

JUDGMENT : MR JUSTICE CHRISTOPHER CLARKE. TCC. 30th November 2007

1. The claimant – P C Harrington Contractors Limited ("PCH") – is a subcontractor to the defendant - Multiplex Constructions (UK) Limited ("Multiplex") – which is the main contractor for the design and construction of the New Wembley National Stadium. Multiplex's employer was Wembley National Stadium Limited ("WNSL"). PCH was engaged as Multiplex's concrete works package sub contractor under a subcontract dated 26th September 2002 containing certain Conditions. The parties are in dispute as to the effect of an Interim Certificate - No 44 – issued by Multiplex on 20th April 2007 under that sub-contract in relation to a pending adjudication.
2. WNSL took possession of the Stadium on 9th March 2007. This was over two years later than expected.
3. All outstanding disputes between WNSL and Multiplex have been settled. Disputes between Multiplex and PCH remain. PCH has a dispute with Multiplex about the proper valuation of PCH's works and a claim for extension of the time for completion. It has begun an action in which it claims, inter alia, further payment under the sub contract of more than £ 17 million.
4. Multiplex claims that some of PCH's work was defective or incomplete and has had to be carried out by others. It has reflected its claims against PCH for loss and damage in the monthly valuation and certification process laid down by the Conditions.
5. Condition 21 is headed "Payment of Sub-Contractor". It contains a scheme for interim payments. Clause 21.2.1 of the conditions provides that "All interim payments shall be made by the Contractor to the Sub-Contractor in accordance with the following clauses". Under the scheme there is to be a progress inspection on the third Business Day prior to the end of each month: clause 21.2.2. Within 5 business days of that inspection PCH is entitled to make an Application for Payment in respect of the previous month: clause 21.3.1.
6. Each Application for Payment is by clause 21.3.2 to "specify the total amount claimed up to and including the Relevant Month by reference to:
 - . 1 the Gross Valuation ...;
 - ...
 - Less
 5. ... The Retention...; and
 6. all previous payments made to the Sub-Contractor under the Sub-Contract",
7. Clause 21.4. provides that the Gross Valuation is to be the lesser of:
 - "1. the amount specified in the Cumulative Monthly Account column as shown in the Payment Profile;
 - And
 2. the value of the works properly completed... and the value of goods and materials brought to the Site"
8. Clause 21.7 provides for the parties to review each Application for Payment and try to agree the amount due to the Sub-Contractor. If they cannot agree the Sub-Contractor is to issue its Application as it sees fit and the Contractor is to issue a Certificate of Payment in accordance with clause 21.9 "for such amount as the Contractor considers to be due. Any outstanding disagreement between the Contractor and the Sub-Contractor shall be determined in accordance with clauses 38A and/or 38C". Clause 38A provides for adjudication and clause 38C for litigation.
9. Clause 21.9 is headed "Issue of Interim Payment Certificates" and provides as follows:
 - "1. Within twelve (12) Business Days days after the receipt of the Application for Payment under clause 21.3. the Contractor shall issue a certificate (a "Certificate of Payment") certifying what amounts are due to the Sub-Contractor pursuant to this clause 21.9, less any amounts which are to be deducted pursuant to clause 21.10....
 2. All Certificates of Payment shall specify the amount which the Contractor proposes to pay to the Sub-Contractor and basis on which that amount was calculated. Such amount shall become due on the date of issue of the Certificate for payment and final date for payment shall arise ten (10) business days after the date of issue of the said Certificate for Payment"
10. Clause 21.10 is headed "Sums due to Contractor". It provides:
 - "1 Where by virtue of any provision in the Sub-Contract, the Sub-Contractor becomes liable to pay sums to the Contractor or the Contractor becomes entitled to abate amounts against sums due to the Sub-Contractor, the Contractor may:
 - .1 deduct such sums in computing the amount in any Certificate of Payment:
 - .2 issue an invoice to the Sub-Contractor for such sum identifying the amount and the grounds for the Contractor's claim; or
 - .3 do a combination of Clauses 21.10.1 and 21.10.2
 - .2 The amounts specified in such Certificate of Payment and/or invoice shall become due and the final date for payment shall arise ten (10) Business Days after the date of issue of such Certificate of Payment and/or invoice as applicable."
11. Clause 21.11 provides as follows:
 - "21.11 Deductions and Disputes
 - .1 ...

In the event that the Contractor proposes to withhold any amount included in a Certificate of Payment he shall give to the Sub-Contractor a notice of intention to withhold payment specifying:

The amount proposed to be withheld and the grounds for withholding payment; or

If there are more than one ground [sic], each ground and the amount attributable for each.

Such notice shall be given not less than five (5) business days before the final date for payment of the amount from which the withholding is proposed to be made.

.2 ...

In the event that the Sub-Contractor questions the Contractor's entitlement to withhold any amount notified under clause 21.11.1. it shall notify the Contractor in writing no later than two (2) business days before the relevant final date for payment.

Upon receipt of the notice, the Contractor and the Sub-Contractor shall meet in good faith to agree the amount, if any, to be withheld.

.3 If the contractor and the Sub-Contractor cannot agree the sum payable then either the Contractor or the Sub-Contractor may refer the matter for resolution under clauses 38A and/or 38C."

12. There is an issue between the parties as to whether deductions can be made under clause 21.10 otherwise than by agreement. The dispute arises because clause 3 of the Conditions provides:
- "Where in Sub-Contract it is provided that an amount is to be added to or subtracted from the Sub-Contract Sum or dealt with by adjustment of the Sub-Contract Sum or included in the computation of the Ascertained Final Sub-Contract Sum, then as soon as such amount is ascertained and agreed in whole or in part such ascertained amount shall be taken into account in the computation of the payment next following such whole or partial ascertainment and agreement".*
13. I do not regard this clause as having the effect that any deduction under clause 21.10 can only be made with the agreement of the Sub-Contractor. Clause 21.10 makes no reference to any agreement being required nor does clause 21.9.1, which requires the making of clause 21.10 deductions, contain any indication that the only deductions to be made in the interim certificate process are consensual ones. That would be somewhat inconsistent with the interim nature of the process. Even if a deduction under clause 21.10.1 had to be by agreement, a withholding under clause 21.11 does not.

The facts

14. The events which led to the present dispute are these. In April 2007 PCH submitted its Application for Payment No 53 to Multiplex in respect of the works executed by it up to March 2007 in which it sought payment in the sum of £ 13,437,726.30. Perhaps because it is PCH's position that Practical Completion was deemed to have occurred the Application for Payment claimed that 100% of the work comprised in the Tender Summary had been done producing a total value for the works of £ 45,185,925. The Application then added (i) claims for variations and claim items, (ii) made no allowance for a previous deduction (effectively reversing it), (iii) deducted certain amounts in respect of "Abatement" and "MPX contra charges" and (iv) made no allowance in respect of a previous positive adjustment, again effectively reversing it.
15. The application produced a balance of £ 13,437,726.30 after allowing for the last payment as follows:

	Last Payment	This Application	Balance
TOTAL	£ 47,057,523.87	£ 45,185,925	- £ 1,871,598.87
Variations	£ 4,778,610.30	£ 11,468,704.64	£ 6,690,094.34
PCH Claim items	£ 1,775,482.83	£ 11,555,051.02	£ 9,779,568.19
Client deduct	-£ 250,000	£ -	£ 250,000.00
Abatement	-£ 18,477.50	-£ 266,897.37	-£ 248,419.87
MPX Contra charges	-£ 1,424,850.73	-£ 383,690.19	£ 1,041,160.54
Moratorium Adjustment	£ 2,203,078.03	£ -	-£ 2,203,078.30
Gross Values	£ 54,121,366.80	£ 67,559,093.10	£ 13,437,726.30

16. On 20th April Multiplex wrote to PCH enclosing Interim Certificate of Payment No 44. together with various appendices giving detailed grounds for deducting and/or withholding. The letter with its enclosures was expressed to constitute Multiplex's notice of intention to deduct and/or withhold payment of £ 24,063,199.73. (This was the total amount of withholdings/deductions in respect of the contract to date).

17. The Certificate contains the following entries:

	TO DATE	MPX MAY 2005 CERTIFICATE	BALANCE DUE IN THIS CERTIFICATE
Contract Works (including Discount)	£45,185,925.00	£47,444,460.19	-£2,258,535.19
Variations and Claims	£12,886,702.16	£6,002,343.20	£6,884,358.96
Original Moratorium ¹	£0.00	£2,203,078.03	-£ 2,203,078.03
Net Payment	£ 58,072,627.16	£ 55,649,881.42	£ 2,422,745.74.
Less Retention @ 5%	-£ 2,903,631.36	-£ 2,782,494.07	-£ 121,137.29
Net Payment This Month (before deductions)	£ 55,169,995.80	£ 52,867,387.35	£ 2,301,608.45
Less amount deducted and/or withheld pursuant to Clause 21.10 and/or 21.11	-£ 14,576,733.79	-£ 1,528,514.63	-£ 13,048,219.16
Net Amount	£40,592,262.01	£51,338,872.72	-£10,746,610.71
Add VAT @17.5%	£7,103,645.85	£8,984,302.73	-£1,880,656.88
Gross Amount	£47,695,907.86	£60,323,175.45	-£12,627,267.59

Note 1 The certificate contains an explanation "(adjustments in this certificate included in line items for variations and claims including adjustment for floor moratorium)".

18. Accompanying the certificate was a table which explained which figures Multiplex had taken in place of those in the PCH application:

Item	PCH Application	Multiplex figure
TOTAL Tender Items	£ 45,185,925	£ 45,185,925
PCH Variations	£ 11,468,704.64	£ 9,393,185.23
PCH Claim Items	£ 11,555,051.02	£ 3,493,516.93
PCH Abatement	-£ 266,897.37	-£ 283,794.74
PCH MPX Contra charges	-£ 383,690.19	-£ 14,292,939.05
TOTAL	£ 67,559,093.10	£ 43,495,893.37

19. The figure of £ 58,072,627.16 in the Certificate is the product of £ 45,185,925 + £ 9,393,185.23 + £ 3,493,516.93 i.e. all the positive items. The figure of - £ 14,576,733.39 is the product of -£ 283,794.74 and - £ 14,292,939.05.
19. As can be seen the Certificate provides for a Nett payment this month, after Retention, but before deductions of £ 2,301,608.45. From that the "amount deducted and/or withheld pursuant to Clause 21.10 and/or 21.11" is £ 13,048,219.16 producing a Nett Amount of "- £ 10,746,610.71". As a result nothing was, under the certificate, due to PCH.
20. The £ 13,048,219.16 deducted was made up of various claims by Multiplex in respect of allegedly incomplete or defective work, one of which was a claim for £ 1,658,665 in respect of alleged but disputed defects in the concrete floors poured by PCH. Multiplex claims that PCH failed to achieve the required specifications with regard to floor tolerance, flatness and finish and that Multiplex had to get other contractors to finish off the work. In July 2007 Multiplex wrote to PCH and asked them to accept liability for the defective floors and to pay the costs of associated remedial works totalling £ 2,070,110.50. The difference between that figure and the earlier figure of £ 1,658,665 appears largely referable to the addition of a claim for consequential losses. In September Multiplex's solicitors wrote to say that unless PCH accepted liability and made that payment within 14 days Multiplex intended to refer the matter to adjudication. PCH declined to make the payment sought.

21. As is apparent from the above the £ 2,070,110.50 claimed by Multiplex in respect of the floors is less than the £ 2,301,608.45 "Nett Payment this month (before deductions)" figure in the Certificate. In the light of that, and given that the floors claim had formed part of the amount deducted in the certificate, PCH sought an undertaking from Multiplex that it would not proceed with the proposed adjudication. PCH's claim is that the £ 2,301,608 figure is an amount that Multiplex has certified as due and that, since Multiplex's claim in respect of the floors is less than that sum, it cannot recover any monetary award in any adjudication in respect of the floor issue, although it may be able to establish its entitlement to damages from PCH. Multiplex declined to give any undertaking and on 28th September issued a Notice of Adjudication in respect of the floors issue seeking, inter alia, an order that PCH pay Multiplex £ 2,070,110.50.

The Housing Grants Construction and Regeneration Act 1996

22. Both sides pray in aid the provisions of Sections 109 to 113 of the Housing Grants Construction and Regeneration Act of 1996 ("the Act"), since it is common ground that clause 21 should, so far as possible, be construed so as to comply with the provisions of the Act. The Act provides that a party to a construction contract is entitled to stage payments in all contracts other than those with a specified or estimated duration of less than 45 days.

23. The relevant provisions of the Act are as follows:

" 109. Entitlement to stage payments.

...

(2) *The parties are free to agree the amounts of the payments and the intervals at which, or the circumstances in which, they become due.*

...

" 110. Dates for payment.

(1) *Every construction contract shall –*

(a) *provide an adequate mechanism for determining what payments become due under the contract, and when, and*

(b) *provide for a final date for payment in relation to any sum which becomes due.*

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

(2) *Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if –*

(a) *the other party had carried out his obligations under the contract, and*

(b) *no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,*

specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.

...

111. – Notice of intention to withhold payment.

(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 this section.

(2) *To be effective such a notice must specify –*

(a) *the amount proposed to be withheld and the ground for withholding payment, or*

(b) *if there is more than one ground, each ground and the amount attributable to it,*

and must be given not later than the prescribed period before the final date for payment.

(3) *The parties are free to agree what the prescribed period is to be. ..."*

PCH's submission

24. PCH contends that the contract envisages that Multiplex, as certifier, will go through a three stage process. The process specified is consistent with the approach of the common law. It also fulfils the requirements of the Act that the contract should provide (a) a mechanism for determining what payments become due under it and (b) for the giving of notice of the amount proposed to be paid, the basis upon which the amount is calculated, and the amount to be withheld.

25. The first step of the process is to identify the sums that are due to PCH for the work. The second is to determine the deductions and withholdings that fall to be made from the sums otherwise due. The third is to compute the payment to be made, by deducting the amount determined at the second stage from that determined at the first.

26. That process has been carried out as follows::

(a) The sum of £ 2,301,608.49 represents the "amounts which are due to the Sub Contractors pursuant to this clause 21.9" as required by clause 21.9.1.

(b) The sum of £ 13,048,219.11 represents the "amounts which are to be deducted pursuant to clause 21.10" as required by the same clause

(c) As a result the "amount which [Multiplex] proposes to pay to [PCH]" per clause 21.9.2. of the Conditions is nil. The "basis upon which that amount was calculated" is apparent from the Certificate, (since £ 2,301,608.49 - £ 13,048,219.11 produces a minus figure), and the documentation provided with the certificate.

PCH submits that, in seeking an adjudication in respect of its £ 2,070,110.50 Multiplex is seeking both to make a deduction and to seek payment in respect of its claim. In any adjudication Multiplex will be bound to recognise that £ 2,301,608.45 is due to PCH and, accordingly, it will not be able to claim any monetary sum in respect of the floors. It can ask the adjudicator to decide whether PCH is liable to Multiplex in respect of the floors and, if so, for what. But no monetary award can be made because account must necessarily be taken of the amount certified as due. The position might be different if Multiplex had initiated (or initiates in future) an adjudication covering claims other than the floor issue. If it were to establish before an adjudicator several claims which together exceeded £ 2,301,608.45 in value it could recover the excess. But that is not what it seeks to do.

27. It is common ground that the contract is not felicitously drafted. In particular it is not clear exactly what is meant by the expression "Certifying what amounts are due to the Sub-Contractor pursuant to clause 21.9". Clauses 21.11.1 and 21.11.2 are redrafts of the original and are apparently designed to ensure that the contract did not fall foul of the Act, but it is unclear what exactly the expression "any amount included in the Certificate" is intended to cover.

Multiplex's case

28. Multiplex contends that clause 21 is a mechanism for producing interim payments. It provides PCH with an entitlement to payment only in respect of the amount specified in an Interim Payment Certificate as the amount which the Contractor proposes to pay. It is "such amount" that shall become due on the date of the certificate and payable ten business days later in accordance with clause 21.9.2.
29. Multiplex draws particular attention to three matters. Firstly, although clause 21.9 requires a certificate of what amounts are due to the Sub-Contractor there is to be deducted from those amounts the amounts which are to be deducted pursuant to clause 21.10 or are the subject of a notice under clause 21.11.1. Clause 21.10 provides that the Contractor may in computing the amount in any Certificate of Payment deduct sums (a) that "the Sub-Contractor becomes liable to pay ...to the Contractor", which would extend to sums that the Contractor is entitled to set off, and (b) sums that "the Contractor becomes entitled to abate ... against sums due to the Sub-Contractor". The character of both of these permitted deductions, and particularly the latter, is such that the sum from which they may be deducted is, to the extent of the deduction not "due" at all. A sum cannot be due if the contractor is never bound to pay it and the contractor is never bound to pay an amount in respect of which he has a right of abatement or set off.
30. Secondly, Multiplex points to the contents of the Application for Payment and the explanatory schedule provided with the Certificate. That application reveals that PCH itself accepted that amounts fell to be deducted, by way of abatement and contra charges, from the positive items in its favour on the account. Multiplex claimed to deduct more by way of abatement and contra charges. Its schedule demonstrated clearly that the £ 2,301,608.45 figure represented the sum of certain positive items (Tender Sum, Variations and PCH Claims), less what was previously allowed for under those headings. The figure takes no account of any abatement or any claim, not even in the amounts accepted by PCH. It cannot therefore be taken to represent the sum that is due.
31. Thirdly, the Gross Valuation is required to state the amount specified in the Cumulative Monthly Amount column (which is in fact £ 45,185,925) or, if less, the value of the works properly carried out. Clause 21.4 does not specify that the works must have been carried out by the Sub-Contractor. If, therefore, as has happened in the instant case, the Sub-Contractor's work has been completed by others, the gross valuation will still include as a positive item the valuation of the complete works (even if the Sub-Contractor has not carried out all of them) and there will then be a claim for the cost of work done by others. This method of accounting has the effect that the Contractor only recovers, in relation to incomplete work, the excess of the price he has to pay a third party over the cost of the works if carried out by the Sub-Contractor. But the inclusion of the full value of the works properly carried out or the amount in the Cumulative Monthly Amount column cannot represent the amount that is due to a sub-contractor who has not performed all of the work.
32. This approach to the contract is, it is submitted, consistent with section 110 (1) of the Act which requires a contract to provide a mechanism for determining what payments become due under the contract (s. 110 (1) (a)); and when these sums become due (s 110 (1) (a)); and a final date for payment in relation to any such sum (s.110 (1) (b)). These three stages all relate to *the same sum*. There is not, as PCH would have it, a sum that becomes due - £ 2,301,608.49 - and a different sum that becomes due and later payable, after deduction. If clause 21.9 involves, as PCH claims, a two stage process of calculating (a) the sum due (regardless of deductions) and (b) the sum due after deductions then there is no mechanism for identifying when the former sum is due. That would be inconsistent with the Act.
33. PCH submit that the fact that Multiplex have specified as a Nett Payment a sum which contains all the positive items and deducts none of the negative items, even those accepted by PCH, is their misfortune. Having chosen to certify in this manner, they are bound, at any rate for the moment, to accept that the amount due to PCH is £ 2,301,609.45.

Conclusion

34. The true construction of clause 21 is to be discerned by considering its purpose. Clause 21 is a scheme for the making of interim payments; not, as Jacob, LJ, observed in *Rupert Morgan Building Services (LLC) Ltd v David Jervis and Harriet Jervis* [2003] EWCA Civ 1563 in respect of comparable but by no means identical provisions, "a means of establishing the ultimate position of the parties". It relates to cash flow. The amount of cash that is to be paid is to be the sum specified in the certificate as the amount that the Contractor proposes to pay. In requiring the Contractor to certify "what amounts are due to the Sub-Contractor pursuant to this clause 21.9 less any amounts which are to be deducted pursuant to clause 21.10 or are the subject of a notice under clause 21.11.1" the clause requires the Contractor to make a series of calculations on the way to a final figure, which is what he proposes to pay, and which, when he has calculated it, will become due and then payable shortly thereafter. The sum due is determined by the Certificate.
35. Clause 21.9.1 does not explain how the amounts "which are due to the Sub-Contractor pursuant to" it are to be calculated. But it is apparent from clauses 21.7, 21.10 and 21.11 that the contractor is to determine what it considers to be due, disregarding for the moment any items of set off, counterclaim, abatement or withholding, which are then to be deducted. Sums that the sub-contractor "becomes liable to pay to the contractor" will, if not the subject of abatement, be sums that, in most cases, the Contractor can set off and will, in any event, be sums which he can counterclaim, and thus fall within clause 21.10. Any portion of the sum of the positive amounts in the account that the Contractor does not propose to pay the Sub-Contractor may also be regarded as an amount which he proposes to withhold (whatever the legal basis upon which he seeks to do so) and thus fall within 21.11, provided that he gives the requisite notice.
36. Accordingly the sum of £ 2,301,608.45 is not a figure which PCH can take to be anything other than the aggregate of the positive amounts in Multiplex's calculations. The figure may include, as in the present case it does, positive amounts that have to go into the calculation (e.g. the value of work not carried out by PCH) in order that Multiplex's damages claim is not overstated, and in order that the basis of calculation is set out – as required by the Act. Such credits may be due as a credit to the Sub-Contractor in the calculation which clause 21 requires to be made, and in that sense are amounts "due to the Sub-Contractor pursuant to this clause 21.9". But the £ 2,301,608.45 figure does not represent what Multiplex accepts or certifies to be due in the sense of being a sum that PCH is entitled to receive. On the contrary the contract, the certificate, and the explanation of it given in the schedule, makes clear that Multiplex does not accept that PCH is entitled to anything. PCH cannot take the credit items in its favour without the debit items which form an intrinsic part of the calculation.

The adjudication

37. Multiplex has initiated an adjudication in relation to the floor issue. It was common ground, that since Multiplex has claimed a monetary sum, it would be within the scope of the adjudication for PCH to raise any claims to payment that it may have, at any rate if they are capable of adjudication within the relevant time limit, in order to defeat Multiplex's monetary claim; although if it sought, itself, to recover a monetary sum from Multiplex it would have to initiate an adjudication of its own. PCH can, for instance, lay a claim in respect of a variation that Multiplex has not accepted. Similarly PCH has a right under clause 21.11.2, subject to the time limit there specified, to challenge, and, if necessary, seek an adjudication on the validity of the deduction made in the Certificate.
38. What, however, in my judgment, it cannot do, is claim that Multiplex has certified or accepted that £ 2,301,608.45 is now due and payable to PCH

Clause 21.11.

39. Given its language it is apparent that clause 21.11 in the form in which it appears in the Sub-Contract was included in order to ensure that the Sub-Contract did not fall foul of the Act. The parties are in dispute as to what is the "amount included in the Certificate" which Multiplex proposes to withhold. PCH submitted that the amount was the £ 2.3 million upon the footing that that is the sum which, but for withholding would otherwise be due. Multiplex submits that it is the £ 13,038,219.16 which is described in the certificate as the "amount deducted and/or withheld pursuant to clause 21.10 and/or 21.11". Since the purpose of the provision and of sections 110 and 111 of the Act is to ensure that the Sub-Contractor knows the basis of the payment calculation, the amount proposed to be withheld, and the grounds for withholding it seems to me that the amount in question is the £ 13,048,219. That is the full amount that Multiplex seeks to withhold, even though, provided that at least £2.3 million is withheld, nothing will be due. Further Multiplex would rely, if need be, on each of the constituent elements of the aggregate figure, since any one or more of them may be declared invalid and it will need to have given timeous notice of the grounds for withholding, otherwise it will find itself debarred by clause 21.11.1.
40. Accordingly I decline to grant the declaration sought, which was to the effect that PCH would start the adjudication with £ 2.3 million in hand. I shall hear Counsel as to what order should, in the light of these conclusions, be made upon the application other than to dismiss it.

Miss Fiona Parkin and Mr Simon Crawshaw (instructed by Speechly Bircham) for the Claimant
Mr Manus McMullan and Mr Mark Chennells (instructed by Nabarro) for the Defendant