

Reports from the courts

Our latest round up the court decisions of most interest to construction comes from **Andrew Croft, Benjamin Spannuth** and **Daniela Miklova** of **Beale & Company Solicitors LLP**, who look at a Court of Appeal ruling relating to termination rights; and another that says true value adjudications cannot commence before the amount awarded in a previous adjudication regarding a dispute in the same payment cycle is paid.

Providence Building Services Limited v Hexagon Housing Association Limited

[2024] EWCA Civ 962; Coulson LJ

In February 2019, Hexagon Housing Association Limited (Hexagon) entered a contract with Providence Building Services Limited (Providence) for the construction of several buildings in Purley (the Contract). The Contract incorporated the JCT Form as amended by the parties.

The relevant contractual clauses are:

“Default by Employer

8.9.1 If the Employer:

.1 does not pay by the final date for payment the amount due to the Contractor in accordance with clause 4.9 and/or any VAT properly chargeable on that amount; or

... the Contractor may give to the Employer a notice specifying the default or defaults (a ‘specified’ default or defaults).

8.9.3 If a specified default or a specified suspension event continues for 28 days from the receipt of notice under clause 8.9.1... the Contractor may on, or within 21 days from, the expiry of that 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;

...

then, upon or within 28 days after such repetition, the Contractor may by notice to the Employer terminate the Contractor’s employment under this Contract.”

On 25 November 2022, Payment Notice 27 was issued requiring Hexagon to pay £264,242.55 by 15 December 2022, which Hexagon failed to do. On 16 December 2022, Providence served a notice under clause 8.9.1 (the December Notice). On 29 December

2022, Hexagon paid the sum of £264,242.55.

On 28 April 2023, Payment Notice 32 was issued requiring Hexagon to pay £365,812.22 by 17 May 2023, which Hexagon again failed to do. On 18 May 2023, Providence issued a notice of termination under clause 8.9.4 which referred to the December Notice and gave notice that Hexagon had repeated a specified default resulting in the termination of Hexagon’s employment under the Contract (the Notice of Termination). Providence accepted what it characterised as Hexagon’s repudiatory breaches of contract to rescind and terminate the Contract.

On 23 May 2023, Hexagon paid the sum of £365,812.22. On 24 May 2023, Hexagon disputed the lawfulness of the Notice of Termination and asserted that Providence had repudiated the Contract. On 31 May 2023, Hexagon wrote to Providence accepting what it characterised as Providence’s repudiatory breach.

Hexagon referred the dispute to adjudication and the adjudicator found in Hexagon’s favour.

On 28 July 2023, Providence issued Part 8 proceedings in the TCC for determination of “whether a right to terminate under Clause 8.9.3 must first have accrued before Providence could have any right to terminate under Clause 8.9.4”. At first instance, the TCC found that “the natural and ordinary meaning” of clause 8.9.4 “requires that a clause 8.9.3 notice *could* have been given but the Contractor has decided not to do so for whatever reason”, finding in Hexagon’s favour.

Providence appealed, arguing that there is nothing in clause 8.9 that “implicates notions of ‘choice’ or ‘decision’: the only relevant question under Clause 8.9.4 is whether the Contractor has or has not given the further notice”. Hexagon’s position was that clause 8.9.4 presupposes the prior existence of an accrued right to have given a notice to terminate under clause 8.9.3.

Decision

The Court of Appeal allowed Providence’s appeal.

The Court of Appeal found that Providence had been entitled to terminate the Contract as Hexagon had repeated a specified default even though a right to terminate had not arisen from Hexagon's original default. Whilst Coulson LJ noted that "the drafting could have been of better quality", he was persuaded that the "plain meaning of the words 'does not give' [...] and the presence of the words 'for any reason' in Clause 8.9.4 [...] lead to the conclusion that Providence's interpretation is to be preferred". Coulson LJ found that "the natural meaning of the conditional words at the commencement of Clause 8.9.4 are clear"; unless Hexagon gives the further notice under clause 8.9.3, the condition is satisfied.

Comment

This judgment provides useful clarification in respect of the exercise of termination rights for Employer default under JCT contracts. Parties are therefore advised to ensure that they understand their termination clauses and the consequences of operating them incorrectly. The judgment also serves as a warning to Employers to avoid late payments to avoid the risk of termination.

C.N.O Plant Hire Ltd v Caldwell Construction Limited

[2024] EWH 2188 (TCC); HHJ Kelly

On 20 September 2022, C.N.O Plant Hire Ltd (CNO) entered into a subcontract with Caldwell Construction Limited (Caldwell) to undertake various works in Maghull (the Subcontract).

On 30 December 2023, CNO issued an interim application for payment claiming £1,359,842.44. From that sum was deducted previous payments made to CNO to give the sum claimed of £253,425.56. Caldwell did not issue a payment notice or pay less notice.

CNO referred the dispute to adjudication. On 5 March 2024, the adjudicator decided that the £253,425.56 was due to CNO (Decision 1).

Caldwell did not pay the sums decided in Decision 1. Instead, on 15 March 2024, Caldwell referred a second adjudication "seeking the 'proper valuation of the final account' and repayments of any sums found to have been overpaid to" CNO and which referred to an interim payment application dated September 2023 (the Second Adjudication).

CNO challenged the second adjudicator's jurisdiction to deal with the Second Adjudication on the basis that the dispute related to substantially the

same subject matter as determined in Decision 1, asserting that the interim payment applications issued in September 2023 and December 2023 respectively were for the same works.

The second adjudicator decided he had jurisdiction to deal with the matter. On 14 April 2024, the second adjudicator awarded CNO the sum of £89,480.94 plus VAT (Decision 2). Caldwell paid CNO £63,695.38 on the basis that Caldwell was entitled to withhold their statutory CIS contributions from payment.

CNO issued Part 8 proceedings for summary judgment to enforce Decision 1 in favour of CNO. Caldwell resisted enforcement and invited the TCC to exercise its discretion to set off or withhold enforcement of Decision 1 on the basis of Decision 2. Caldwell did not assert a defence as a result of a jurisdictional challenge or a breach of natural justice against enforcement of Decision 1.

Decision

HHJ Kelly found that the Court could not exercise its power to order a set-off or withhold enforcement of Decision 1 as Caldwell had not commenced enforcement proceedings in respect of Decision 2.

HHJ Kelly cited *S&T (UK) Ltd v Grove Developments LTD [2018] EWCA Civ 2448* which established that where a party is required to pay a notified sum but fails to do so, it may not commence a true value adjudication. HHJ Kelly dismissed Caldwell's argument that Decision 2 was not in respect of the same payment cycle on the basis that both interim payment applications concerned the same work and ongoing discussions concerning the final account.

Further, HHJ Kelly criticised Caldwell's argument to claim set-off or withhold enforcement in respect of Decision 2 as a means of defence. Instead, Caldwell should have followed the established process of applying to enforce Decision 2 and to ask the Court to consider the two enforcement applications together. This would have provided CNO with an opportunity to make submissions in defence to Caldwell's application.

Comment

This judgment reinforces that parties cannot commence a true value adjudication without first paying the amount awarded in a previous adjudication regarding a dispute within the same payment cycle. Parties are reminded to pursue established procedures when resisting enforcement action of adjudication decisions. **CL**