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PROVIDENCE V HEXAGON - THE CHALLENGE OF CONTRACT INTERPRETATION

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SUMMARY

In this article, first published in PLC Construction, Shy Jackson considers the Supreme Court's decision in Providence Building Services Ltd v Hexagon Housing Association Ltd [2026] UKSC 1 that a contractor was not entitled to terminate a JCT Design and Build Contract, 2016 Edition for repeated late payments (specified defaults) by its employer in circumstances where the right to terminate for the first specified default had not accrued.

This article contains links which are only accessible by PLC subscribers.

In late 2024 we wrote about the Court of Appeal's decision in Providence Building Services Ltd v Hexagon Housing Association Ltd [2024] EWCA Civ 962, saying it was a good reminder that contract interpretation is not always straightforward.

In its first decision of 2026, in Providence Building Services Ltd v Hexagon Housing Association Ltd [2026] UKSC 1, the Supreme Court has reversed the Court of Appeal's decision and agreed with the trial judge, demonstrating that, while the principles of contract interpretation are well established, it is their application in practice to a set of words that is the real challenge.

This case involved the termination provisions of the JCT Design and Build Contract, 2016 Edition (DB 2016), which is commonly used in the UK. The key issue was the termination provision for non-payment, where the trial judge held the contractor's termination was invalid, but the Court of Appeal decided it was in fact valid. The case turned very much on the specific wording used, but the general approach, especially the commentary on how standard forms of contract should be interpreted, is of wider interest.

For more information on:

- The Supreme Court's decision, see Legal update, Contractor's termination under JCT clause 8.9.4 was not valid (Supreme Court)Opens in a new window.

- 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 FACTUAL BACKGROUND

The contract between the parties was entered into in 2019, based on DB 2016 with a value of £7.2 million. The standard form was amended in various ways, including clause 8.9.

In late 2022, Payment Notice 27 was issued, which required payment of approximately £260,000 on or before 15 December 2022. The employer failed to make payment and on 16 December 2022, the contractor issued a Notice of Specified Default under clause 8.9.1 of the contract, which permits a notice to be issued when a certified amount is not paid by the final date for payment. Clause 8.9.3 allows termination, by a further notice, if no payment is made within the requisite period (here 28 days, amended from 14 days). As the employer made that payment on 29 December, 14 days late, no such notice was issued.

In 2023, Payment Notice 32 was issued, 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. The termination was because the employer had repeated a "*specified default*" that was the subject of the earlier notice issued in December 2022, which is one of the permitted termination grounds under clause 8.9.4.

The employer made payment on 23 May 2023, six days late, and disputed the validity of the termination.

THE EARLIER DECISIONS

The trial judge, Adrian Williamson KC, looked at the specific wording used as a whole, finding that if a termination notice was not given under clause 8.9.3 because the default had been cured, the contractor could not rely on that to terminate for a repeated default under clause 8.9.4. He also 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.

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*". He therefore held that the termination was invalid.

The Court of Appeal's judgment was delivered by Stuart-Smith LJ, with whom the other Lord Justices agreed. He acknowledged that the general principles that apply to contract interpretation are well established, but 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 was 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. Like the trial judge, Stuart-Smith LJ found the arguments about commercial sense unhelpful, as both parties' positions were sensible and based on the purpose of the clause, namely to encourage compliance with the payment obligation.

Looking at the specific wording used, he held that there was no basis to impose any condition that would qualify the words "*for any reason*" (why a termination notice was not issued for the earlier default), and these words could be interpreted on a wide basis. That meant that it did not matter that the earlier failure to pay was remedied and there was no accrued right to give such a notice. The termination by the contractor was held to be valid.

THE SUPREME COURT

The Supreme Court judgment was delivered by Lord Burrows, with whom the other four Lords agreed. He began by setting out the basis for the modern approach to contract interpretation, referring to the line of leading authorities which began with Lord Hoffmann's speech in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, the clarification in Arnold v Britton [2015] UKSC 36 about being careful in placing weight on business common sense and the statement in Wood v Capita Insurance Services Ltd [2017] UKSC 24 that contractual interpretation:

"*…involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated…*".

Lord Burrows then made some observations about the approach to be taken when interpreting standard forms of contract. He noted that the JCT form is not a "*take it or leave it*" standard form but one that is negotiated and equality of bargaining power is therefore not an issue. He also pointed out that it was not in dispute that the JCT Design and Build Contract Guide 2016 was admissible evidence in interpreting the contract and that the admissible background includes past court decisions that may show that a contract has been amended in order to depart from a court decision. In this case, however, he did not find such materials helpful.

He did however warn against what has been described as the "*archaeology of the forms*" and agreed with the summary in Chitty on Contracts (Sweet & Maxwell) 36th Ed, 2025, Vol I, Part 5, Chapter 16: Express Terms at paragraph 16-061 that:

"*…an industry-wide standard-form contract should usually be interpreted consistently for all contracting parties using that form and, subject to bespoke amendments, that interpretation is unlikely to be contradicted by the objective intentions of the particular contracting parties*".

Lord Burrows then considered the interpretation of clauses 8.9.3 and 8.9.4. In the lower courts the focus was on the words "for any reason" in clause 8.9.4 but he looked at the opening words of that clause:

"*If the Contractor for any reason does not give the further notice…* ".

In his view this meant clause 8.9.4 was parasitic on clause 8.9.3, so that a contractor can only terminate under clause 8.9.4 if there is an accrued right to do so under clause 8.9.3. Otherwise, the clause would only need to refer to the employer repeating a specified default. He did not think his interpretation was affected by the words "*for any reason*" (which in his view covered all possible reasons why a contractor that was entitled to terminate under clause 8.9.3 did not do so) and went on to make a number of observations as to the competing interpretations.

- First, he made the point that the employer's interpretation was objectively and contextually a natural one. In contrast, the contractor's interpretation contradicted the objective natural meaning of the words in their context by rendering the opening words of clause 8.9.4 superfluous and, in any event, it was an unclear and ambiguous interpretation.
- Secondly, he found that the employer's interpretation produced a rational and less extreme outcome than the contractor's interpretation. In his view, the rational consequence was that termination was only possible where the earlier breach (for which a specified notice of default was given) went uncured for 28 days, and was in that sense particularly serious. Whereas he considered the contractor's interpretation would produce an extreme outcome, for example the contractor would be entitled to terminate if the employer made only two late payments, each a day late. As he put it, "[t]hat might be thought to provide a sledgehammer to crack a nut".

Lord Burrows also did not think it was helpful to look at the contractual remedies for late payment and how the resulting cash flow problems could be dealt with. He noted that while the Court of Appeal considered that other remedies were inadequate in countering cash flow difficulties, this was not a reason to distort the termination clause in favour of the contractor.

Lord Burrows concluded by observing that if this was a problem for contractors, that could be dealt with by different wording; something JCT could consider in a future draft of the standard form. The employer's appeal was allowed and the termination was therefore held to be invalid.

CONCLUSIONS

The real problem is that, as Lord Diplock observed in Slim v Daily Telegraph [1968] 2 Q.B. 157:

"*… words are imprecise instruments for communicating the thoughts of one man to another*."

Everyone agrees that interpretation should be based on the plain meaning of the words used, but this case highlights the fact that this is not as easy as it sounds, even when looking at carefully drafted contractual terms and the contract as a whole. In most disputes concerning contract interpretation both parties will come up with credible and legitimate interpretations of the same wording but which are fundamentally different.

While the trend has been to avoid over reliance on what makes commercial sense, there is a clear tension between a strict literal approach and trying to identify what makes commercial sense. That is why in Wood v Capita, interpretation was described as an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated.

In this case, the trial judge and the Court of Appeal both made the point that looking for commercial sense did not help, as both interpretations were commercially sensible. In the Supreme Court, also looking at the commercial purpose of the clause, to discourage late payment, Lord Burrows disagreed with Stuart-Smith LJ's view of how relevant it was whether other contractual provisions provided an adequate remedy for the cash flow problems that late payment might cause. But Lord Burrows did consider it helpful to look at what interpretation produced a more rational outcome, seeing an outcome where two payments made one day late in each case would allow termination, as an extreme one. So commercial sense still plays a role, and the extent of its relevance is part of the iterative process of interpretation, where the words used are still the primary basis for interpreting contracts but commercial sense may tip the balance between two competing interpretations.

Looking at the wider implications, the commentary on how standard forms of contract should be interpreted is useful, but in this case it did not make a difference. While it was accepted that the court could look at guidance and earlier versions as an aid to interpretation, there was a clear limit as to how useful that could be and it will be unusual for this to provide the definitive answer as to how the words should be interpreted.

Overall, yet another reminder that it is not always easy to agree on what words mean, even in a carefully drafted contract and where senior experienced judges are seeking to determine the correct interpretation. The judgment referred to Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd [1996] 1 A.C. 266, where Lord Hoffmann discussed the effect courts have on the drafting of standard forms. This is what may have led Lord Burrows to suggest that JCT may want to consider the wording in its next edition. Until then, parties will need to consider whether the Supreme Court's decision has clarified how the JCT termination provisions operate or whether amendments may still play a useful role.

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