

Insights

INTERPRETING TERMINATION CLAUSES: A RECENT EXAMPLE FROM THE COURT OF APPEAL

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SUMMARY

In this Insight, first published in PLC, Shy Jackson considers the Court of Appeal's decision in *Providence Building Services Ltd v Hexagon Housing Association Ltd* [2024] EWCA Civ 962 that a contractor was entitled to terminate a JCT Design and Build Contract, 2016 Edition for two late payments by its employer.

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When the Court of Appeal reverses a decision of the Technology and Construction Court (TCC) on the interpretation of standard clauses, this is a good reminder that contract interpretation is not always straightforward. All the more so when this determined whether termination of a building contract by the contractor for non-payment was valid, which was the subject of the recent decision in *Providence Building Services Ltd v Hexagon Housing Association Ltd* [2024] EWCA Civ 962.

The case involved the termination provisions of JCT Design and Build Contract, 2016 Edition (DB 2016), which is commonly used in the UK. But there are wider lessons about the approach under English law to the interpretation of standard form contracts, the extent to which the commercial context is relevant and the importance of focusing on the words used.

For more information on:

- The Court of Appeal's decision, see [Legal update, Contractor's termination under JCT clause 8.9.4 was valid \(Court of Appeal\)](#).
- Terminating a JCT contract, see [Practice note, Terminating a JCT building contract](#).
- Contract interpretation generally, see [Practice note, Contracts: interpretation](#).

- For a specimen, read-only copy of DB 2016, see [Standard document, JCT Design and Build Contract, 2016 Edition](#).

THE EVENTS LEADING TO TERMINATION

In February 2019 the parties entered into a contract for the construction of a number of buildings at a site in Purley. The contract was based on DB 2016, as amended by the parties, and it had an original value of £7.2 million.

More than two years into the contract, the employer's agent issued Payment Notice 27, which required payment of approximately £260,000 on or before 15 December 2022. The employer failed to make payment and the contractor issued a Notice of Specified Default under clause 8.9.1 of the contract on 16 December 2022. This clause permits a notice to be issued when a certified amount is not paid by the final date for payment. The employer made that payment on 29 December, 14 days late.

The following year, the employer's agent issued Payment Notice 32, which required payment of approximately £360,000 by 17 May 2023. The employer failed to make payment and the following day, on 18 May 2023, the contractor issued a Notice of Termination under clause 8.9.4 of the Contract, relying on the earlier notice issued in December 2022 as a repeated default. The employer made payment on 23 May 2023 and disputed the validity of the termination.

THE TCC'S DECISION THAT TERMINATION WAS INVALID

The judge first considered clause 8.9.3, which, as amended, provided that if a specified default continued for more than 28 days, the contractor could terminate within the following 21 days' on notice. (DB 2016 entitles the contractor to terminate if a specified default continues for 14 days.) The judge then went on to consider clause 8.9.4, which was also amended. It stated that if for any reason no notice was given under clause 8.9.3 but the employer repeated the specified default, a notice of termination could be issued upon or within 28 days after such repetition. (DB 2016 provides that the contractor may terminate its employment on notice, upon or within a reasonable time after such repetition.)

The judge observed that the principles of contractual interpretation were well established and that contractual termination clauses were to be strictly construed and must be strictly complied with. Looking at the two clauses together, the judge's view was that the contractor could not rely on the earlier specified default notice, as payment was made within 28 days. In other words, if an earlier termination notice was not given because the failure had been cured, it could not be relied upon as a repeated default.

The judge also looked at the commercial arguments both sides presented to support their position but concluded that "... in this case the 'business commonsense' arguments do not take the matter

very far one way or the other".

THE COURT OF APPEAL'S DECISION THAT TERMINATION WAS VALID

The Court of Appeal recognised that the general principles that apply to contract interpretation are well established, but it also noted that when dealing with a standard form of wording, the interpretation is unlikely to be affected by the context of the particular contract and will depend on "... an intense focus on the words used". It also pointed out that there was limited value in looking at earlier editions of the standard form contract in order to identify the correct interpretation.

Turning to the specific wording of the termination clause, it held that the correct place to start is with the words that are to be interpreted and that there was no basis to impose any condition that would qualify the words "for any reason". This was not however to be looked at in isolation and it was necessary to look at the context of clause 8.9 in its entirety, and clause 8.9.4 as part of the iterative process of interpretation.

In that regard, the wider context of clause 8.9 was the contractor's termination rights, and the issue was whether clause 8.9.4 was sufficiently linked to clause 8.9.3 so that clause 8.9.4 could only operate where there was a valid accrued right to terminate under clause 8.9.3. It held that this was not the case and that the words "for any reason" should be interpreted on a wide basis. That meant that it did not matter that the earlier failure to pay was remedied, there was still a repeated default and the termination by the contractor was valid.

CONCLUSIONS

This decision addresses a specific set of circumstances and concerns specific JCT wording (The time periods in clauses 8.9.3 and 8.9.4 were amended in this case but this did not affect the interpretation of clause 8.9.4.). Users of the JCT forms need to be aware of this decision as the same wording appears in the recently published JCT Design and Build Contract, 2024 Edition and other JCT standard form contracts such as the JCT Standard Building Contract, 2016 and 2024 Editions.

In this case the failure to make payment was remedied within a short period and, as acknowledged by the courts, the contract included other remedies that the contractor could rely on. However, that did not mean the contractor could not also terminate. This therefore highlights the risks of failing to make timely payment and while contractors will rarely seek to terminate for late payment, that is something the JCT forms of contract provide for.

The Court of Appeal decision is also a good example of the current approach of the English courts to interpreting contracts. The statements by the court as to the limited impact arguments about commercial common sense have on contract interpretation, as well as the limited relevance of looking at earlier editions of standard form contracts as guides to interpretation, have a wider

application. This will therefore also be relevant for anyone looking to interpret the latest versions of contracts such as NEC and FIDIC.

As was also pointed out, when it comes to interpreting wording used in standard form contracts, the commercial context is less relevant as the specific wording has not been the subject of negotiation in the same way as a bespoke clause drafted for a specific project. In such a case, interpretation would very much be based on looking at the plain and ordinary meaning of the words used, in the context of the agreement itself. Again, this is a wider principle that will apply to the interpretation of all standard forms of construction contract where English law is the governing law.

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