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Aggregate

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Welcome.

Welcome to the latest edition of Archor's Aggregate newsletter.

This is the tenth edition of our newsletter – a milestone we're very pleased to reach. And we release it at the same time as we open our second office, adding to our HQ with new space in Cambridge. We're extremely grateful to all our clients for their continued support.

With that gushiness out of the way, we turn to business. This edition contains lots of interesting articles:

- Jessica recently became Archor's latest solicitor by passing her final exams and becoming fully qualified – congratulations! She celebrated by (amongst other things!) writing on a Court of Appeal case that threatens to have seismic implications for employers paying late.
- Andrew posts a warning for parties involved in PFI contracts as a result of the Building Safety Act – noting that PFI schemes were often setup well before the BSA was envisaged and may now be not suited to complying with obligations under it.
- Hayley looks at another point under the Building Safety Act, considering whether contractors can be Principal Designer for the purposes of the Building Regulations.
- Finally, Lucy looks at a case where the terms of settlement were called into question. One party thought it had settled everything, while another said it hadn't – the court was asked to decide.

We hope you enjoy this edition, and as ever, if you have any ideas for future articles or other feedback, do please get in touch.

Oli
Editor-in-Chief

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Late payment

Employers, you've been warned

Jessica Garrod
Associate

You may be aware of the High Court decision in Providence Building Services Limited v. Hexagon Housing Association Limited from last year in which the Court provided clarification on a contractor's right to terminate its employment under a JCT Design and Build Contract 2016 ("JCT D&B"). If you are, forget what it might have taught you as the Court of Appeal has now overturned the decision!

By way of reminder (or introduction for those new to the case), Providence, the contractor, was constructing a number of buildings at a site in Purley for Hexagon. A dispute arose in relation to Payment Notice 27, whereby the employer's agent certified the sum of £264,242.55 with a final date for payment of 15 December 2022. Hexagon failed to make payment on time, and Providence served Hexagon, the following day, with a Notice of Specified Default pursuant to clause 8.9.1. Hexagon corrected its default within the required period and, as a result, Providence did not become entitled to terminate the contract under clause 8.9.3.

Five months later, the employer's agent issued Payment Notice 32, certifying the sum of £365,812.22 as due, which was also not paid by the final date for payment. As a result, Providence issued a Notice of Termination pursuant to clause 8.9.4 which referred back to the earlier Notice of Specified Default and relied on Hexagon's non-payment of Payment Notice 32 as a repetition of the specified default. Hexagon paid the outstanding sum the following day and alleged that Providence was in repudiatory breach of contract because of its wrongful termination.

Providence (the contractor) asked the court for a declaration as to the correct interpretation of clause 8.9.4.

In the first instance decision, the judge held that in order for Providence to be entitled to terminate under clause 8.9.4, it must have first become entitled to terminate under clause 8.9.3. As such, Providence's termination was invalid – it hadn't become entitled to terminate because Hexagon had cured the earlier default in time.

However, the Court of Appeal disagreed, and Lord Justice Stuart-Smith found that the *"natural and probable meaning of Clause 8.9.4 is that it applies to a case where no right accrued to give a further notice under Clause 8.9.3"*. According to the Court of Appeal, the first instance judge gave the words of clause 8.9.4 a meaning which went beyond the ordinary and natural. While Lord Justice Stuart-Smith did state that *"the drafting could have been of better quality"*, he said the clause was ultimately not ambiguous.

As such, even if a specified default has been rectified by an employer prior to the contractor accruing a termination right under clause 8.9.3, if the default is repeated then a contractor can still terminate under clause 8.9.4. That logic would apply to any specified default, but is particularly relevant in relation to late payment.

This appeal is good news for contractors. As soon as a certified payment is late, a warning notice can be issued under clause 8.9.1. Even if the employer pays the sum before the expiry of the warning period, the next time a payment is late, the contractor will have the right to terminate immediately under clause 8.9.4 because the default will have been repeated. This very substantially increases the contractor's powers in relation to late payment – although they won't have to terminate, this decision will give them considerable leverage by presenting the option.

However, the reverse is also true: employers in the construction industry won't be happy about this decision. As it conflicts with the first instance decision and is a potentially important point for a lot of contracts, Hexagon may seek to appeal it to the Supreme Court. But for the time being it means that all employers under JCT D&B contracts with this provision unamended (as it often is) are at considerable risk should they make payment late and contractors take the protective approach of issuing a termination warning notice.

The judgment is likely to be significant for the foreseeable future given that the recently published 2024 edition of the JCT D&B uses the same language as the 2016 form (which was the version in this case). Unless and until it gets to the Supreme Court and a different decision is reached, if you are an employer and you repeatedly fail to make payments on time, you run the risk that a contractor has accrued the right to terminate (even if you have rectified the previous default).

Employers will therefore want to ensure that they are strictly adhering to the payment provisions in their contracts to avoid this risk – noting that termination would be for employer default and therefore leave them exposed to claims for lost profit, as well as delays to the project. For future contracts employers may want to consider negotiating an amendment to their JCT termination provisions in light of this appeal.

> *"The drafting could have been of better quality*
>
> **Lord Justice Stuart-Smith**
> Court of Appeal

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The Building Safety Act and PFI Contracts

The end of the Teflon tube?

Andrew Rush
Senior Partner

Private Finance Initiative Contracts ("PFI Contracts") were introduced in the 1990s as a way to use private money to finance public infrastructure works.

Historically, under the PFI structure, the public authority entered into a circa 25 year contract with a private sector entity, in the form of a special purpose vehicle ("SPV"), for the financing, design, build and maintenance of the relevant project (e.g. a hospital, prison or housing). Once the construction of the project was complete, the public authority would take beneficial occupation and the SPV would provide maintenance services for the remaining fixed term. The SPV would recoup its funding of the build through yearly service charges. Following the expiry of the fixed term, the completed building would be transferred back to the public authority.

PFI contracts pre-date a number of legislative changes in the UK, and did not anticipate the impact of the Building Safety Act 2022 ("BSA") and its secondary legislation. Any PFI project involving housing or any other building is covered by the new legislation. Now the legislation relating to the BSA has come into full effect, any significant maintenance to a building as part of a PFI contract is covered by the new legislation.

There are two issues that come with this. Firstly, who pays for compliance with the new legislation; and secondly who is going to take on the role of duty holder.

While all PFI contracts are bespoke and need to be read to understand the specific terms, typically such contracts dealt with changes in law based on whether the change was a qualifying change in law. Irrespective of who pays for the additional cost of compliance, how does the new duty holder regime work within a PFI contractual structure?

Historically under PFI Contracts the SPV would be a shell company made up of investors, the original build contractor and the maintenance contractor. These original parties will generally have long since exited the SPV with new investors taking a more long-term view of the financial worth of the PFI asset. The SPV doesn't have an effective management structure, and simply passes all risk to the maintenance contractor (both soft and hard). This concept is commonly referred to as the Teflon tube, with the SPV retaining no responsibility.

However, with the implementation of the BSA and its secondary legislation, the party acting as the "client" takes on ultimate responsibility for compliance with Building Regulations which cannot be sub-contracted. So now the SPV is faced with having to take on the responsibility as client under the BSA together with needing to have a specific nominated representative.

So in practice the SPV needs to reconsider how it is managed. There will need to be a specific individual as a nominated representative (in the absence of any named party, it is assumed it will be a named director of the SPV). The SPV will be responsible for the Building Regulations Principal Designer and Principal Contractor.

If the SPV is not best placed to take on the role of Client, the parties to such contracts may consider the public authority as best suited to assume this role for the purposes of Building Regulations.

Each PFI arrangement is specific and will need to be carefully considered, but the issues arising under the BSA need to be addressed within a contractual structure not designed to readily cope with the new duties imposed on "clients".

If you have any issues or queries regarding PFI Contracts or the Building Safety Act, please contact us.

Can a Contractor Act As Building Regulations Principal Designer?

Under the Building Safety Act 2022 ("BSA") and secondary legislation, the Building Regulations Principal Designer role ("BR PD") is a strict obligation and therefore carries strict liability. Further, for the purposes of the BSA, there is an emphasis that the BR PD must be a designer under Regulation 11D of the Building Regulations etc. (Amendment) (England) Regulations 2023 (the "Amendment Regulations").

Hayley Morgan
Senior Associate

To comply with the associated duties, the organisation appointed as BR PD, must meet two distinct categories of competence:

1. First, they must have the organisational capability to perform the duties of the BR PD. This competence can be demonstrated in a number of ways such as having management systems and processes in place, policies covering the area, and of course formal training for the role. Also note, that British Standard – PAS 8671:2022 – provides greater examples and insight on the organisational capabilities BR PDs.
2. Secondly, the organisation must appoint an individual with the required capabilities to comply with the duties and act as the key point of contact for each particular scheme. For Higher-Risk Buildings ("HRBs") this individual will be signing the compliance statement at Gateway 2 under the HRB Procedures Regulations, as well as the compliance declaration at the end of Gateway 3. For Non-HRBs this individual will be signing the compliance at practical completion. The individual's competence can be demonstrated by the individual having completed formal training, maintaining a portfolio of work experience, and a professional body accreditation.

Where a contractor does not hold both the organisational competence and the individual competence to act as the BR PD, it should not take on the role of BR PD. The role (including improper appointment) comes with a potential criminal liability both against the organisation and the individual.

Further, it is not in the interests of the employer to try to force a contractor to take on this role if it is not competent. The employer, as ultimate client, is also a duty holder under the BSA regime and the "client" carries ultimate responsibility for appointing competent individuals for the key duty holder roles. Therefore, it is in the interests of the employer to ensure it has the proper persons in place because otherwise it will open itself up to liability.
Note though that if the contractor is not able to act as the BR PD, it will not prevent it from acting as the CDM Regulations Principal Designer, the CDM Regulations Principal Contractor or the Building Regulations Principal Contractor under the BSA.

There is a debate within the market as to whether the BR PD role can be sub-contracted to others. Our view is not. However, even if the position is clarified and it is permitted to do so, the contractor would remain liable (notwithstanding it has sub-contracted out the role).

This is a complicated and relatively novel area, with parties still familiarising themselves with the scope and extent of obligations under the BSA. If you are faced with appointing these roles, please get in touch so we can advise you of your obligations.

A different settle of fish:

Have you really settled what you think you have settled?

Many of the readers of this article will have been involved in settlement negotiations at some point. The results of those will often have been recorded in a settlement agreement or (where those arise out of litigation, including adjudication enforcement), a consent order.

Lucy Day
Associate

It is of course good that parties record their agreement in writing – a failure to do so often leads to other disputes. And by recording a full and final settlement, a party may be forgiven for assuming that its opposing party is now unable to bring a new claim against it in relation to the original dispute.

But in certain circumstances, the opposite is in fact true, and a new claim can indeed be commenced – a scary thought?! In Dawnvale Cafe Components Limited v. Hylgar Properties Limited, this is precisely what happened.

Hylgar was a property developer that engaged Dawnvale's services for the design, supply and installation of M&E works at a site in Wirral. Unfortunately, the parties' relationship broke down which led to the contract being terminated. As is often the case, both parties accused the other of repudiating the contract.

Hylgar commenced an adjudication, following which the Adjudicator found that Dawnvale had committed the repudiatory breach. The Adjudicator went on to determine the true value of the works, which resulted in a decision requiring Dawnvale to repay Hylgar, together with the Adjudicator's fees.

Dawnvale failed to pay, requiring Hylgar to enforce the decision, together with claiming interest and costs in the Technology and Construction Court. In August 2021, the enforcement proceedings were then settled by way of a Tomlin Order (a type of consent order) on the following terms: *"The payment of the Settlement Sum is in full and final settlement of any and all claims the Claimant may have against the Defendant arising from or in connection with these proceedings"*.

Later, in August 2023, Hylgar issued a letter to Dawnvale which sought to recover further losses of just under £650k arising from the same repudiatory breach of contract that had been the subject of the earlier adjudication and enforcement proceedings. The letter threatened to refer the new claim to adjudication if Dawnvale did not pay.

Dawnvale thought, however, that any such claim was barred by the previous Tomlin Order's 'full and final settlement'. It issued Part 8 Proceedings to have the court confirm this.

The Court carefully considered the language of the Tomlin Order, and concluded that the new claim did not arise from the original proceedings, nor was it in connection with the original proceedings. The original proceedings were the enforcement proceedings, effectively a procedural question about the enforceability of the first adjudication decision. The new threatened proceedings were a substantive dispute about the earlier breach – not the same issue. The Court noted that if the parties had intended to settle all future related claims, the Tomlin Order would be expected to have used more precise wording, such as claims 'arising from the Contract' or 'the Dispute', rather than 'the proceedings' as was the case.

While the parties were sensible to record the terms of their agreement in writing, this case should serve as a reminder to all parties involved to use precise language in any resulting settlement agreements, for fear of not actually settling what you might think you are settling.

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