



North West
Branch

CIArb

The Professional Organisation for Arbitrators, Mediators and Adjudicators

North West Branch of the Chartered Institute of Arbitrators

Welcome to the first Newsletter of 2007. At the 3 March 2008 AGM the Director General Michael Forbes Smith and Mike Owen will be outlining significant developments at the CIArb of interest both to arbitrators and mediators. The meeting will be well worth attending!

SECTION 111 HOUSING GRANTS CONSTRUCTION AND REGENERATION ACT 1996

Melville Dundas Limited (In Receivership) and others (respondents)

v

George Wimpey UK Limited and others (appellants)

House of Lords 25 April 2007

By KT Salmon Supreme Court of England and Wales; solicitor Aire; MCI Arb

Can a paying party, withhold payment of a sum due under a construction contract after the final date for payment, without having given a notice of intention to withhold payment?

Before this case the answer would surely have been "of course not". Now, we must think again.

The House of Lords decided by a majority (3-2) that clause 27.6.5.1 of the JCT Standard Form of Building Contract, with Contractors Design, 1998 Edition ('the Contract'), allowed the Employer, Wimpey, to do just that.

The reasoning was that nothing in the HGCR, deprives parties of freedom of contract: specifically the freedom to provide for the circumstances in which payment becomes due or having become due ceases to be due.

The facts were simple. Wimpey engaged Melville Dundas as contractor under the Contract for construction works at Whitecraigs Glasgow. On 2 May 2003, Melville applied for an interim payment of £396k. Payment became due and the final date for payment was 14 days later on 16 May. Wimpey did not pay. They gave no notice of intention to withhold payment. On 22 May administrative receivers were appointed by Melville's bank. On 30 May Wimpey exercised its right by notice to determine Melville's employment under the Contract.

At first instance before the Lord Ordinary, Wimpey succeeded in arguing that the payment ceased to be due upon determination by reason of clause 27. The Inner House reversed that finding and said payment once due remained due.

All the Law Lords agreed that the words in clause 27 were clear and meant that payments previously due, ceased to be due on determination (except any payment that had become due at least 28 days before the earliest date on which notice of determination could have been given). What they could not agree was whether that clause offended section 111 of the HGCR.



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The Majority justified its view in large part by looking at the position on the insolvency of Melville. Thus, whilst Wimpey was entitled to claim the costs of completion, if it had to make the interim payment, the bank would get the benefit and Wimpey would be an unsecured creditor, on the facts, without hope of repayment even if the final accounting showed it had overpaid.

Does this mean the judgment is limited to determination for insolvency? It seems not.

First, clause 27 provides for determination for reasons other than insolvency related events, namely for persistent default or corruption.

Second, in his judgment, Lord Hoffman, went as far as saying

"...section 111(1) should be construed as not applying to a lawful ground for withholding payment of which it was in the nature of things not possible for notice to have been given within the statutory time frame."

The dangers of this approach, are stated in the dissenting judgment of Lord Neuberger

"...if right, it would be possible for parties to agree terms which could retrospectively render undue a stage payment, which had become due for final payment, in almost any circumstances they wished. If section 109(2) enabled parties freely to agree any circumstances they wished in which stage payments which had become due should cease to be treated as due, section 109 and indeed sections 110 and 111, could be rendered a dead letter."

The only limitation suggested is that the court could decide a term is ineffective because its effect is to circumvent the provisions of sections 109 – 111. The judgment does not say what amounts to circumvention.

What conclusions can we draw?

1. The provisions of clause 27 of the JCT form in question comply with HGCRAs meaning a paying party who later determines, can avoid payment of sums previously due (except those due 28 days before the earliest date on which notice to determine could be given) despite the absence of notice to withhold.
2. Similar 'determination' provisions in other standard forms or bespoke contracts will not contravene HGCRAs and will be valid.
3. Other clauses that provide a right of withholding without notice may be valid provided that the right of withholding is 'lawful' and one in respect of which it was 'not possible' to have given a notice within the statutory time frame. This could apply, for example, to a situation where after the last date for giving notice, the payer becomes aware of defects in the work; or the contractor causes damage to the works; or goes into delay making him liable to pay liquidated damages. Clauses making such provision might be valid.
4. This is a Scottish case, technically not binding on English courts. Yet it is a decision of the House of Lords, and will have persuasive effect in the courts of England and Wales.
5. The decision rests in part on Scottish legal considerations (as to insolvency) and on the Scottish version of the JCT Contract. There are however sufficient similarities in the two legal systems as regards insolvency and between the English and Scottish JCT forms, to make it unlikely English courts will distinguish the decision on those grounds.
6. Contractors and sub-contractors must now be even more astute to review payment, determination and set-off provisions, to ensure they do not extend rights to withhold payment by rendering 'undue', sums which have previously become due and payable.
7. Employers, and Contractors entering into sub-contracts, should be aware of the possibility of withholding and of extending the right to withhold, in situations where it is impossible to give timely notice.



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Letters of Intent

It is often said that Letters of Intent are not contractually binding, or that they cause more confusion than they are worth. This is because they are often poorly drafted, are used inappropriately and their effect is not properly understood. There are two types of Letter of Intent. The first merely provides comfort to the Contractor but no commitment from the Employer. The Employer may say, for example, that he intends to enter into a contract and would the Contractor please start to mobilise in preparation. An intention for the future is not contractually binding, and if the Contractor is not awarded the contract, there may be a quarrel over money. The second type of Letter forms a contract in its own right, and is used where it is genuinely not possible to enter into the formal contract at this stage because full particulars have not yet been agreed, but there is some compelling reason for progressing the works at once. It may be, for example, that the Contractor must order materials or procure the design now in order to meet the proposed programme. The Contractor requires some contractual comfort, and the Employer requires definition of the scope of works and payment.

If it is essential to progress the works before the formal contract can be agreed, the Letter should be contractually binding. It should set out the nature and scope of the work to be carried out, the maximum amount to be paid for that work, and it should provide a mechanism for valuation and payment. It should state the form of the formal contract that will be entered into when negotiations are completed (e.g. JCT D&B), it should state that the formal contract will supercede the Letter and that work carried out under the Letter will be deemed to be carried out under the conditions of the formal contract. The Letter should make it clear that the Employer is under no obligation to enter into the formal contract or to give the Contractor any further work and may terminate the instruction contained in the Letter at any time subject to payment of whatever sums have accrued. It may be appropriate to include provisions whereby the Employer may step in to any sub-contracts or orders for materials if the instruction is terminated.

There may be further provisions relating to the Contractor providing copies of drawings and other documents, confidentiality, the CDM Regulations and any indemnities to be given to the Employer by the Contractor. There may be express provisions relating to dispute resolution, and disputes may not be referable to arbitration unless there is a written arbitration agreement. The Contractor should sign and return one copy of the letter to indicate his acceptance of its terms, although there may be acceptance by performance if the Contractor proceeds with the works without signing the Letter.

Once the letter is in place, the Contractor knows that he will be paid and the Employer knows his liability is limited. The parties should continue to negotiate the formal contract with a view to signing it as soon as possible. One effect of a Letter of Intent is that the Employer will lose much of his bargaining power, because the Contractor knows that he has the Employer on the hook and is unlikely to search for a new contractor. Thus the Contractor can insist on his own terms during negotiation of the formal contract and the Employer has little room to manoeuvre. Another effect may be that the parties take their eyes off the ball, because the works are progressing, and never get round to signing the formal contract. If the formal contract is not signed, and something goes wrong on site, and the parties' obligations are not clear, there may be confusion and acrimony. A Letter of Intent may allow the work to proceed if necessary, but should not be used if it is not necessary.

Daniel Brawn
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Talking rubbish

Jody Kite, solicitor specialising in both contentious and non-contentious areas of construction law at Mace and Jones, examines how the Government's 'green agenda' will make its mark on the construction industry in the coming year, following the pending implementation of the Site Waste Management Plans Regulations in April 2008.

As any viewer of the BBC consumer tip-off BBC television programme Rogue Traders will testify, some builders have a notorious public reputation for not completing a project, let alone disposing of their waste in an environmentally friendly manner at the end of one. Media hype aside, the Government has genuine concerns regarding the amount of waste produced by England and Wales' wider construction industry.

Research suggests that millions of tons of construction waste each year fails to make its way to the landfill site. Yet who are the main culprits and further, will the Government's proposed Site Waste Management Plans Regulations 2008 see fit to tackle them? As the law stands, implementation of the current Site Waste Management Plans is optional and not a compulsory requirement. It is therefore not surprising that the construction industry continually produces high levels of waste year upon year, hence the Government's concerns regarding its disposal. That said, many larger projects do implement effective waste management policies on site, but these make up a relatively small percentage of England and Wales' construction industry.

Given the trends, you would think that the Government's microscope would be firmly fixed on the smaller 'offenders'. However, the Regulations, as drafted, exempt projects valued below £250,000 from the Government's plans to make site waste management plans a compulsory legal requirement. As larger projects generally tend to exercise good waste management, the Regulations will mostly affect small to medium-sized projects valued above the £250,000 threshold. And, if implemented, affect them the proposed Regulations will; should an individual be held responsible for a company's waste crime under the Regulations, they can expect, on conviction, to receive a fine and/or imprisonment. Yet in light of Lord Falconer's willingness to foster non-custodial sentences in respect of low-level crime and associated problems with corporate culpability, it seems extremely likely that any such punishment will be dealt with by way of fixed fine.

Despite these proposals for waste management reform, it must be remembered that the Government's ongoing consultations are not due to be finalised until July 2007. Yet should the Regulations be implemented as drafted, smaller developers will look on as others must embrace the changes. One can only speculate what the fly-tipping voyeurs of BBC consumer-televised culture will make of the reforms...

Forthcoming Events

17 September
7.30 p.m.

Dinner meeting
Speaker: Hew Dundas,
De Vere, Daresbury

06 February 2008

Construction Case Update
Krista Lee, De Vere, Daresbury

15 October
7.45 p.m.

Delay Analysis
Chris Linnett and Steve Lowsley

03 March 2008
7.45 p.m.

Branch AGM
Speakers: M Forbes-Smith,
Mike Owen, De Vere, Daresbury

22 November

Annual Dinner, Black Tie
Speaker: His Honour
Judge Hickinbottom
De Vere, Daresbury

14 April 2008
7.45 p.m.

Latest Development in Adjudication
Dominic Helps, De Vere, Daresbury

10 December

Talk by a TCC Judge
De Vere, Daresbury

30 April 2008

Study of Mediation
Mark Mattison and Quentin Smith
De Vere, Daresbury

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