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The Lesser of Two Evils: Finality on Termination Provisions – Providence Building Services Limited (Respondent) v. Hexagon Housing Association Limited (Appellant)

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This article follows on from our previous articles, most recently on the Court of Appeal decision in *Providence Building Services Limited v. Hexagon Housing Association Limited* [2024] EWCA Civ 962 in our Summer 2025 Construction and Engineering Matters.

In a decision bringing much needed finality and closure to the interpretation of certain termination provisions within the widely used JCT standard form of contract,[1] the Supreme Court has overturned the decision of the Court of Appeal.[2]

By way of brief background, the dispute concerned the correct interpretation of the following clauses of the JCT Design and Build Contract 2016 (as amended by the parties):

> **"Default by Employer**
>
> **8.9.3** If a specified default or a specified suspension event continues for ~~14 days~~ [28 days] from the receipt of notice under clause 8.9.1 or 8.9.2, the Contractor may on, or within 21 days from, the expiry of that ~~14 day~~ [28 day] period by a further notice to the Employer terminate the Contractor's employment under this Contract.
>
> **8.9.4** If the Contractor for any reason does not give the further notice referred to in clause 8.9.3, but (whether previously repeated or not):
>
> .1 the Employer repeats a specified default; or
> …
> then, upon or within ~~a reasonable time~~ [28 days] after such repetition, the Contractor may by notice to the Employer terminate the Contractor's employment under this Contract."

In the Court of Appeal, the contractor, Providence, was successful in obtaining judgement that it could rely on Clause 8.9.4 to terminate its contract with Hexagon without first having accrued a right to terminate under Clause 8.9.3. In the Court of Appeal's view, the words "for any reason" in Clause 8.9.4 were broad enough to capture circumstances where there was no accrued right to give notice under Clause 8.9.3. Therefore, Providence could rely on a repeated specified default, in this case late payment by Hexagon, even if the original default was remedied within the contractual 28-day cure period.

Having been successful in prior adjudication proceedings and at first instance before the Technology and Construction Court, Hexagon appealed the Court of Appeal's decision to the Supreme Court.

The sole issue of contractual interpretation for the Supreme Court's determination on appeal was:

> "Can the contractor terminate its employment under clause 8.9.4 of the JCT 2016 Design and Build Form, in a case where a right to give the further notice referred to in clause 8.9.3 has never previously accrued?"

In short, the decision of Lord Burrows (with whom Lord Reed, Lord Briggs, Lord Stephens and Lord Richards agreed), categorically confirms that the answer to the question for determination is "No".

The Supreme Court's Decision

In allowing the appeal, the Supreme Court found that:

1. In the context of Clause 8.9, Clause 8.9.4 appears to be parasitic on Clause 8.9.3 rather than being independent of it. In other words, if Clause 8.9.4 were independent there would be no need for the opening words of Clause 8.9.4, i.e. "If the Contractor for any reason does not give the further notice referred to in clause 8.9.3, but (whether previously repeated or not) …".
2. Clause 8.9.3 is the "gateway" to Clause 8.9.4 in that the contractor must have had an accrued right to terminate under Clause 8.9.3 before Clause 8.9.4 could operate.
3. The above approach produces a natural and less extreme outcome than that contended by Providence. That is, for example, if the employer made two late payments, each being made one day late, the contractor, on Providence's interpretation, would be entitled to serve a notice terminating the contract and, by extension, be entitled to lost profits. In the Supreme Court's view, "[t]hat might provide a sledgehammer to crack a nut". While counsel for Providence contended that the employer could invoke Clause 8.2.1, requiring that the termination should not be given unreasonably or vexatiously, as the Supreme Court noted, this would lead to uncertainty with the employer then having the arduous task of showing the notice was given unreasonably or vexatiously, something that is sure to be strongly disputed by the contractor. Of course, on the other hand, it is reasonably foreseeable that an employer may repeatedly take advantage of "extra" time to make payment after the date for payment but before the right to terminate accrues pursuant to Clause 8.9.3, without fear of the costly consequences of termination (albeit in these circumstances, the employer would be exposed to possible "smash and grab" adjudication proceedings).

1 While the dispute concerned the JCT 2016 Design and Build Form, the relevant provisions are the same across both the 2016 and 2024 standard form versions.

2 Full details of both the first instance decision and the Court of Appeal judgement can be found in our previous articles.

However, in circumstances where the contractor retains the right to suspend for employer defaults and to interest for late payment, the suggestion of the Supreme Court seems to be that this interpretation is the lesser of two evils.

4. The Court of Appeal's reliance on Clause 8.4 (being the reciprocal provision for the employer's right to issue a notice of termination for the contractor's default) to aid the interpretation of Clause 8.9 was misplaced for three reasons:

    a. First, there is no reason why the contractor's and the employer's rights to terminate should be symmetrical, particularly given the relevant provisions are so different.

    b. Second, clauses 8.9 and 8.4 were plainly asymmetrical because the time periods specified were different (28 days, and 14 days and "within a reasonable time after such repetition" respectively).

    c. Third, different words were used by the drafter of the JCT standard form in clauses 8.9.4 and 8.4.3. Given the JCT is prepared by experienced construction professionals and specialist lawyers, it suggests that the clauses have different meanings.

Somewhat surprisingly, the Supreme Court also gave short shrift to the helpfulness of the JCT's *Design and Build Contract Guide 2016* and previous versions of the JCT form or past judicial decisions on those previous versions. In respect of the latter, it is notable that the construction of the corresponding provisions within the 1998 JCT version,[3] although differently worded, had the same effect contended for by Providence and was indeed accepted by the Court of Appeal in the present matter. However, and notwithstanding Providence's continued submissions in this regard, the Supreme Court did not derive any help from archaeological digging by the parties into past editions of the JCT contract.

Finally, in coming to its decision, the Supreme Court provided a useful summary of the relevant law on the interpretation of contracts, including industry-wide standard-form contracts such as the JCT contract. Ultimately, the Supreme Court confirmed that the correct approach is:

> "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."

Although the approach should be largely uncontroversial, it serves as a useful reminder to those in industries including construction, shipping and beyond, which are heavily reliant on the use of standard-form contracts, as to how courts will generally interpret those contracts.

Key Takeaways

While the appeal concerns a short point of contractual interpretation, the Supreme Court's judgement potentially has far-reaching consequences for how contractors and employers up and down the country using the JCT standard form of contract will draft and operate their contracts.

In one sense, the Supreme Court's decision reaffirms the industry status quo prior to the flurry of judicial input sought by Providence and Hexagon. It is notable that in the several years between the publication of the JCT Design and Build Contract 2016 and Providence commencing court proceedings, there was a dearth of authority and commentary on the interpretation of the termination provisions in question. The explanation for this lacuna may simply be that contracting parties generally understood the meaning of these clauses. Alternatively, it may be that termination is such a high stakes game, contracting parties have not wanted to risk relying on Clause 8.9.4 to terminate, where losing for the contractor would adversely impact its supply chain relationships, and be costly – potentially meaning its having to pay many of them before the contractor was paid by the employer (assuming a contested termination was found in the contractor's favour many months after the event).

However, it remains to be seen whether, given the publicity of the Supreme Court's recent decision, parties will now revisit the terms of the standard JCT contract and seek to reallocate the risk that for many years had seemingly been "baked in" to those provisions. That is, contractors may now fear that recourse to rights of suspension, interest for late payment and adjudication are insufficient remedies for repeated employer defaults.

These remedies take time and money, and the very basis of the Housing Grants, Construction and Regeneration Act 1996 as amended could be called into question (cash flow being at the heart of the legislation) because a repeat offender employer, who pays one day before the cure period ends on every payment over a 24 month contract period, could cost the contractor dearly over the period – such an outcome seemingly does not match the intention of the act from a policy perspective. This is particularly so where repeated late payments are likely to have adverse impacts on supply chains, cashflow and lines of credit (for which the Supreme Court had little regard when interpreting the disputed clauses). Accordingly, and notwithstanding the possible imbalances of negotiating power, contractors may now seek more significant amendments to the termination provisions; for example, to expressly include a right for the contractor to terminate the contract following a certain number of instances of late payments by the employer.

Ironically, the reversion to understood contractual norms may inadvertently result, at least initially, in some uncertainty and a more considered approach to the termination provisions of the JCT (and perhaps other standard forms) suite of contracts.

What remains clear though is that parties should have careful consideration of any termination provisions to ensure that all necessary prerequisites have accrued prior to issuing a notice of termination.

3 The wording of the provisions was subsequently amended in the 2005 version.

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