

Court of Appeal judgment handed down in Providence Building Services Limited v Hexagon Housing Association Limited

Court of Appeal judgment handed down in Providence Building Services Limited v Hexagon Housing Association Limited: Important further clarification of Contractor's right of termination in the JCT 2016 D&B Contract

1. Following on from the High Court judgment in *Providence Building Services Limited v Hexagon Housing Association Limited* on which [Helen Dennis](#) produced a note in November of last year (See: [Judgment handed down in Providence Building Services Limited v Hexagon Housing Association Limited: Important clarification of a Contractor's right to terminate its employment under the JCT 2016 D&B Contract](#)), the Court of Appeal has now considered the case and reversed the High Court's decision in relation to the Contractor's right of termination.
2. In a judgment handed down on 15 August 2024, the Court of Appeal (comprising Coulson LJ, Popplewell LJ and Stuart-Smith LJ) concluded that on the true and proper construction of the contract at issue, it was not necessary that a right to terminate under clause 8.9.3 must have first accrued before the Claimant could have the right to terminate its employment under clause 8.9.4. This is an important clarification as to the effect of certain termination provisions included in the widely-used JCT Design and Build Contract 2016 (and other contracts within the JCT suite of contracts which contain materially the same terms). The decision will therefore be of importance to all those operating in the construction field.
3. The dispute between Providence Building Services Limited ("Providence") and Hexagon Housing Association Limited ("Hexagon") had been referred to the High Court as a Part 8 claim for a declaration as to the correct construction of clause 8.9.4 of the contract which had been concluded between the parties, which was based on the JCT Design and Build Form 2016 (the "Contract"). The wording of clause 8.9.4 in the Contract was not materially amended from the aforementioned standard form.
4. Clause 8.9 of the Contract concerns the Contractor (in this case, Providence)'s entitlement to terminate for default of the Employer (Hexagon). So far as material, the clause in the Contract provided as follows (the parties' bespoke amendments are underlined):

"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...

...

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

.2 ...

.3 If a specified default or a specified suspension event continues for 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 28 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 28 days after such repetition, the Contractor may by notice to the Employer terminate the Contractor's employment under this Contract."

5. The agreed material facts were that (1) Hexagon had committed a specified default by making late payment but had remedied that specified default (by making payment) before a right to termination had arisen under clause 8.9.3 and (2) Hexagon had thereafter repeated the specified default (approximately 7 months later) by making late payment again in relation to a subsequent payment cycle. The day after the repetition of the specified default, Providence sought to terminate the Contract by issuing a notice of termination pursuant to clause 8.9.4.
6. The issue between the parties and which the Court of Appeal considered was whether in order for a contractor to terminate the Contract pursuant to clause 8.9.4, a right to terminate must previously have arisen (but not been exercised) pursuant to clause 8.9.3. Providence argued that no such prior right to terminate was required and Hexagon argued that it was.
7. It is understood that this Part 8 claim raised a previously undecided point of construction in relation to the termination provisions of the JCT Design and Build Contract 2016 in relation to termination for employer default.
8. Having heard submissions from counsel for both parties, the Court of Appeal (Stuart-Smith LJ giving the sole reasoned judgment, with which Popplewell and Coulson LLJ agreed) concluded that on the true and proper construction of the Contract, it was not necessary that a right to terminate under clause 8.9.3 must have first accrued before the Claimant could have the right to terminate its employment under clause 8.9.4. The Court of Appeal did not decide whether in fact the termination was valid.
9. The Court accepted Providence's case that once an employer had committed a specified default but the right to termination had not arisen (because the specified default had been remedied before the right to termination had arisen), thereafter the contractor had an immediate right to terminate its employment under the Contract if the employer ever failed to make payment on time again. The Court considered this was the case on the basis of the express words of the clauses in question, viewed in their context. At paragraph [44] of the judgment Stuart-Smith LJ stated as follows:

"Standing back and reviewing the case as a whole, I am persuaded that the plain meaning of the words "does not give", the congruence of those critical words in Clauses 8.4.3 and 8.9.4, and the presence of the words "for any reason" in Clause 8.9.4, when seen in the full context of the terms of the contract and the previous versions of the JCT Form, lead to the conclusion that Providence's interpretation is to be preferred. I reject the submission that the commercial consequences of the rival interpretations should lead to a different result...."

10. The full judgment is available here: [Providence Building Services Ltd v Hexagon Housing Association Ltd \[2024\] EWCA Civ 962 \(15 August 2024\) \(bailii.org\)](#).
11. The decision of the Court of Appeal, leaves open the important question in any case as to whether the issue of a notice of termination was unreasonable or vexatious for the purposes of clause 8.2 of the standard form contract. This will be a question of fact in each case.
12. [Jonathan Lewis KC](#) appeared as Leading Counsel for Hexagon.

Written by [Helen Dennis](#).