

THE JCT CONTRACT IN A COLD CLIMATE

Lecture at King's College

Wednesday 18

February 2009

Adrian Williamson QC and

Adam Constable

Keating Chambers

"8.9.1 If the Employer:

.1 does not pay by the final date for payment the amount properly due to the Contractor in respect of any certificate and/or any VAT properly chargeable on that amount; or

...

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

...

- .3 If a specified default continues for 14 days from the receipt of notice under clause 8.9.1 or 8.9.2, the Contractor may on, or within 10 days from, the expiry of that 14 day period by a further notice to the Employer terminate the Contractor's employment under this Contract.*
- .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 a reasonable time after such repetition, the Contractor may by notice to the Employer terminate the Contractor's employment under this Contract".

14.12.05 Architect issued Certificate of Non-Completion.

11.1.06 Architect issued Interim Certificate showing £187,988 due.

17.1.06 Employer:

- (1) Issued Clause 24.2 Notice of Intention to deduct LADs from 14.12.05.
- (2) Gave notice under clause 30.1.1.3 of intention to pay only £126,359 i.e. a deduction of £61,629 for LADs.

- 20.1.06 £126,359 paid.
- 23.1.06 EOT granted to 10.1.06
- 25.1.06 Final date for payment
- 26.1.06 Notice of default given, on basis that due to EOT Employer only entitled to deduct £12,326 for LADs.
- 28.6.06 Final date for payment of £39,981 under further Interim Certificate.
- 5.7.06 Notice of termination given.
- 6.7.06 £39,981 paid.

"34. ... It is in my judgment impossible to imply into clause 28.2.4 a term that a reasonable time must elapse between the repetition of the specified default and the giving of the notice of determination. Such a term would be inconsistent with the express terms of clause 28.2.4 which provides that a notice of determination may be given "upon or within a reasonable time after such repetition". If a notice may be given "upon or within a reasonable time after" the repetition of the specified default, it cannot be implied that it may only be given after a reasonable time. Such an interpretation or implication would involve disregarding the words "upon or" in

in clause 28.2.4. Clause 28.2.4 is in my judgment clear and unambiguous and it provides that a notice of determination may be given as soon as the specified default has been repeated. There is nothing unreasonable in that, since the employer has already received a warning in respect of the previous default and must be taken to know that if he repeats the default he runs the risk that the contract may be determined either forthwith or within a reasonable time after the repetition of the specified default. The inclusion of the words "within a reasonable time" in clause 28.2.4 make clear that if the contractor is to terminate the contract because a specified default has been repeated, the contractor must

act reasonably promptly. He may not, for example, either delay unreasonably in giving a notice of determination or allow the contract to proceed and then at some later date of his choosing seek to determine the contract for that breach. The words limit the period within which any notice must be given. They do not postpone or delay the period within which a notice may be given or give the employer a period of grace before the contract may be determined."

“39. In my judgment the following propositions may be derived from these authorities:

- 1. It is for the employer to show on the balance of probabilities that the contractor has determined the contract unreasonably or vexatiously.*
- 2. By vexatiously is meant that the contractor determined the contract with the ulterior motive or purpose of oppressing, harassing or annoying the employer.*

3. *The test of what is an unreasonable determination is to be ascertained by reference how a reasonable contractor would have acted in all the circumstances.*
4. *It is not for the court to substitute its own view of what is reasonable for the view taken by the contractor if that is one which a reasonable contractor might have taken in the circumstances.*

5. *Although the motive or purpose which a contractor had in exercising the right of determination is a relevant consideration, the test of what is unreasonable conduct in this context is objective and the fact that the individual contractor may have thought that his conduct in determining the contract was reasonable is not conclusive.*
6. *The effect on the employer of determination by the contractor is a factor to be taken into account and a determination may be unreasonable if it disproportionately disadvantages the employer."*

“(1) Provided the two preconditions in clause 24.2.1 are satisfied, namely that the architect has issued a Certificate of Non-Completion under clause 24.1 and the employer has informed the contractor in writing before the date of the Final Certificate that he intends to withhold or deduct LADs, then clause 24.2.1.1 entitles the employer to give a notice under clause 30.1.1.4 stating that he intends to deduct LADs from monies due to the contractor.

(2) Once that notice under clause 30.1.1.4 has been issued, then, absent special circumstances, both contractor and employer should be entitled to proceed on the basis that payment will and can properly be made in accordance with that notice."

“.3 (if not already applicable) clauses 8.7.4, 8.7.5 and 8.8 shall thereupon apply and the other provisions of this Contract which require any further payment or any release of Retention to the Contractor shall cease to apply;”

- (1) The final date for an interim payment was 16.5.03
- (2) On 22.5.03 receivers were appointed
- (3) The Employer determined the Contract on 30.5.03

"Subject to clauses 27.5.3 and 27.6.5.2 the provisions of this contract which require any further payment or any release or further release of retention to the contractor shall not apply; provided that clause 27.6.5.1 shall not be construed so as to prevent the enforcement by the contractor of any rights under this contract in respect of amounts properly due to be paid by the employer to the contractor which the employer has unreasonably not paid and which, where clause 27.3.4 applies, have accrued 28 days or more before the date when under clause 27.3.4 the employer could have first give notice to determine the employment of the contractor..."

“In the lower courts it appears to have been conceded that the effect of this clause was that upon determination by Wimpey, the interim payment was no longer payable. It had accrued less than 28 days before 22 May 2003, which was the date on which Wimpey could first have given notice of determination. Before the House, however, Mr. Howie submitted on behalf of the contractor that the words “which require any further payment...to the contractor” should be read to mean “which give rise to any further liability to make payments to the contractor” and have no application to a liability for interim payment which has already accrued. In my opinion this is not what the clause says.

“Require any further payment” means require the employer to pay any more money. Mr. Howie’s construction would make the proviso pointless, since the clause could not then apply to any amounts “properly due to be paid by the employer to the contract”, whenever they accrued.”