

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

1. In an ex tempore judgment handed down by Mr Adrian Williamson KC (sitting as a judge of the High Court) on 7 November 2023, the Technology and Construction Court provided important clarification as to the effect of certain of the termination provisions included in the widely-used JCT Design and Build Contract 2016. The decision will therefore be of importance to all those operating in the construction field.
2. The dispute between Providence Building Services Limited ("Providence") and Hexagon Housing Association Limited ("Hexagon") was referred to the 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.
3. 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."

4. 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 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.
5. The issue between the parties 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. It was 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.
6. 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.
7. Having heard submissions from counsel for both parties, the judge declared that on the true and proper construction of the Contract, it was 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. Applying that requirement to the instant case, the judge determined that since Providence had not accrued such right under clause 8.9.3 of the Contract (because Hexagon had remedied the specified default before the right to termination had arisen), its notice of 18 May 2023 purporting to terminate the Contract was invalid for the purpose of clause 8.9.4 and did not lawfully terminate its employment under the Contract pursuant to that clause.
8. Providence applied for but the judge refused permission to appeal to the Court of Appeal.

[Jonathan Lewis KC](#) appeared as Leading Counsel for Hexagon.

[Providence Building Services Limited v Hexagon Housing Association Limited – HT-2023-000265 \(07.11.2023\)\(Approved Judgment\)](#)

By [Helen Dennis](#).