Spiking the guns of trigger-happy contractors

Barrister Nick Kaplan of 3 Paper Buildings analyses a Technology and Construction Court decision in the first case where it considered whether a contractor had validly exercised a right to terminate under a JCT contract. Permission to appeal has already been granted.

KEY POINTS

- This article considers the recent TCC decision in ***Providence Building Services Ltd v Hexagon Housing Association Ltd [2023] EWHC 2965***.
- The case concerned termination of a JCT D&B 2016 contract for repetition of an employer default; specifically late payment of the contractor's interim applications.
- The Court held that the contractor had not validly exercised the right to terminate for repetition of a default under clause 8.9.4 of the contract, because it had no pre-existing right to terminate for continuation of the default under clause 8.9.3.
- The decision is the first time the Court has considered this specific issue under the JCT terms. It is therefore likely to be of wide significance given the wide use of the JCT form nationally.
- Partly for that reason, the Court of Appeal recently gave the contractor (Providence) permission to appeal, which appeal is due to be heard in July of this year.

A recent decision of the Technology and Construction Court ("TCC") in the case of ***Providence Building Services Limited v Hexagon Housing Association Limited***, considered the meaning of the termination provisions in the most widely used form of construction contract in the UK.

The issue concerned the circumstances in which a contractor could terminate for repeated failures by its employer to make payment on time. The proceedings centred around the proper interpretation of clause 8.9 of the JCT Form of Design and Build Contract 2106. There parties have also adjudicated as to whether Hexagon's late payments amounted to a repudiatory breach of the contract; the adjudicator concluded (in favour of Hexagon) that they did not. The parties agreed that that issue was not suitable for Part 8 proceedings.

In the Part 8 claim in these proceedings, the Judge concluded that, on the natural and ordinary meaning of the relevant contractual provisions, the contractor could validly terminate for repetition of an employer default, only if it had already acquired the right to terminate in respect of an earlier instance of the same breach/default.

The decision is an important one for the construction industry that employers and contractors alike should be familiar with. It is, perhaps surprisingly given how widely used the JCT form is, the first case to decide this particular issue, which concerns one of the most important provisions in the JCT form.

The decision is a salutary reminder to contractors to think very carefully before pulling the termination trigger. The Judge's obiter comments on the (arguably more ambiguous) employer termination provisions serve as a similarly stark warning for employers wishing to terminate for contractor default.

The Contractual Provisions

Clause 8.9.1 of the contract provided that if Hexagon failed to make a payment by the final date for a payment in any payment cycle, Providence could give Hexagon a notice that its failure was a "specified default". I will refer to a clause 8.9.1 notice as an "NSD".

Clause 8.9.3 then provided that, following such

a NSD being given by the Providence, Hexagon had a period of 28 days to remedy the specified default by making payment of the sums due in full. Clause 8.9.3 also provided that, if Hexagon failed to make payment in full within that 28-day period, Providence thereafter had 21 days within which it could issue a notice to terminate.

Notably, the right for Providence to terminate for continuation of a default under 8.9.3 was a discretionary right, which Providence could either exercise or not exercise, only if Hexagon had failed to make payment within the 28 day notice period following service of the NSD.

In that context, clause 8.9.4 then provided as follows:

> "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) … 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."

Background

Hexagon engaged Providence to carry out construction works under the terms of the JCT Form of Design and Build Contract 2016, which was subject to certain bespoke amendments agreed between the parties.

The termination provisions were largely unchanged from the standard JCT wording, save that, in respect of employer defaults, the notice periods within clause 8.9 were increased from a period of 14 days (the standard provisions) to a period of 28 days (see above).

Hexagon was late in paying the sum due under Payment Notice 27. Providence served a NSD under clause 8.9.1. As explained above, that NSD required Hexagon to remedy the specified default within 28 days. Shortly after receipt of the NSD, Hexagon paid the sums due and thereby rectified the default before the expiry of the 28-day cure period allowed in clause 8.9.3.

Plainly, at this stage, the contractual default provisions were working as intended; the cash was flowing again.

Notably, however, because the default was rectified within the '28-day' cure period under clause 8.9.3, Providence did not acquire any right to terminate for continuation of the default under clause 8.9.3. So far, so normal.

In payment cycle 32 Hexagon was late in paying again. In that payment cycle Hexagon should have made payment by 17 May 2023. It didn't do so. On 18 May 2023 (i.e., the day immediately after payment should have been made), Providence issued a notice purporting to terminate under clause 8.9.4. It did so on the grounds that Hexagon had repeated its default.

Although Hexagon paid the sum due in full on 23 May 2023, Providence took the view that this was too little too late. Thereafter it withdrew from site.

The Dispute

Having paid the sum due on 23 May 2023, Hexagon challenged the validity of the termination notice and referred the issue to adjudication for a temporarily binding decision.

Hexagon's case was that the right to terminate for a repeated breach only accrued if Hexagon had failed to pay within the 'cure period' for the first default but Providence had (for any reason) not exercised its clause 8.9.3 right to terminate. In other words, its case was that a right to terminate under 8.9.3 must have arisen for continuation of the first default before a right to terminate under 8.9.4 could arise for a repetition of the default.

In effect, Hexgaon argued that the provisions of clause 8.9 must be read as setting out a series of escalating steps whereby Providence had a series of opportunities to notify Hexagon of its defaults, and Hexagon had a corresponding series of opportunities to remedy those defaults. It is only if a default is not remedied that Providence acquires the right to terminate. If Providence then chooses not to terminate under 8.9.3, the contract continues at its indulgence and Hexagon is 'skating on thin ice' thereafter, such that any repetition of a default can result in immediate termination by Providence. However, where the original default is remedied, no right to terminate arises and the process restarts at clause 8.9.1.

Providence argued, on the contrary, that the contract gave it the right to terminate immediately for any repetition of a specified default, whether or not the original breach/default had been cured in time. In effect it read the provisions as operating like a 'yellow card/red card' system in a football match. Any NSD issued at any time operates as a yellow warning card, any subsequent repetition then allows for an immediate red card ending the contract even if the first default leading to the

yellow card was cured in time.

Providence's submissions focused heavily on the words 'for any reason' in clause 8.9.3 which, it argued, included the reason that no right to terminate under 8.9.3 ever arose.

Hexagon, in contrast, submitted that the words 'for any reason' needed to be read in their full contractual context. In particular, Hexagon said, the words "if the Contractor for any reason does not give the further notice referred to in clause 8.9.3…", refer back to the fact that Providence has a discretion to terminate under clause 8.9.3 which it could exercise or not for any reason; but, critically, only if and after a right to terminate under 8.9.3 had arisen.

The adjudicator found in Hexagon's favour. Providence was aggrieved at the decision and issued a Part 8 claim seeking a declaration that a right to terminate under clause 8.9.3 did not need to arise, prior to Providence being able to terminate for repetition of a default under clause 8.9.4.

The same arguments that had been before the adjudicator in writing were aired orally before the Judge.

The Decision

The Court agreed with Hexagon's interpretation of the clause. The Judge considered that, as a matter of the ordinary and natural meaning of the language used in clause 8.9 as a whole, the right to terminate for repeated breach under clause 8.9.4, only arose if a right to terminate under clause 8.9.3 had first arisen but had not been exercised.

The Judge gave a declaration that Providence's termination notice was invalid for the purposes of clause 8.9.4, and that it failed to lawfully terminate Providence's employment under the contract.

Conclusions

Termination is, for obvious reasons, the 'nuclear option' for those dissatisfied with another party's performance (or non-performance) of a contract. The Judgment in this case is a stark warning to parties to carefully consider all possible interpretations of contractual termination provisions before pulling the termination trigger.

For contractors in particular, the Judgment confirms (at least for now) that their rights to terminate for late payment are carefully circumscribed by the JCT termination provisions, which effectively prevent trigger-happy contractors withdrawing from contracts on the basis of relatively minor delays in payment (even if repeated).

For employers under JCT contracts, while the 'employer termination' provisions at clause 8.4 of the contract are differently (and more ambiguously) worded, the Court's obiter remarks indicate that they *may* be construed in the same way as the Judge interpreted clause 8.9. Employers, therefore, must think equally carefully before terminating for repetition of a contractor default.

Post Script

The decision has not been without its critics. Unsurprisingly, it has proved unpopular with contractors. However, the fight is not yet over as the Court of Appeal recently granted Providence permission to appeal the decision. Watch this space. **CL**

Nick Kaplan is a Barrister at 3 Paper Buildings specialising in construction law. Nick acted for Hexagon in the adjudication and as junior counsel for Hexagon in the Part 8 proceedings commenced by Providence