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In this edition of the Construction Updater we report on:

Extension of time provisions and ‘time at large’

Multiplex Constructions (UK) Limited v Honeywell Control Systems Limited No. 2 [2007] EWHC 447 (TCC)

Mr Justice Jackson has given a further judgment in the Multiplex proceedings, in relation to the construction of Wembley stadium.

Had Multiplex, by its conduct, put time ‘at large’ under the sub-contract? How will the courts approach the construction of extension of time provisions where there is ambiguity? When will time be set at large? What is the position if a sub-contractor fails to comply with conditions precedent in an extension of time mechanism where the employer is partly responsible for delay?

Termination under JCT

Reinwood Limited v L Brown & Sons Limited [2007] CILL 2413

The JCT forms of contract entitle the contractor to terminate its employment under the contract in certain circumstances (where the employer is in breach of contract) provided its notice of termination has not been issued “unreasonably or vexatiously”.

What do the words “unreasonably or vexatiously” mean, in this context? What factors will the courts consider when determining whether a notice of termination has been issued unreasonably or vexatiously?

Adjudication - Successive adjudications and the Quietfield principles

HG Construction Ltd v Ashwell Homes (East Anglia) Ltd [2007] EWHC 144 (TCC)

What principles apply to determine whether an earlier adjudication decision is binding in relation to a later adjudication? Is it relevant whether or not the contract adjudication provisions expressly stipulate that an adjudicator must resign if he is asked to determine a dispute which is the same, or substantially the same, as one which has previously been determined in an adjudication?

Adjudication - Letters of Intent and the Construction Act

Bennett (Electrical) Services Limited v Inviron Limited [2007] EWHC 49 (TCC)

Can a letter of intent which is expressed to be “subject to contract” constitute a construction contract for the purposes of section 107 of the Housing, Grants, Construction and Regeneration Act 1996?

Will a letter of intent which constitutes a contract and which identifies work scope, programming requirements and a fixed price, but not matters such as variations, insurance, health and safety, comply with the “in writing” requirements under section 107?

Will a construction contract comply with the “in writing” requirements of section 107 if it is a complete record of all the written terms, but the works are then subject to significant oral variation?

This month’s quiz
Extension of time provisions and ‘time at large’

In the leading case of Peak Construction (Liverpool) Limited v McKinney Foundations [1970] 1 BLR 111, the construction contract contained a mechanism for extending the completion date, but this mechanism failed to provide for an extension of time where the contractor was delayed in achieving the completion date due to the fault of the employer.

Peak illustrated that a provision which postpones the completion date on account of delay caused by some breach or failure by the employer is inserted as a protection for the employer. This is because the employer cannot insist upon a condition (i.e. completion by a specified date) if it is partly the employer’s own fault that such condition cannot be fulfilled. It is therefore in the employer’s interests to include such a provision, so that the employer can insist upon completion by the extended completion date.

If (as in Peak) the employer is partly responsible for the contractor’s failure to achieve the completion date, but there is no contractual mechanism for the completion date to be extended in such circumstances, then the legal position is:

- the completion date becomes unenforceable: time is ‘at large’, with the result that the contractor’s obligation is to complete the works within a “reasonable time” (to be assessed by reference to all the circumstances); and
- any liquidated damages provision becomes unenforceable: the employer is entitled to recover unliquidated damages for delay, provided that it can prove the actual losses it suffered as a result of the delay.

Contractors have taken the Peak principle on board, arguing that time and damages are ‘at large’ so as to defeat the employer’s ability to require completion by the completion date (as extended) and the payment of liquidated damages. If that argument succeeds, employers may have considerable difficulty (and expense) establishing (i) what is, in all the circumstances, a reasonable time for completion of the works; and (ii) the actual losses the employer has suffered as a result of delayed completion.

In the following case - another one of the Multiplex proceedings in relation to the construction of Wembley stadium - the sub-contractor argued that time was ‘at large’ and an adjudicator agreed. The aggrieved contractor - Multiplex - sought declarations from the court that time was not at large; and that the sub-contractor was required to complete its works within the time specified in the sub-contract (as extended pursuant to the terms of the sub-contract). The sub-contractor countered this by raising numerous arguments as to why time was ‘at large’.

Multiplex Constructions (UK) Limited v Honeywell Control Systems Limited No. 2 [2007] EWHC 447 (TCC)

Wembley National Stadium Limited (“WNSL”) entered into a main contract with Multiplex (and its guarantor). Multiplex entered into a sub-contract with the sub-contractor (Honeywell) for the electronic systems at the stadium.

By the time the sub-contractor entered into its sub-contract, substantial delays to the project had already occurred. Delays continued to occur after the sub-contractor commenced work. The sub-contractor was highly critical of Multiplex’s organisation and programming of the work and alleged that Multiplex was responsible for the delays; Multiplex made similar allegations against the sub-contractor.

During 2005, Multiplex issued three revised programmes to the sub-contractor, each in the form of a direction under clause 4.2 of the sub-contract. Each programme showed a later completion date for the sub-contract works. The sub-contractor commenced adjudication proceedings claiming prolongation costs. A separate dispute then arose as to whether Multiplex had, by its conduct, put time ‘at large’.

Before considering the arguments, it is necessary to set out briefly a summary of the relevant sub-contract terms:

The relevant sub-contract terms

Multiplex had power to issue instructions to the sub-contractor which could delay completion under the following provisions of the sub-contract:
Clause 4.2 - directions

"... The Contractor may issue any reasonable direction in writing to the Sub-Contractor... (including the ordering of any Variation...)"

"... The Sub-Contractor shall... forthwith comply with all directions..."

Clause 4.6 - Variations

Clause 4.6 set out a mechanism for Multiplex to issue variations. This provided for the parties to agree to an extension of time and the costs consequences associated with the variation or, in default of such agreement, for the dispute to be determined pursuant to the dispute resolution provisions.

Clause 4.6 included the following proviso (the 'guillotine provision'):

"... provided always that... the Sub-Contractor shall be entitled to no greater... extension of time... than that which, in relation to the Sub-Contract Works, the Contractor receives from the Employer in respect of the equivalent Change under the Contract."

Clause 46 - postponement

"The Contractor may issue instructions in regard to the postponement of any... work to be executed under the provisions of the Sub-Contract."

Clause 11 - extension of time: “Relevant Events”

Clause 11 gave the sub-contractor the right to an extension of time in relation to ‘Relevant Events’:

"... If and whenever it becomes apparent... that the... completion of the Sub-Contract Works... is being... delayed, the Sub-Contractor shall forthwith give written notice to the Contractor of the material circumstances including, so far as the Sub-Contractor is able, the cause... of the delay and identify in such notice which in his opinion is a Relevant Event.” [Emphasis added.]

"... In respect of... every Relevant Event... the Sub-Contractor shall, if practicable in such notice, or otherwise in writing as soon as possible after such notice [give particulars and estimate delay]”. [Emphasis added.]

The following clause applied:

"... It shall be a condition precedent to the Sub-Contractor’s entitlement to any extension of time under clause 11, that he shall have served all necessary notices on the Contractor by the dates specified and provided all necessary supporting information including but not limited to causation and effect programmes... In the event the Sub-Contractor fails to notify the Contractor by the dates specified and/or fails to provide any necessary supporting information then he shall waive his right, both under the Contract and at common law, in equity and/or pursuant to statute to any entitlement to an extension of time under this clause 11.” [Emphasis added]

‘Relevant Events’ included:

- Variations pursuant to clause 4.6.
- Compliance with the Contractor’s instructions under clause 46 [instructions to postpone].
- "delay caused by any act of prevention or default by the Contractor in performing its obligations under the Sub-Contract ...”
Clause 12 - effect of delayed completion
Clause 12 did not provide for the sub-contractor to be liable for liquidated damages in the event it failed to achieve the completion date. Instead, it provided that, in the event of such failure:

"... the Sub-Contractor shall indemnify the Contractor for, and shall pay or allow to the Contractor a sum equivalent to, any damage, loss, cost and/or expense suffered or incurred by the Contractor and caused by the failure of the Sub-Contractor as aforesaid." [Emphasis added]

Time ‘at large’: the sub-contractor’s arguments and the court’s findings
The alternative arguments advanced by the sub-contractor as to why time was at large included (using the descriptions adopted by the court):

The ‘construction point’
The argument: A direction for a variation under clause 4.2 did not constitute a Relevant Event under clause 11, so the extension of time mechanism did not apply to directions issued under clause 4.2. Since Multiplex had no power under clause 11 to extend time in respect of a clause 4.2 direction which affected the completion date, under the Peak principle, time was at large.

The court’s decision: The issue by Multiplex of a direction under clause 4.2 - which constituted a variation and delayed completion - constituted a Relevant Event under clause 11:

- First, such variation constituted an ‘act of prevention’ by Multiplex. The fact that Multiplex was permitted to issue such a direction under the contract did not prevent it from being an act of prevention.
- Secondly, each direction constituted an instruction to postpone under clause 46.

There was therefore a mechanism to extend time for directions issued under clause 4.2 which constituted a variation and delayed completion. The Peak principle did not therefore apply, and time was not at large.

The ‘operational point’
The argument: Multiplex was in breach of its obligations in respect of programming (by failing to link its revised sub-contractor programmes to the overall programme), which made it impossible for the sub-contractor to estimate the impact of the delays. The sub-contractor was therefore unable to comply with the notification requirements under clause 11. This had the effect of setting time at large.

The court’s decision: Clause 11 did not require the sub-contractor to provide information which was not available to him at the time of the notice of delay. The clause required the sub-contractor to provide information in its notice "if practicable" or otherwise "as soon as possible". In short, clause 11 was not an absolute obligation - it required the sub-contractor to do its best as soon as it reasonably could.

The evidence demonstrated that the sub-contractor had given notices of delay; it had stated that it could not ascertain the precise consequences of the delay; and it had stated that it intended to serve such information when it became possible for it to do so. The court concluded that this evidence demonstrated that the sub-contractor had complied with clause 11. The clause 11 machinery was both operable and being operated: time was not, therefore, at large.

The ‘Gaymark point’
The argument: Clause 11 required the sub-contractor to comply with the notice requirements as a condition precedent once Multiplex had issued a direction under clause 4.2 which caused delay. Even if the sub-contractor had been able to comply with the notice provisions in clause 11, it had failed to do so. Following the Australian case of Gaymark Investments Pty Limited v Walter Construction Group Limited [1999] NTSC 143; (2005) 21 Construction Law Journal 71, the effect of this was to set time at large (following the Peak principle) because otherwise Multiplex would be able to recover damages (under clause 12) for a period of delay which Multiplex had caused.

The court’s decision: There was considerable doubt as to whether Gaymark represented English law. If
Gaymark was good law, it would mean that a contractor/sub-contractor could disregard with impunity any provision making notice a condition precedent and effectively set time at large at its own option.

It was not necessary for the court to decide whether Gaymark represented English law, since Gaymark could be distinguished. In Gaymark, the contract in question contained a liquidated damages clause, so that if the contractor failed to comply with the condition precedent set out in the extension of time provision, the contractor automatically became liable to pay liquidated damages. In contrast, in this case, the sub-contract did not contain a liquidated damages provision. If the sub-contractor failed to comply with the condition precedent set out in the extension of time provision, clause 12 provided that the sub-contractor would only become liable to pay losses incurred by Multiplex which were “caused by the failure of the Sub-Contractor”.

In these circumstances, if the sub-contractor could have complied with the conditions precedent set out in the extension of time provision, but had simply failed to do so (whether or not deliberately), this did not set time at large.

The settlement agreement point

The argument: The sub-contractor was entitled to an extension of time in respect of variations to the sub-contract works which were changes to the main contract works. Under clause 4.6, the sub-contractor’s right to an extension of time in relation to variations was limited to the extension granted under the main contract. Multiplex had entered into a settlement agreement with the employer, the terms of which were confidential.

If it was assumed that:

- Variations were instigated by WNSL which caused substantial delays, these would entitle (i) Multiplex to an extension of time under the main contract; and (ii) the sub-contractor to an extension of time under the sub-contract.

- The commercial deal agreed by Multiplex involved Multiplex abandoning its claim to an extension of time for these variations, the result would be that Multiplex would not “receive” an extension of time under the main contract, so the sub-contractor would not (as a result of the guillotine provision set out in clause 4.6) be able to claim the extension to which it would otherwise be entitled in respect of those variations.

In other words, the abandonment by Multiplex of the extension of time mechanism under the main contract prevented the extension of time mechanism under the sub-contract from operating properly and, as a result, time was at large.

The court’s decision: If the mechanism for extending time under the main contract had been abandoned or replaced by the settlement agreement, then the guillotine provision in clause 4.6 would fall away. Multiplex could not rely upon the guillotine provision to deprive the sub-contractor of its rights for an extension of time otherwise due under the sub-contract. The settlement agreement between Multiplex and WNSL did not therefore set time at large under the sub-contract.

Editors’ comments

The court’s decision that the extension of time mechanism in clause 11 remained effective and operational reflected the judge’s view that, in so far as an extension of time clause was ambiguous, the court should lean in favour of a construction which permitted a contractor or sub-contractor to recover appropriate extensions of time in respect of events causing delay.

The judge’s approach will no doubt be welcomed by employers who have faced arguments from contractors that the extension of time mechanism was inoperable so that time and (where there were liquidated damages provisions) damages, were at large.

Although obiter, the doubt cast by the judge on the Gaymark case is interesting. This case adds force to the academic argument (strongly propounded by the late Ian Duncan Wallace QC) - that Gaymark does not represent English law.

Contractors and sub-contractors, be warned! Where an employer has itself delayed the works and a contractor or sub-contractor (deliberately or otherwise) fails to exercise its contractual rights under the
extension of time mechanism (which would have negated the effect of an act of prevention by the employer or contractor), it remains a moot point under English law as to whether:

- time is at large; and
- if there are liquidated damages provisions, the contractor/sub-contractor will be liable to pay liquidated damages for delay.

View *Multiplex Constructions (UK) Limited v Honeywell Control Systems Limited No. 2 [2007] EWHC 447 (TCC)*
Termination under JCT

Under the JCT forms of contract, the contractor is entitled to terminate its employment under the contract if (amongst other things) the employer repeats a breach of contract, where the contractor has issued a default notice to the employer in relation to the previous breach. The contractor’s right to terminate arises “upon” or “within a reasonable time” of the repetition of the specified breach. This notice of termination must not be issued “unreasonably or vexatiously”.

In the following case, the contract was the JCT Form 1998 Edition, Private With Quantities and the contractor determined its employment under the contract, relying upon the above provision. (The older JCT forms refer to “determination” rather than “termination”, but there is no significance in the different terminology).

One of the key issues was whether the contractor had acted “unreasonably or vexatiously” in determining the contract. Cogent arguments were advanced on both sides:

Reinwood Limited v L Brown & Sons Limited [2007] CILL 2413

The contract was for works in excess of £6 million. The employer was a special purpose vehicle incorporated in the Isle of Man. The works were in delay. The relationship between the parties had become increasingly strained.

The employer committed two breaches of its payment obligations:

- The first breach occurred in January 2006. The final date for payment for an interim payment was 25 January 2006. The employer made an interim payment to the contractor early, and had deducted from the amount paid, amounts by way of liquidated damages for delay. However, on 20 January 2006, the architect awarded an extension of time. The result was that the employer was, at the final date for payment, no longer entitled to withhold the entire amount of liquidated damages - £61,629 - which it had deducted. It was only entitled to deduct £12,326.

  The employer failed to pay the £49,303 which was owing by 25 January 2006. The contractor sent the employer a notice of default under the contract, and the employer paid the outstanding amount within seven days (with interest).

- The second breach occurred in June 2006 when the employer failed to pay an interim payment of £39,981 by 28 June 2006, which was the final date for payment. The employer made the payment on 6 July 2006.

Prior to 6 July 2006, the contractor issued a notice of determination on the basis that, by failing to pay the sum of £39,981 on 28 June 2006, the employer had repeated a specified default.

Under the JCT forms of contract, if the contractor determines the contract on the basis of the above provision, the employer is subject to an accelerated payment regime for the works properly carried out by the contractor and is deprived of its right to the retention.

The employer argued, amongst other things, that the contractor had acted “unreasonably or vexatiously” in determining the contract, and its notice of determination was therefore invalid.

What does acting ‘unreasonably’ or ‘vexatiously’ mean?
The judge reviewed the authorities and set out the following propositions:

- It was for the employer to establish, on the balance of probabilities, that the contractor had determined the contract unreasonably or vexatiously.

- ‘Vexatiously’ meant that the contractor had an ulterior purpose or motive in determining the contract; or acted with the purpose of oppressing, harassing or annoying the employer.

- The test of what was an unreasonable determination was to be ascertained by reference to how a reasonable contractor would have acted in all the circumstances.
The court would not substitute its own view of what was reasonable for the view taken by the contractor if the contractor's view was one which a reasonable contractor might have taken in all the circumstances.

The test of what was unreasonable conduct was objective.

The effect on the employer of the determination was a factor to be taken into account, and a determination might be unreasonable if it disproportionately disadvantaged the employer.

**The employer's arguments: the contractor had acted “unreasonably or vexatiously”**
The employer argued that the contractor had acted “unreasonably or vexatiously” in determining the contract because:

- The failure to make the payment on 28 June 2006 had been an oversight. It was only six days late; it was modest in amount; the contractor could easily have telephoned the employer to find out why the payment had not been made and, if it had done so, the payment would have been made sooner.

- There was outstanding defective work required to be carried out before practical completion and the contractor was in culpable delay. In these circumstances, it would be disproportionate that (as a consequence of the termination) the employer would be subject to an accelerated payment regime and would be deprived of its right to the retention, when the contractor could have exercised its right to suspend work until payment was made, and/or sought to enforce its right to payment via adjudication.

- The contractor had an agenda to extricate itself from the contract. It had, in effect, seized upon an oversight by the employer as an excuse to leave the site and avoid the imposition of further liquidated damages, thereby avoiding incurring further losses on the contract.

**Had the contractor acted “unreasonably or vexatiously”?**
The judge accepted that the employer’s breaches of contract were, in financial terms, comparatively small (in the context of a contract in excess of £6 million); the periods of delay were short; and the employer had not been persistently in delay in paying monies due under the contract. However, the judge also noted the following:

- A failure by the employer to pay amounts due under the contract was a serious breach. A sum of £39,000 would pay quite a lot of wages and the amount was not so insignificant that it would not affect the contractor's cash flow.

- The contractor legitimately had concerns regarding the adversarial approach being adopted by the employer to the contract. The contractor had been involved on another project (with a company in the same group as the employer) in which the contractor had had to bring five adjudications. Although these adjudications had not all been entirely successful, they had resulted in the contractor obtaining monies to which it was entitled. The contractor therefore had valid grounds for believing that this contract would result in a series of adjudications before the contractor would be able to obtain the monies due to it.

- It was unlikely that the contractor would obtain any further payment if it remained on site because it had been informed that its loss and expense claims (which had provisionally been accepted by the quantity surveyors in earlier interim certificates) were going to be reviewed downwards - at the insistence of the employer. The contractor had grounds for believing that the employer was seeking unduly to influence the conduct of the quantity surveyors - and also the architects - in its favour, and against the contractor.

- There was a bona fide dispute between the parties as to whether practical completion had been achieved - there was no evidence that the contractor's view (that practical completion had been achieved) could not be held by a reasonable contractor.

- There was no evidence that the employer would suffer any financial difficulties as a result of the determination of the contract. This was not a case where the employer was left with a half completed building; and it had not been argued that it would be difficult for the employer to finish off the remaining works quickly.
The contractor had a legitimate concern to protect its legitimate interests. It had acted in its best interests and not with any motive of harassing, oppressing or annoying the employer.

The employer’s behaviour in relation to payment in January 2006 had not been conducive to good relations. In these circumstances, the employer could not be surprised if the contractor was suspicious of its actions.

The judge concluded that, in all the circumstances, it was not unreasonable for the contractor to exercise a right of determination, and thereby resolve all matters in a single adjudication.

Editors’ comments
The judge was clearly unimpressed with the employer’s behaviour in this case - in particular, with the undue influence it had sought to exert on the architect and quantity surveyor. As the details of the employer’s behaviour emerged from the judgment, it became increasingly clear that the employer’s argument was unlikely to prevail.

Would the position have been different if a ‘model’ employer had on two occasions (admittedly due to its own administrative error/incompetence) failed to make two payments, in circumstances in which the contractor was in culpable delay; was liable for liquidated damages; and was making losses on the contract?
Adjudication - Successive adjudications and the Quietfield principles

In the January 2007 Updater, we reported on *Quietfield Ltd –v– Vascroft Construction Ltd* EWCA Civ 1737, in which the Court of Appeal set out the following principles:

- Under the Housing Grants, Construction and Regeneration Act 1996 (the "Construction Act") and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (the "Scheme"), successive adjudications were permissible provided that a second adjudicator was not required to decide an issue which the first adjudicator had already decided.

- The first question in each case therefore was: what had the first adjudicator decided?

- Whether dispute A was substantially the same as dispute B was a question of fact and degree.

In the following case, the court considered whether the principles established in *Quietfield* applied in a case where the Scheme did not apply.

*HG Construction Ltd –v– Ashwell Homes (East Anglia) Ltd* [2007] EWHC 144 (TCC)

In this case, there were four successive adjudications.

The central issue was whether the contractor could rely upon:

- the adjudicator’s decision in adjudication 3 - that: "There is no basis on which the Liquidated and Ascertained Damages operate and therefore they should be refunded"

in the light of:

- the adjudicator’s decision in adjudication 1 - that: "The provisions within the contract for the deduction of Liquidated and Ascertained Damages ... are valid and enforceable”.

The employer argued that the adjudicator’s decision in adjudication 3 was unenforceable since the issue of the enforceability of liquidated damages had already been determined in adjudication 1.

**What principles apply to determine whether the earlier adjudication decision is binding in relation to a later adjudication?**

Under paragraph 9 of the Scheme, if an adjudicator is faced with a dispute which is the same or substantially the same as one which has previously been determined in an adjudication, the adjudicator must resign.

In this case, the adjudication provisions set out in the Scheme did not apply. The only relevant contractual provision was clause 39A.7.1 of the relevant JCT contract, which provided that the decision of the adjudicator was temporarily binding, pending final determination by arbitration, legal proceedings or subsequent agreement between the parties (reflecting section 108(3) of the Construction Act).

The question therefore arose as to whether the principles set out by the Court of Appeal in *Quietfield* (in which the Scheme applied) were equally applicable in this case.

**Do the Quietfield principles apply where the Scheme does not apply?**

The judge found that - whether or not the Scheme applied - the underlying principles did not differ. If an adjudicator was being asked to determine a matter which was the same or substantially the same as one which had previously been determined in an adjudication then - as a matter of practice - the adjudicator should decline to decide that matter. If that was the only matter which he was being asked to decide, the adjudicator should resign. This was the effect of clause 39A.7.1 of the JCT contract.

Ramsey J emphasised that the test was whether the issue the adjudicator was being asked to decide was "the same or substantially the same" as a dispute or difference that has already been the subject of an adjudication: there did not have to be complete identity of factual and legal issues.
Was the dispute the same or substantially the same?

The contractor argued that:

- the dispute in adjudication 1 was limited to the issue as to whether the liquidated damages provisions (i) were unenforceable because of uncertainty with regards to the works comprised in each section; and (ii) constituted a penalty; whereas

- the dispute in adjudication 3 was as to whether the liquidated damages provisions were unenforceable because the employer had taken early possession of parts of the premises, and it was not possible to calculate the resulting reduction in the amount of liquidated damages payable for the remaining parts (pursuant to the contractual mechanism for granting proportional relief).

The court noted that, in adjudication 1, the employer had characterised the dispute as concerning “... the validity and/or enforceability of the provisions within the Contract for the deduction of liquidated damages.”

The court found that the underlying argument in adjudication 3 was the same as that in adjudication 1, namely, that the liquidated damages were unenforceable because it was not possible to value the works in each section. The adjudicator had rejected this argument in adjudication 1.

The judge went on to say that, even if the contractor’s argument in adjudication 3 (as to why the liquidated damages were invalid and unenforceable) had been a new one, the contractor would still not have been entitled to raise this argument as the first adjudicator had decided the dispute between the parties in relation to the enforceability of the liquidated damages provisions.

Editors’ comments

The employer, in this case, had referred to adjudication the general issue as to the enforceability of the liquidated damages provisions, since this had been in dispute. Its notice to refer had not been restricted to certain specific issues raised by the contractor. The employer was well advised in so doing. The first adjudicator’s decision - that the liquidated damages provisions were enforceable - precluded the contractor from subsequently developing new arguments - or allegedly new arguments - impugning the validity and enforceability of the liquidated damages provisions.

View HG Construction Ltd -v- Ashwell Homes (East Anglia) Ltd [2007] EWHC 144 (TCC)
Adjudication - Letters of Intent and the Construction Act

In the December 2006 edition of the Updater, we reviewed the case of Hart Investments Ltd v Fidler and another [2006] EWHC 2857 (TCC), which was the first reported case on the issue as to whether a letter of intent complied with the “in writing” requirements of s107 of the Construction Act.

In that case, the court applied the decision in RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd [2002] 1 WLR 2344, namely, that the whole contract - not merely a part of it - had to be evidenced in writing, to comply with s107 of the Construction Act.

The court concluded, in that case, that the relevant paragraphs in the letter of intent did not constitute a complete record of the parties’ proposed agreement; the letter of intent did not therefore comply with s107 of the Construction Act; and Part II of the Construction Act (including its provisions for adjudication) did not therefore apply.

The issue as to whether a letter of intent will comply with s107 of the Construction Act has now been considered in a further case:

Bennett (Electrical) Services Limited v Inviron Limited [2007] EWHC 49 (TCC)

The contractor sent a sub-contractor a letter of intent which was headed "Subject to Contract". The sub-contractor commenced adjudication proceedings. The adjudicator found that he had no jurisdiction on the grounds that there was no contract between the parties which complied with section 107 of the Construction Act.

The sub-contractor commenced a second adjudication in relation to the same dispute. The second adjudicator ruled that he had jurisdiction and decided in favour of the sub-contractor. The sub-contractor sought to enforce the second adjudicator's decision.

Was there a contract between the parties?

The first issue was whether the letter of intent constituted a contract in writing, as required under s107 of the Construction Act. The judge held that the effect of the words "subject to contract" was that no contract came into being.

That finding was sufficient to dispose of the case. There was no construction contract under section 107 of the Construction Act. The adjudicator therefore had no jurisdiction.

However, the judge then considered what the position would be if (contrary to his finding) a contract had come into existence.

Did the letter of intent comply with the “in writing” requirements of s107 of the Construction Act?

The sub-contractor argued that the letter of intent contained all the terms of the construction contract: the work scope, programming requirements and fixed price were all identified.

The court rejected the sub-contractor’s argument. Additional works had been instructed, for which the letter of intent had no provision for price/ rates, method of assessment or timing of payment. The letter of intent also referred to a meeting at which key issues had been discussed, including mechanics of payment, variations, insurance and health and safety. These were all key matters, which had not been recorded in the letter of intent.

As a result, following the RJT case, the letter of intent did not comply with "in writing" requirements of s107 of the Construction Act.

Editors’ comments

The judge did not need to consider the contractor’s argument that the second adjudicator had no jurisdiction because the issue of jurisdiction had already been determined in an earlier adjudication. On this ground alone, it seems that the sub-contractor’s proceedings to enforce the second adjudicator’s decision were doomed to fail.
When applying the principles of the RJT case, the judge noted that a construction contract will not comply with the “in writing” requirements of section 107 of the Construction Act where written terms are complete, but “the works have been subject to significant oral variation”.

If this is correct, it follows that a construction contract which records all terms agreed between the parties and which therefore falls within the scope of section 107 of the Construction Act, may subsequently fall outside the scope of section 107, if oral variations are made. The judge, in this case, referred to the oral variations being “significant”. However, in line with the RJT reasoning, it is arguable that a contract would cease to fall within the scope of section 107 of the Construction Act if any oral variations were subsequently made. Presumably, this would be the case even if the oral variations were wholly unconnected with the subject matter of the dispute. This could be a trap for the unwary!

View Bennett (Electrical) Services Limited v Inviron Limited [2007] EWHC 49 (TCC)
March’s quiz
Test your knowledge of how extension of time clauses operate!

A construction contract provides:

- in clause A, for the employer to have authority to issue directions to the contractor (including directions which vary the works and which delay completion).
- in clause B, for the employer to issue variations.
- an extension of time (EoT) mechanism - for the contractor to be granted an EoT if it is delayed in carrying out the works due to:
  a. variations issued by the employer pursuant to Clause B of the contract; and/or
  b. an act of prevention by the employer.

The employer issues directions to the contractor under clause A which vary the works and delay completion.

**Question One**
Can the issuance by the employer of directions under clause A - which the employer is expressly authorised to issue - constitute an "act of prevention" under the EoT provision?

a. Yes  
b. No  
c. Legal position is unclear

The contract stipulates that strict compliance by the contractor with the notice provisions are a condition precedent to the contractor’s right to an extension of time.

**Question Two**
If, following receipt of the directions under clause A, the contractor fails (deliberately or otherwise) to comply with the conditions precedent, will time be at large?

a. Yes  
b. No  
c. Legal position is unclear

Quiz answers

This publication is written as a general guide only. It is not intended to contain definitive legal advice which should be sought as appropriate in relation to a particular matter.

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