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Insights

DEERNS UK LIMITED V VDC LHR11 LIMITED: CONSTRUCTION CONTRACT PAYMENT PROVISIONS

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Summary

The judgment in Deerns UK Limited v VDC LHR11 Limited [2026] EWHC 1509 (TCC) is a useful reminder that if payment provisions in construction contracts do not comply with the requirements of the Construction Act they risk being superseded by the Scheme for Construction Contracts. This can lead to unexpected consequences: in this case, a payer being liable to pay a notified sum in full after the pay less notices it served were deemed to be out of time.

The background facts

Deerns UK, a professional consultant, brought a claim against the employer, VDC, for payment of circa £910,500, which it contended was due following the employer's failure to serve timely pay less notices.

The crux of the consultant's claim was that the appointment did not include a valid final date for payment, as required by section 110(1)(b) of the Housing Grants, Construction and Regeneration Act 1996 (Construction Act), and consequently that the Scheme for Construction Contracts would apply such that the final date for payment was 17 (rather than 30) days from the due date. Therefore the pay less notices served by the employer were out of time.

The employer argued that the appointment did include a valid final date for payment, and that in any event the parties' dealings had given rise to an estoppel by convention preventing the consultant from claiming that the appointment was non-compliant with the Construction Act on the basis that the appointment had been operated in a way that was compliant.

The appointment terms stated that the final date for payment was 30 days from the due date, *save that* if the consultant's invoice was issued late then the final date for payment would be postponed by a commensurate period. The issue was therefore whether this was a valid provision and, if it was not, was the consultant estopped from arguing the provision was invalid due to a common understanding between the parties on how it should be operated.

The court's decision

In his judgment, Mr Justice Eyre noted that any additional step or mechanism that decouples the due date and final date for payment is contrary to the Construction Act. Therefore by failing to provide a fixed and unconditional period between the due date and the final date for payment, the appointment was held to contravene the Construction Act.

As a result, the Scheme was held to apply and the final date for payment was therefore 17 days after the due date, rather than the 30 days noted in the appointment. Consequently, the employer's pay less notices were issued out of time, and the employer was liable to pay the full amount set out in the consultant's payment application.

The judge dismissed the employer's argument that the consultant was estopped from claiming that the payment provisions contravened the Construction Act because the parties had a common understanding and in practice operated the payment terms in a way that was Construction Act compliant. The judge concluded that there was not enough evidence demonstrating that the consultant agreed with or acted on the employer's understanding of how the payment provisions operated in order to comply with the Construction Act.

Key takeaways

The Construction Act requires construction contracts falling within its scope to provide an adequate mechanism for determining when payments become due, and to provide a final date for payment by which time such sums must be paid. Parties can agree a mechanism to vary the due date, such as linking the due date to the date of issue of an invoice, and can agree the length of the prescribed period prior to the final date for payment before which a pay less notice must be served.

Parties are also free to agree how long the period is between the due date and the final date for payment. But, crucially, the contract must provide a fixed period between the due date and final date for payment, and parties cannot contract out of this requirement.

Note that the only circumstance under the Construction Act in which the period between the due date and final date for payment would be lengthened is following issue of a default payment notice (section 110B). If a default payment notice is issued then the final date for payment is postponed by the number of days between the date of the default payment notice and the date by which the payment notice was required to be given i.e. not later than 5 days after the payment due date.

But, as this case highlights, while the due date for payment can be moveable, for instance, linked to receipt of a notice or invoice, the final date for payment must be a fixed period following the due date. The payer cannot insert conditions or mechanisms between the due date and the final date for payment which would have the effect of delaying the final date for payment.

The decision in this case should not come as a surprise, as it followed other similar decisions in *Rochford Construction Ltd v Kilhan Construction Ltd* and *Lidl Great Britain Ltd v Closed Circuit Cooling Ltd* (see this BCLP Insight for commentary on these cases). Where payment provisions fail to comply with the Construction Act, the Scheme will apply to the extent necessary to achieve what is required by the Construction Act.

Therefore parties should:

- always specify a fixed number of days between the due date and final date for payment;
- not include any condition or mechanism that might have the effect of moving the final date for payment;
- ensure pay less notices are issued with reference to the correct final date for payment, particularly where the Scheme may have displaced contractual terms;
- review existing construction contracts for compliance, particularly where bespoke payment provisions have been agreed or where significant payments might be contested.

Looking ahead

At the date of this Insight, the Commercial Payments Bill is making its way through parliament and as such will be subject to further amendment. However, it is one to keep on the radar as it will of course affect payment arrangements under construction contracts. Most notably for this Insight, the Bill currently limits the length of payment periods in construction contracts to no more than 60 days (or 30 days for a public authority), stipulates that pay less notices must be served at least seven days before the final date for payment and, where a default payment notice is served, the final date for payment cannot be pushed beyond the new 60 day limit (or 30 days for public authorities). This removes some of the flexibility parties currently have when agreeing their payment arrangements, as outlined above.

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