paid by the employer, is a sum which the employer's agent has said is due under Clause 30.3.3; which sum has not been the subject of a withholding notice under Clause 30.3.4; and the non-payment of which is therefore a breach of contract which occurred more than 28 days before the determination. Furthermore, I consider that this interpretation brings with it a number of common-sense and commercial benefits noted in paragraph 38 above.
41. I conclude that the proviso to Clause 27.6.5.1 operates in this case and prevents the Defendants from relying on their cross-claims to defeat the Claimant/contractor's claim for the sums due. I therefore give summary judgment in favour of the Claimant in the sum of £93,460.33 plus interest.

MISS LUCY GARRETT (instructed by Speechly Bircham) for the Claimant.
MR. RICHARD COPLIN (instructed by Forsters) for the Defendant.