

Insights

VAT INVOICES AND THE FINAL DATE FOR PAYMENT

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SUMMARY

In its recent decision in [Lidl Great Britain Ltd v Closed Circuit Cooling Ltd \(t/a 3CL\) \[2023\] EWHC 2243 \(TCC\)](#), the TCC provided some helpful guidance around the statutory payment provisions in the Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996) with which all construction contracts are required to comply. In doing so it reinforced Cockerill J's comments in an earlier case, [Rochford Construction Ltd v Kilhan Construction Ltd \[2020\] EWHC 941 \(TCC\)](#) and highlighted, yet again, the importance to employers and contractors of ensuring that their construction contracts comply with the Construction Act 1996.

WHAT HAPPENED?

Lidl, as most readers will be aware, are an international retail chain. 3CL is a worldwide industrial refrigeration and air-conditioning contractor.

The parties had entered into a framework agreement that enabled them to enter into individual works orders, each of which constituted a separate contract. The framework agreement and the order, which was the subject of the dispute, contained provisions entitling 3CL to make applications for interim payment following the achievement of defined milestones.

This case related to multiple claims issued by each party seeking the determination of issues arising out of a couple of adjudicator's decisions. The parties brought several disputes before the court, but the key one for the purposes of this article was the third. This was a claim brought by 3CL whereby the contractor argued that, because the terms of the contract made the final date for payment conditional upon 3CL issuing a VAT invoice, this was not compliant with the requirements of the Construction Act 1996. Lidl's position was that because 3CL had failed to provide such an invoice, the final date for payment had not occurred and the employer was not obliged to pay the relevant amount to 3CL.

The relevant provision in the Construction Act 1996 is section 110. Section 110(1) requires that:

"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."

Section 110(1A) of the Construction Act 1996 provides further qualification as to what would constitute an "adequate mechanism". This states that an adequate mechanism is not one which makes payment conditional on:

"(a) the performance of obligations under another contract, or

(b) a decision by any person as to whether obligations under another contract have been performed."

Further, section 110(D) provides that a construction contract does not provide an adequate mechanism "where a construction contract provides for the date on which a payment becomes due to be determined by reference to the giving to the person to whom the payment is due of a notice which relates to what payments are due under the contract."

In Rochford, the claimant had argued that the final date for payment in that contract was 30 days from service of an invoice. Without delving too far into the particular details of that case, having considered the position, the judge said (obiter) that, while the Construction Act 1996 allowed the parties to agree the length of the period between the due date and the final date for payment, it clearly stated that the final date for payment needed to be linked to the due date by a fixed period of time. The final date for payment could not be linked to the occurrence of an event after the due date, such as the issue of a VAT invoice. Therefore, the relevant provisions in that case were not compliant with the Construction Act 1996.

JUDGMENT

Lidl argued that there were points of distinction between Rochford and this case, not least that Cockerill J's comments in that case were only obiter. However, the judge disagreed and pointed to the wording of the contract, which stated that "the final date for payment is either 21 days following the due date or receipt of the Contractor's valid VAT invoice, whichever is the later".

The judge's view was that this meant that the final date for payment was dependent on the date of 3CL's invoice. For that reason, there was not a fixed period between the due date and the final date for payment and therefore the contract was not compliant with the Construction Act 1996.

THOUGHTS

This decision hopefully will not come as too much of a surprise to parties who are familiar with the provisions of the Construction Act 1996. However, it is worth noting that one of the 2020 updates to the NEC4 suite amended the provisions of several NEC4 contracts that linked the final date for payment to the submission of an invoice as a direct response to the judge's comments in Rochford. Parties contracting on NEC4 contracts entered into before the updates would be advised to check the terms of their contract to make sure that the payment provisions are compliant with the Construction Act 1996.

Some employers may be concerned that this ruling means they could be required to make payments to contractors before a valid VAT invoice has been issued. This could create conflict with their internal payment processes, which may require an invoice to be submitted before payments can be made. However, a simple solution would be to link the due date under the contract to the receipt of a valid invoice (or the occurrence of some other event). There is nothing in the Construction Act 1996 that prevents this - the key point, as demonstrated in Lidl is that once the due date has occurred, the contract must then include a fixed period after that date following which the final date for payment occurs.

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