

Insights

JCT'S INSOLVENCY PAYMENT REGIME – HOW DOES IT WORK?

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SUMMARY

The case of *Levi Solicitors LLP v Wilson and another* considered the impact of contractor insolvency on debts owed to an employer under a *JCT contract*.

Significantly, the court helpfully clarified how the payment regime under JCT contracts operated in the context of insolvency.

This blog takes a closer look at the case.

Background

In 2014, Farrar Construction Ltd (contractor) was employed by JKR Property Development Ltd (employer) under a *JCT Minor Works Building Contract, 2011 Edition* (MW 2011).

The standard payment clauses were not amended. However, when it became apparent that the contractor was not paying a sub-contractor, the contract was varied in writing to allow the employer to pay sums otherwise due to the contractor directly to the sub-contractor.

Practical completion was certified in 2015. The contractor was required to supply documentation (to enable the final payment to be calculated) within a period of three months from the date of practical completion. However, there was no evidence that such documents were ever sent.

The contractor became insolvent in 2016 and entered into a *company voluntary arrangement* (CVA).

As a result of the contract variation and payments made by the employer to the sub-contractor, the employer overpaid the contractor. The employer believed this sum to be repayable by the contractor and also claimed *liquidated damages* for delayed completion of the works. The supervisor of the CVA admitted a proof of the employer's debt.

One of the contractor's other creditors, Levi Solicitors LLP, argued that the supervisor should not have admitted the proof of debt because it was insufficiently established. Specifically, the employer:

- Could not claim repayment of the sums as it had not complied with the procedure in clause 6.7 of the contract and so no sum was due. (Clause 6.7 sets out the *process to be followed if an insolvency occurs*, including that a final account must be set out in a certificate issued by the contract administrator or a statement from the employer and be given within the three month time period prescribed by the contract).
- Failed to satisfy the requirements of clause 4.8 of the contract (which sets out the process for issuing the final certificate) because it did not issue a valid certificate.

Issues

One of the issues that the court had to determine was whether the employer had lost its right to repayment because it had not given a statement of final account within the prescribed period.

Decision

The court held in favour of the employer. Key points from the judgment included:

- The interim and final payment regime set out in the contract ceased to apply following the contractor's insolvency regardless of whether the employer terminated the contractor's engagement. Instead, the contractual payment regime for what should happen following an insolvency automatically applied.
- The time limit for calculating the final account under the "insolvency payment regime" should not be imposed strictly. There was nothing in the language of the provisions, or the way they interacted with others, to suggest they were intended to prevent a later claim by the employer for any sum properly due to it. There was also no obvious reason for stringently enforcing these provisions. The employer was entitled to submit a final account and claim the balance at any time before the expiry of the limitation period.
- The employer's proof of debt should be accepted by the supervisor of the CVA as a contingent creditor.

A timely reminder

As the payment regime that kicks in upon insolvency under JCT MW 2011 is similar to those contained in contracts across the *2011* and *2016* JCT suites, the court's summary of the relevant principles provides an invaluable framework for JCT users who may be faced with payment issues following contractor insolvency:

- It is a question of the construction of the contract whether the provision of a final certificate (or statement) is a condition precedent to any debt arising under the contract.
- While any amount that is certified must be paid, it is not conclusive and can be challenged later by arbitration or court proceedings.
- If a final certificate or statement is a condition precedent to liability, the payer cannot rely on the absence of such a certificate or statement (that should have been but was not provided) in an arbitration or legal proceedings to establish the true amount of the payee's liability.
- Subject to [section 111](#) of the Construction Act 1996 (the requirement to pay a notified sum), the parties are free to agree that in the event of the contractor's insolvency, a payment otherwise due to the contractor will not be payable.
- The parties can also agree that following insolvency, payments that have not yet become due will not be payable and instead an account will be taken when the works are completed.
- The purpose of the standard insolvency terms in the JCT suite of contracts is to provide a separate procedure to determine the balance of the account between the employer and the insolvent contractor following termination of the contract and completion of the works.
- Parties that intend the time limit for submitting a final account under the insolvency payment regime to be strictly adhered to need to use express language to give effect to that intention.

Finally, while the court's conclusion that there is no strict time limit under an unamended JCT contract for setting out the balance payable between the parties following contractor insolvency will be reassuring to employers, it is always good practice to adhere to contractual time periods and procedures.

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