Millers Specialist Joinery Co. Ltd v Nobles Construction Ltd [2001] Adj.L.R. 08/3

JUDGMENT: **His Honour Judge Gilliland** QC : 3rd August 2001. Salford County Court. TCC

1. This is an application by the claimant for summary judgment pursuant to CPR part 24.2 on the grounds that the defendant has no real prospect of successfully defending the claim. The claim is for payment for goods and for joinery services supplied to the defendant in connection with a construction project at the Triangle in the centre of Manchester. The pleaded claim is for £35,714.21 under 10 invoices rendered by the claimant to the defendant between 26 June 2000 and 26 September 2000 at or towards the end of the works. These are the only invoices which have not been paid. Copies of the invoices are annexed to the particulars of claim dated 7 November 2000. There is also a claim for interest on these invoices under the Late Payment of Commercial Debts (Interest) Act 1998 and also for interest on the late payment of other invoices listed in Schedule 3 to the particulars of claim. There is a data in the alternative for interest under S.69 of the County Courts Act 1984.

2. Each of the invoices states on its face that terms are 30 days net and the defendant has not disputed that it was a term of the agreement between the parties that the date when the invoices became due for payment under the contract was 30 days after the relevant invoice. The defendant opposes the application for summary judgment on the following bases; first, that as to a sum of £7127.40 there has been a double charge because the claimant has rendered invoices and been paid for the cost of mouldings as the agreed daywork rate also included the supply of materials; secondly, that as to £8400 it is disputed that the agreed dry work rate of £22.50 applied to the work of polishing new joinery at the Triangle as opposed to refurbishing existing joinery; thirdly, that as to the balance, there is a dispute whether the claimant is entitled or bound to deduct tax in respect of the labour content of the work carried out by the claimant or its sub contractors. The parties have agreed that the matter of the tax requires some further investigation and the claimant has not pursued its application for summary judgment in relation to the sum of £16,005.96 retained by the defendant on that issue. The amounts in issue are thus the sum of £7127.40 in respect of the mouldings and £8400 in respect of the polishing. The defendant says that the correct rate for the polishing of new joinery is £14.50.

3. The claimant's case is straightforward. It is that the contract between the parties was a construction contract within s104 Housing Grants, Construction and Regeneration Act 1996, that the defendant did not give any effective notice of intention to withhold payment under the invoices within the period of 7 days before the invoices became due for payment, and that accordingly under S. 111(1) of the 1996 Act the defendant is not now entitled to withhold payment of the invoices. The claimant submits that the amounts of the invoices are "*sums due under the contract*" within S.111 (1). The consequence, the claimant submits, is that the defendant cannot defend the claim on the grounds that the mouldings are included within the agreed rate or that the agreed rate for the polishing of £22.50 does not apply to the polishing of new joinery and that only the lower rate of £14.50 can be recovered for that work.

4. The defendant, apart from submissions on the merits, has made 3 principal legal submissions. First, that Part II of the 1996 Act and thus S.111 has no application to the agreement between the parties because Part II only applies to construction contracts which are in writing within the meaning of S.107 of the 1996 Act and this agreement was neither in writing nor evidenced in writing. Secondly, if that submission is wrong, that there was no need for the defendant to have given any notice of intention to withhold payment under S111 (1) because the sums in dispute are not sums which were "due under the contract". Thirdly because a Judgment in the claimant's favour under CPR part 24 is a final judgment and would prevent the defendant from raising the defences on the merits it seeks to rely on, there is a good reason why the matter should be disposed of at trial and not summarily. Accordingly it is submitted the application should be dismissed.

The contract

5. The claimant began working at the Triangle in December 1999 but the terms of the contract were not agreed until a meeting between Mr. Dunbar of the claimant and Mr. Dalton, the defendant's quantity surveyor, on 11 January 2000. On 12 January Mr. Dalton wrote a letter to the claimant marked for the attention of Mr. Dunbar. The opening sentence states: "Further to our meeting yesterday regarding the restoration joinery works may we confirm the following".

There are then set out various terms in relation first to stripping works, next in relation to general joinery and repair works and staining and polishing works and confirmation that the rate of payment was to be £27.50 an hour inclusive of various materials. The rate of £27.50 was subsequently retrospectively varied to £22.50 an hour. Finally there were provisions relating to repairs to porticos, screens, lobbies, staircases etc. which were to be carried out off site apart from some minor staining. A fixed lump sum price was to be provided as the works proceeded. Nothing however turns on the absence of any lump sum price and the defendant has not relied on that provision. The letter concluded: "We trust that the aforementioned meets with your requirements and look forward to your continued co-operation".

I was told by Miss Pennifer, counsel for the defendant, that Mr. Dunbar had also written to Mr Dalton following the meeting setting out what he understood bad been agreed. That letter crossed in the post with Mr. Dalton's letter. Mr. Dunbar's letter is not strictly in evidence but Miss Pennifer without objection read out its contents. It does not appear that there is any material difference as to what Mr. Dalton and Mr. Dunbar considered they had agreed. Neither appears to have replied to the letters they received. In paragraph 7 of his first witness statement dated 6 December 2000, Mr. Scarisbrick, who is the quantity surveyor dealing with the matter on behalf of the defendant and the defendant's principal witness, said of Mr. Dalton's letter dated 12 January: "Nobles wrote to Millers by letter of 12 January 2000 confirming the agreement reached with regard to the work to be carried out by Millers". That has not been disputed by the claimant and it is clear in my judgment that both parties accept that Mr. Dalton's letter is a correct record of what had been agreed at the meeting.

The Mouldings

6. Of the 10 invoices for which the claimant is seeking payment in these proceedings, only 5 include items for mouldings. These are invoices 2817, 2855, 2856, 2885, and 2912. Invoice 2817 is not one of the invoices listed by Mr. Scarisbrick in the defendant's statement of the final account on pp. 6A-C of his first witness statement and is not included in the calculation of the total deductions of £7127.40 claimed to be deductible in respect of the mouldings. The invoiced amount for mouldings in Invoice 2817 is only £36.33 excluding VAT. It is apparent from the defendant's statement of the final account that the sum of £7127.40 does not include any VAT. The remainder of the items in Invoice 2817 do not relate either to mouldings or to polishing. The amounts charged for mouldings in the other 4 invoices now being claimed are £836.57 (Invoice 2855), £559.96 (Invoice 2856), £459.55 (Invoice 2885), and £277.58 (Invoice 2912). I have taken these figures from the defendant's statement of final account at pp. 6A-C. The figures are consistent with the invoices although the descriptions are not always the same in the invoices. Of the total of £7127.40 retained, only £2,133.66 arises under the invoices now claimed for and the balance of £4,993.74 is money which the defendant has already paid under other invoices. The defendant's claim that it has a defence as to £7127.40 in respect of the mouldings thus has 2 different aspects. The first as to £4993.74 is a defence by way of a counterclaim or set-off to recover monies previously overpaid on other invoices. The second is that the sum of £2,133.66 is not actually payable under the invoices now claimed for because the claimant is not entitled under the contract to charge for those items. To the sum of £2,133.66 there should be added £36.33 in respect of Invoice 2817 making a total of £2,168.99 which can be said to be disputed under the invoices now being claimed for.

Polishing

7. Only Invoices 2845, 2884, 2939, and 2962 relate to polishing work. £7206.87 has been paid under Invoice 2845 leaving an unpaid balance of £3976.19 (including VAT). The total unpaid under these invoices is £29,832.06 inclusive of VAT. None of the invoices in respect of which summary judgment is sought on its face relates to polishing new joinery as opposed to polishing existing or refurbished joinery work. Each of the invoices refers to stripping, repairing and making good. There has been no suggestion that the invoices are inaccurate in their description of the polishing work which the claimant has carried out. The defendant has not provided any breakdown of its calculation of the £8,400 or stated to which invoices the calculation relates. The defendant indeed has not actually stated that any of the 4 outstanding invoices includes a claim for polishing work on new joinery or on new

joinery supplied by the defendant. The defendant has not, it seems to me, actually provided may evidence to show that the unpaid invoices include a charge for polishing new joinery. It is clear that a substantial part of these unpaid invoices cannot on any view relate to polishing new joinery because the unpaid amount of these invoices' exceeds by about 3 times the total amount of £8400 claimed to be deductible. In my judgment the defendant has not provided any evidence which would support a suggestion that any of the invoices the subject of the claim makes a charge in respect of polishing new joinery as opposed to polishing existing or refurbished joinery. There is no factual basis for any suggestion that there has actually been an overcharge in these 4 invoices. The claim to deduct or retain £8,400 can only be a claim to deduct overpayments which have already been made under other unspecified invoices.

8. The defendant's claim to be entitled to retain £7,127.40 in respect of the mouldings is based on the terms of Mr. Dalton's letter of 12 January 2000. Under the heading of ***"general joinery repair works"*** it was stated that all the general joinery repair works itemised in the scope of works at pp. IJ/11 to IJ/34 would be carried out by the claimant and the letter then provided as follows: "We would confirm that you will provide such works at the rate of [£22.50] per hour. This rate applies to works carried out either by joiners or polishers and includes all necessary replacement materials, staining/polishing materials (including tillers and veneers, etc.) small tools, plant, travel time, parking fees and out of hours working if required."

   The defendant's claim that the cost of the supply of the mouldings falls within this provision implicitly asserts that the mouldings in question were replacement materials. The claimant's claim implicitly asserts that they were not. It is impossible in my judgment on the failed evidence at present before the court to reach any conclusion as to whether the claimant or the defendant is correct. The evidence amounts in substance only to an assertion and a counter assertion on a disputed matter of fact which cannot be resolved. It must follow in my judgment that so far as the media of this defence are concerned, if the matter were to proceed to trial, the defendant might turn out to be correct. Equally it may be that the claimant would prove to be correct. It cannot fairly be said in my judgment that the defendant has no real prospect of establishing at trial that the agreed rate does include for the cost of the mouldings which are in issue.

9. The defendant's contention that the agreed rate does not apply to polishing areas of new joinery as opposed to polishing areas where the joinery is also being repaired cannot it seems to me be said to have no real prospect of success. The extent of the works included within the repair works is in principle to be ascertained by what has been itemised in the scope of works referred to. The evidence of Mr. Scarisbrick (Paras. 15 and 16 of his first witness statement) to that "by way of variation additional areas of polishing were given to Millers to undertake. These comprised areas of entirely new joinery work as opposed to refurbishment of existing joinery work, such polishing to new joinery work does not require the provision of replacement moulding and materials that were included within the original sub-contract rates. Whilst the polishing work to new and existing joinery are analogous to a degree, the rate for polishing existing joinery needs to be fairly adjusted to take account of the reduced scope of work in respect of polishing new joinery". That evidence has not been challenged or contradicted. If as Mr. Scarisbrick states the areas in question were additional areas and were added to the contract works by way of a variation and thus by implication not within the scope of work referred to, it is arguable that the agreed rate will not apply as a matter of contract because that work is not within the original contract. The issue may then become what is a reasonable rate for the work. It may be that £22.50 is a reasonable rate for what was actually done. It may be that £14 50 is a reasonable rate. What is a reasonable rate will however depend upon facts which are not in evidence. Alternatively it may be that it should be inferred that there was an implicit agreement or understanding or that the claimant reasonably believed that the same rate was applicable to the additional work. However that will depend upon facts which are not in evidence. It is clear that the defendant only raised this point after the work had been carried out and nothing appears to have been said to the claimant to indicate that a different rate was applicable. The defendant also paid invoices claiming £22.50 without demur. What appears to have happened is that when Mr. Dalton

came to review all the claimant's invoices after the completion of the work he proposed an amendment to the rate of £22.50 because the defendant had actually provided most of the new wood which had been polished and that a reduction was justified accordingly. See his letter dated 20 October 2000. Although I have some doubt whether the defendant would actually succeed at trial on the matter of the polishing of the new joinery work, I do not consider that the matter is so clear that it can properly be said that the defendant has no reasonable prospect of establishing at trial that the work in question was outside the agreed rate and that a reasonable rate for polishing new joinery work was less than £22.50. There is no evidence before the court to show what works were within the original scope of works or whether the new work referred to by Mr. Scarisbrick was in a different area as he appears to suggest.

10. If the matter had stopped there, it would follow that the claimant would not succeed in obtaining summary judgment in respect of the disputed sums of £7,127.40 and £8,400 because it cannot be said that the defendant did not have a reasonable prospect of establishing either that it had valid counterclaims upon which under the general law it could rely as an equitable set-off by way of defence or that £2,169.99 was not payable for the mouldings. However the claimant relies on Part II of the 1996 Act and in particular upon S.111 as preventing the defendant from withholding payment under the invoices and thus depriving the defendant of any right it might otherwise have had of retention in respect of any previous overpayments. The claimant contends that the failure of the defendant to serve a valid notice under S.111 (1) prevents the defendant from withholding payment of any disputed amounts under the 10 invoices. On the figures, that amount is only £2,169,99 excluding VAT.

11. The first question is whether the agreement which was made between Mr. Dunbar and Mr. Dalton in January 2000 is a construction contract within S.104 of the 1996 Act. in my judgment the agreement was clearly an agreement for the carrying out of "construction operations" as defined in S.105. The works agreed to be carried out were works of repair and or alteration and or decoration. Miss Pennifer submitted that in relation to the supply of materials the contract fell within the exception in S.105 (2) (d) for the manufacture or delivery to site of materials but the there is in my judgment no basis for that submission. There can it seems to me be no doubt that the claimant was not only supplying materials but was under the contract also to install the joinery items. The basis of Mr. Scarisbrick's evidence is (i) the mouldings were included in the rate which is a rate for carrying out joinery and polishing work and (ii) a reduced rate should be applied in respect of polishing new joinery work. Both these contentions are predicated on the basis that the contract between the parties was a contract for the carrying out of joinery and polishing work and not a contract for the supply of materials. It is true that in relation to the claim to retain income tax in relation to the labour element of sub-contracted work, the claimant did contend that the work was outside the very similar definition of "construction operations" to S. 567 of the Income and Corporation Taxes Act 1988, and that the supply of materials did not attract any deduction of tax, but whatever may be the correct interpretation of that section, it is in my judgment clear that the contract between the parties was not a contract for the supply and delivery of goods to the site but was a contract which also provided for their installation. Accordingly the exception in S. 105 (2) (d) does not apply.

12. The next issue is whether S107 (1) excludes the agreement from Part II of the 1996 Act. The subsection provides that Part II only applies where the construction contract is *"in writing"*. By S.107 (2) it is provided:

"There is an agreement in writing"

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by an exchange of communications in writing, or

(c) if the agreement is evidenced in writing."

Miss Pennifer submitted that the agreement which was made in this case was an oral agreement between Mr. Dunbar and Mr. Dalton. That I consider is clearly correct because Mr. Dalton's letter of 12 January is a letter confirming what had been agreed at the meeting on the previous day. In those circumstances the agreement however would appear to fall within S 107 (2) (c) since the letter clearly

"evidences" or records what had been agreed. Miss Pennifer however drew attention to S. 107 (4) which provides:

"An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties or by a third party with the authority of the parties to the agreement."

Miss Pennifer submitted that there was no evidence that Mr. Dalton had ever been authorised by Mr. Dunbar to record in writing what had been agreed and that accordingly S. 107 (4) had not been satisfied. That submission is I consider correct. There is nothing to indicate that Mr. Dunbar or anyone else from the claimant ever authorised Mr. Dalton to write the letter as a record of what had been agreed and I do not accept that such an inference should be drawn from the use of the word "confirm". On its face the letter is simply a letter written by one party recording what he understood had been agreed. The fact that Mr. Dunbar also wrote a similar letter to Mr. Dalton also indicates to me that he had not authorised Mr. Dalton to record the terms on his behalf. The inference is that he intended to provide Mr. Dalton with his own record of what had been agreed. This would have been entirely unnecessary if it bad been understood expressly or implicitly that Mr. Dalton had been authorised to produce the record of what had been agreed. Paragraph 7 of Mr. Scarisbrick's witness statement cannot be treated as a ratification of any lack of authority because Mr. Dalton did not purport to write the letter as agent.

13. Miss Pennifer next submitted that because s107(4) had not been satisfied, the agreement was not "evidenced in writing" for the purposes of s107(2)(c). 1 do not accept that submission. It involves the view that subsection (4) provides an exhaustive definition of what is meant in sub-section (2)(c) by the words "evidenced in writing". Sub-section (4) however is not expressed to be a definition setting out what was meant by the words "evidenced in writing". It merely states that an agreement will be evidenced in writing where it has been recorded by a person with the authority of the parties. It does not state that this is the only way in which an agreement may be evidenced in writing. In the present case both parties accept that Mr. Dalton's letter of 12 January is a correct record of what had then been agreed. That in my experience is a classic example of when an agreement can in the ordinary and accepted signification of the words be described as being "evidenced in writing". It would in my judgment be remarkable result if a document which the parties accept is a correct record of what had been agreed was not to be regarded as written evidence of what they had agreed. There does not appear to be any rational justification for excluding such a document from the definition of a construction contract under Part II of the 1996 Act and insisting on a requirement that authority to record the terms must have been given before an agreement can be said to evidenced in writing and thus be a construction contract for the purposes of Part II. Authority is only relevant where the document is to be treated as binding or effective without any further step or assent being necessary. In my judgment the words "evidenced in writing" in ss(2)(c) are used in their ordinary sense as referring to a written document which sets out or refers to the relevant terms of the agreement and sub-section (4) is not intended to restrict the application of sub-section (2)(c). Sub-section (4), like sub-sections (3) and (5), rather is a provision which widens or extends the ambit of what is to be regarded as an agreement in writing for the purposes of Part II of the 1996 Act. It is probably directed to the situation where at or after a meeting it has been agreed that someone should prepare minutes of what had been agreed and the effect of the provision is to make clear that the minutes themselves are to be treated as written evidence of the agreement even if it cannot be shown that the minutes have actually been assented to by all the parties.

14. It follows that Part II of the 1996 Act is in my judgment applicable to the agreement. Part II contains a number of different provisions. First, under S.108 provision is made for adjudication and any party has the right to refer disputes to an adjudicator whose decision must be given within a short period of time and which will be binding on the parties unless and until the dispute has been finally determined by legal proceedings, by arbitration where applicable, or by agreement. See S. 108(3). Adjudication thus is intended to provide a quick summary means whereby disputes can be resolved on a temporary basis and payments of disputed sums can be ordered to be made without the need to commence possibly lengthy and costly litigation or arbitration proceedings. It is not however

incumbent on a party to make use of the adjudication process if he does not wish to do so and a party may, as the claimant has done in the present case, proceed straight to litigation (or to arbitration if it is applicable). Even after having commenced legal proceedings a party can, if he wishes, still refer the dispute to adjudication. Herschel Engineering Ltd v Breen Property Ltd [2000] BLR 272.

15. Secondly S.109 to S.113 of the 1996 Act make provision in relation to payments under construction contracts. S.109 provides for stage payments. S.110 makes provision as to when payments become due under construction contracts and for a final date by which payments which have become due must be paid. Under S.110 (2) provision is also made for a notice to be given not later than 5 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 or (b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts".

The notice must state the amount, if any, of the payment made or proposed to be made and the basis on which the amount has been calculated. S.111 deals with the withholding after the final date for payment of sums "due under the contract". It provides that a party to a construction contract "may not withhold payment after the final date for payment of a sum due under the contract" unless a valid notice of intention to withhold payment has been given within a specified period before the final date for payment. A notice which has been given under S.110 (2) will also be a valid notice for the purposes of S.111 if it complies with the requirements of S.111 (2) which requires that the amount proposed to he withheld and the grounds for withholding the payment must be stated. The notices under the 2 sections are however directed to different aspects of a payment. Under S.110 the act is directed to making clear what is being paid and how that sum has been calculated, whereas under S.111 the notice is directed to the amount which is being withheld and the reasons for withholding payment. S. 112 gives a party to a construction contract a right to suspend work when a sum due under a construction contract has not been paid in full by the final date for payment and where no effective notice of intention to withhold payment has been given. S. 113 prohibits *"pay when paid"* provisions in a construction contract. Subject to S. 113 it is however open to the parties to make their own agreement as to when sums are to become due and what is to be the final date for payment. Insofar as they do not do so, the relevant provisions of the Scheme for Construction Contracts (SI 1998 No.649) will apply to determine when payments become due and what is the final date for payment.

16. The issue in the present case is what is the effect of S.111(1) in relation to the 10 invoices. The sub-section provides that where, as is not disputed, no valid notice of intention to withhold payment has been given a party to a construction contract in the position of the defendant to not entitled when the period of 30 days stated in the invoices has passed to withhold payment of sums *"due under the contract"*. Part II of the 1996 Act does not define what is meant by the words "due under the contract" in S.111(1). Miss Pennifer submitted that the sums of £7127.40 and £8400 were not sums which were "due under the contract" and thus no notice of intention to withhold these sums was required to be given. They were, she submitted, not sums which were payable under the contract and thus they could not be said ever to have become due under the contract. The claimant's application she submitted was based on the premise that any sum claimed by a contractor or sub-contractor under a construction contract became due at the expiry of the relevant period in the absence of valid notice under S.111 (1). Mr Grantham for the claimant submitted that the word "due" cannot mean actually due because that construction would rob S.111 of any effect. If Miss Pennifer were correct there would never be any need to give a notice of intention to withhold payment if the payer claimed a defence to the whole or part of the claim. A "sum due" in S.111 must mean he submitted a sum of money arising in respect of works carried out under the contract. The words "under the contract" in S.111 (1.) limited the sums in question to sums arising under the contract in question.

17. When considering the effect of S.111 (1) and the meaning of the words "due under the contract" it is not so much the nature of the sum which is sought to be deducted which is of importance but rather the sum from which the deduction is sought to be made which has to be considered. Attention must first be directed to the sums which are claimed by the party seeking payment. The issue is whether

those sums claimed can property be said to be sums "due under the contract". If they are sums which are due under the contract, then the effect of S.111 (1) is to prevent the paying party from withholding payment if he has not given the requisite notice of intention to withhold payment. In the present case with the possible exception of the sum of £2,169.99, it is clear in my judgment that under the terms of the contract between the parties the amounts claimed in the invoices did become due and payable 30 days after the date of the relevant invoices. The invoices (apart from £2,169.99) do not relate to mouldings and on the evidence before the court are not claiming payment for polishing ROW joinery work. The work has been done, the materials supplied, and the time for payment has passed.

18. To the extent to which the sums sought to be retained are over payments which have already been made under the contract on previous invoices, the clear effect of S.111 (1) in my judgment is to prevent the defendant from exercising my right it may have had under the general law to recover that overpayment by way of deduction or retention from the 10 invoices unless the requisite notice has been given. No such notice was given. The circumstance that a previous overpayment may operate under the general law by way of an equitable set-off and thus technically be a matter of defence or that it may perhaps be able to be characterised as an abatement which technically in law prevents the amount claimed from ever becoming due does not in my judgment obviate the need for the paying party if he wishes to rely upon a right to deduct previous over payments to give the requisite notice under S. 111 (1). If that were not the case, it is difficult to see what practical effect S.111 would have. The effect of S.111 is to prevent the paying party if he does not give the appropriate notice from exercising his right to retain or withhold payment of monies which would otherwise be due and payable but for the existence of some right to withhold payment. S.111 refers to "withholding"' payment generally. It must have been intended to include situations where the paying party was legitimately entitled under the general law or under the terms of the contract to withhold monies which were otherwise payable. The section clearly cannot be read simply as a provision which is restricted to requiring a notice of intention to withhold a payment to be given when there is no right to withhold any payment.

19. So far as set-off is concerned the question was considered by HH. Judge Hicks Q.C. in **VHE Construction plc v RBSTB Trust Co Ltd** [2000] BLR 187,192 where, at para 36 of his judgment he said: *"The first subject of dispute as to the effect of section 111 is whether s111 (1) excludes the right to deduct money in exercise of a claim to setoff in the absence of an effective notice of intention to withhold payment. Mr. Thomas for RBSTB submits that it does not. I am quite clear, not only that it does, but that that is one of its principal purposes ... The words "**may not withhold payment**" are in my view ample in width to have the effect of excluding set-offs and there is no reason why they should not mean what they say".*

I respectfully agree. It is clear from this decision that *"the final date for payment of a sum due under the contract"* may exist although technically if a valid notice had been given the paying party would have been entitled to exercise a right of retention or to withhold the sum in question and thus not have been obliged to make the payment.

20 The question of overpayments and abatement was considered in **Whiteways Contractors (Sussex) Ltd v Impresa Castelli Construction UK Ltd** (Case HT 00 199 Aug. 2000). There an adjudicator had made an award in favour of the claimant but the paying party claimed to abate the amount of the award because of previous overpayments in respect of payments made for items which had not been supplied, payments for work claimed for but which had not been carried out, and payments in respect of excessive mark ups for overheads and profits. The matters for which an abatement was sought were not matters which had been included in the adjudication and no valid notice under s.111 (1) of an intention to withhold payment of the monies appears to have been given. It was submitted on behalf of the paying party that under the law concerning abatement the sums had never become due under the contract and thus did not fall within S.111. This submission was rejected by HH Judge Bowsher Q.C. who said at page 10 of the transcript that the Act made no distinction between set-offs and abatements: *"I see no reason why it should have done so, and I am not tempted to try to strain the language of the Act to find some fine distinction between its applicability to abatements as opposed to set-offs".*

The abatement which the paying party sought to rely on in that case did not arise in respect of the matters which had been the subject of the adjudication and the case is not it seems to me an authority on the question whether the sum of £2,169.99 can be deducted without any notice having been given under S.111 (1). It does however make clear in my judgment that where the claim to deduct is in respect of previous overpayments, a valid notice must be given.

21 The result in my judgment is that the defendant is not entitled to refuse payment under the 10 invoices on the ground that it has already made overpayments under previous invoices. This leaves the question of the £2169.99 in respect of the mouldings which are included in Invoices 2817, 2855, 2856, 2885,and 2912. The defendant's case is that those sums are not properly payable at all under the invoices and thus cannot properly be said to be sums which are "due under the contract" within the meaning of S.111 (1). Support for the defendant's contention can it seems to me be derived from certain words used by HH. Judge Bowsher Q.C. in the **Whiteways** case. Notwithstanding that he had rejected the argument that a distinction should be drawn between a set-off and an abatement, the judge did go on to say in paragraph 32 of his judgment: *"Of course, in considering a dispute, an Adjudicator will make his own valuation of the claim before him and in doing so, he may abate the claim to respects not mentioned in the notice of intention to withhold payment. But he ought not to look outside the four corners of the claim unless they have been mentioned in a notice of intention to withhold payment. So to take a hypothetical example, if there is a dispute about Valuation 10, the Adjudicator may make his own valuation of the matters referred to in Valuation 10 whether or not they are referred to specifically in a notice of intention to withhold payment. But it would be wrong for him to enquire into an alleged over valuation on Valuation 6, whether the paying party alleges abatement or set-off, unless the notice of intention to withhold payment identified that as a matter of dispute."*

22. If an adjudicator may inquire into the amount of the valuation notwithstanding that there has not been any notice of intention to withhold payment in respect of a particular matter under that valuation, it would be strange if a court could not also do so when the matter of the entitlement of the claimant to the amount claimed was in issue. It seems to me to follow from what HH Judge Bowsher Q.C. said that the failure to serve an effective notice does not have the result that the amount of the valuation is to be treated as the amount which is "due under the contract" within S.111(1). It can be said that the passage I have quoted from the judgment is obiter but I am not persuaded that the view expressed by HH. Judge Bowsher Q.C. is wrong. On the contrary with respect it is in my judgment correct. While it is possible that Parliament may have intended that the paying party should not in any circumstances, apart possibly from fraud, be able to withhold payment of any sums claimed in a valuation or in an invoice unless a valid notice of intention to withhold payment had been given, that would in my judgment be a surprising conclusion and there is it seems to me nothing in S.111 which compels that result. The use of the words "due under the contract" in my judgment points to an intention that it is only from sums which would otherwise be due and payable that a retention or withholding can be made and that what Parliament had in mind was the type of situation where a liability to make payment had arisen but the paying party had a cross claim which if established would have the effect of entitling him to withhold the whole or part of the sum which he would otherwise have been obliged to pay. If it were correct that the effect of a failure to serve a valid notice of intention to withhold payment under S. 111 was that the amount of the valuation or invoice was to be regarded as a sum "due under the contract", the consequence would appear to be that neither an adjudicator nor the court could properly refuse to order payment in full even though it might be perfectly clear for example that the work or the materials claimed for had not been carried out or supplied, or that the wrong rate or price had been claimed or that there bad been some other error in the invoice or valuation. If the effect of a failure to serve a notice under the section is to deprive the payer of the right to refuse payment on the basis that the sum from which the deduction is sought to be made is not properly due and payable, it is difficult to see on what basis the court could refuse to give judgment for the full amount or what cause of action the payer would subsequently have to recover the payment. There is nothing in S.111 to indicate that it has only a temporary effect or that it is only applicable for the purposes of adjudication proceedings. On its face the provision is directed to enabling the recipient to he paid on the final date for payment and that is a matter of legal right under

the contract. The adjudicator and the court, whether on an application for summary judgment or at trial, would, it seems to me, be bound to give effect to the failure to serve a notice under S.111 and to order payment in full. On the other hand, if the failure to give a notice under S.111 merely deprives the payer of any right he may have to withhold payment from monies otherwise payable, there would be nothing to prevent the payer from seeking to recover any payment he may have made by separate proceedings in exercise of the underlying right which might have justified a retention being made if a valid notice had been given. In my judgment this to what Parliament has done in enacting S.111.

23 Parliament could have provided that the result of a failure to serve a notice under S.111 was to deprive the paying party of any right to challenge the amount of the payment actually due under the contract but in my judgment clear words would be required to produce that result. The language of S.111 does not in my judgment compel that conclusion. It is dealing only with the right to withhold payment and not with what is due under the contract. I respectfully agree with HH Judge Bowsher Q.C. that no distinction should be drawn between matters of abatement and matters of set-off and that a notice must be given under S.111 if monies are to be withheld from sums which would be payable but for the set-off or abatement. The question is a matter of substance and not of legal form or technicality. It does not follow in my judgment that merely because an abatement may technically reduce the amount due and payable under the contract that Parliament is to be taken to have intended that the amount claimed could not be challenged if no notice is given under S.111. An abatement normally involves a breach of contract on the part of the contractor and is in the nature of a cross claim which operates to reduce the amount which can be recovered. It was developed by the common law as a procedural means whereby justice could be done as between the parties without the need for the defendant to bring a cross action. It is not in substance different from a set-off.

24. The result, in my judgment, is that the claimant is entitled to summary judgment for the amount of principal claimed leas the sums of £16,005.96 in respect of tax and £2169.99 plus VAT in respect of the mouldings. No question arises of refusing summary judgment because any over payment which may have been made could not be recovered subsequently. There has been no adjudication on the validity of any right which the defendant may have to recover an over payment and all that has been finally decided is that because no valid notice was given under S.111 the defendant is not entitled to retain or withhold sums in respect of any previous over payments. There is also a claim for interest at the higher rate under the 1998 Act. It does not appear to be disputed that the 1998 Act is applicable and prima facie interest at the higher rate ought to be paid by the defendant on the unpaid and on the under paid and late paid invoices. However Miss Pennifer has referred to certain credit notes issued by the claimant. These may have been issued because some of the early payments made by the defendant were at the original rate of £27.50 before it was reduced to £22.50. Mr. Grantham was unable to assist on this matter. Miss Pennifer submitted that if there had been an overpayment as she suggested, then that overpayment was relevant to the issue of interest under the 1998 Act. I have not heard full argument on the point and I propose to reserve the question of interest for further consideration when the question can be considered in the light of the facts as to any overpayment. A date has been fixed for further consideration of the matter and for hearing any submissions on costs. I shall give formal judgment at the restored hearing and also any necessary directions for the further conduct of the action in relation to the £2,169.99.

25 In the meantime this judgment is released as a draft judgment which is subject to editorial revision. Its contents may be communicated to the parties.