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Neutral Citation Number: [2023] EWHC 2965 (TCC)

Case No. HT-2023-000265

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY & CONSTRUCTION COURT (KBD)**

Rolls Building Fetter Lane
London EC4A 1NL
7 November 2023

B e f o r e :

**MR ADRIAN WILLIAMSON KC
(Sitting as a Deputy High Court Judge)**

PROVIDENCE BUILDING SERVICES LIMITED Claimant
- and -
HEXAGON HOUSING ASSOCIATION LIMITED Defendant

**MR M CHENNELLS KC (instructed by Clyde & Co.) appeared on behalf of the Claimant.
MR J LEWIS KC and MR N KAPLAN (instructed by Devonshires Solicitors) appeared on behalf of
the Defendant.**

HTML VERSION OF JUDGMENT

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Mr Adrian Williamson KC:

1. In these Part 8 proceedings the claimant Contractor ("Providence") seeks a declaration against the defendant employer ("Hexagon") as to the proper construction of clause 8.9 of the Contract between the parties. Hexagon claim counter declarations covering similar ground.
2. The background is, for present purposes, not contentious. The parties have helpfully agreed a list of facts. I now summarise the key facts.
3. The parties entered into a Contract in February 2019 by which Providence, as Contractor, agreed to carry out and complete works involving the erection of a number of buildings at a site in Purley.
4. The Contract incorporated the JCT Design and Build Contract 2016 standard form, as amended by a schedule of amendments ("the Contract"). The original Contract sum was approximately £7.2 million.
5. Pursuant to Payment Notice 27, issued by the employer's agent Baily Garner on 25 November 2022, Hexagon was obliged to pay the sum of approximately £260,000 on or before 15 December 2022, but

it did not do so. Providence therefore served a Notice of Specified Default under clause 8.9.1 of the Contract on 16 December 2022.

6. Baily Garner issued a further relevant Payment Notice, number 32, on 28 April of this year in the sum of approximately £360,000. The final date of payment was 17 May, but Hexagon did not pay by that date.
7. On 18 May 2023, Providence therefore issued its Notice of Termination under clause 8.9.4 of the Contract. This relied upon the Notice of Specified Default of December 2022, and the repetition of that specified default. There was also, without prejudice to the Contractual termination, an acceptance, or purported acceptance, of Hexagon's repudiatory breach.
8. Hexagon subsequently paid the sum claimed but challenged the validity of the Notice of Termination by a letter of 24 May 2023. They then accepted, or purported to accept, Providence's repudiatory breach on 31 May 2023. I should say in passing that issues relating to repudiatory breach on either side are not before me in these Part 8 proceedings.
9. Hexagon referred the dispute between the parties to adjudication by Notice of Intention to Refer on 12 June of this year seeking decisions and declarations inter alia as to the Notice of Termination and the clause 8.9.4 point. They also sought relief in relation to repudiatory breach. The Adjudicator, by a decision dated 20 July 2023, found substantially in favour of Hexagon but his decision and reasoning are, of course, not binding upon me.
10. As is apparent from the above summary, the key battleground between the parties relates to Providence's right, or otherwise, to terminate their employment under the Contract pursuant to clause 8.9 thereof, a standard JCT clause amended by the Schedule of Amendments.
11. Clause 8.9.1.1 provides that if the employer does not pay by the final date for payment the amount due to the Contractor in accordance with clause 4.9 of the Contract, the Contractor may give to the Employer a notice specifying the default.
12. Clause 8.9 then further provides at:

".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; . . . ".2 . . .

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.'
13. The principles relating to the interpretation of commercial Contracts are well-known. In that connection I gratefully adopt the recent summary of those principles set out in the judgment of Sir Geoffrey Vos, Chancellor (as he then was), in *Lamesa Investments Limited v Cynergy Bank Limited* [2020] EWCA Civ 821 at [18], a decision of the Court of Appeal.
14. It is also trite and, I think, common ground, that Contractual termination clauses are to be strictly construed, and must be strictly complied with: see *Robin Ellis Limited v Vinexsa Limited* [2003] 93 Con LR page 92 at [22] and *Struthers v Davies* [2022] EWHC 333 TCC at [41].
15. Applying those principles, it seems to me that my first and probably only task is to ascertain the natural and ordinary meaning of clauses 8.9.3 and 8.9.4 of the Contract set in the context of the Contract as a whole.

16. Clause 8.9.3 is straightforward. If a specified default continues for 28 days after a clause 8.9.1 notice, the Contractor may give notice to terminate the Contractor's employment under the Contract. That clause gives the Contractor a choice whether or not to serve a notice to terminate and, of course, termination requires the Contractor to take an active step namely serving a Notice of Termination.
17. Turning then to clause 8.9.4, I agree with Hexagon's submission that the words "does not give" in the context of a clause 8.9.3 notice envisage an active step being taken by the Contractor, or not. If the Contractor takes that active step under clause 8.9.3 then termination ensues. If he does not, then, if there is a repeated default, the Contractor may serve Notice of Termination under clause 8.9.4.
18. Providence placed considerable emphasis upon the words: "for any reason" in clause 8.9.4 but in my view those words will not bear the weight Providence seek to put upon them. All those words entail is that the Contractor may have decided not to give the clause 8.9.3 notice "for any reason".
19. Neither those words, nor clauses 8.9.3 and 8.9.4 as a whole, envisage in my view that a Contractor can give a valid clause 8.9.4 notice in circumstances where the right to give a clause 8.9.3 notice has never arisen. That is where the specified default has been cured within the 28-day period. In my view, clause 8.9.4 requires that a clause 8.9.3 notice could have been given but the Contractor has decided not to do so for whatever reason.
20. That conclusion is sufficient to dispose of these proceedings. However, I should, in deference to the arguments of counsel, deal with certain other points that were raised.
21. Both sides sought to play charades upon clause 8.4.3 of the Contract which forms part of a clause conferring a right to terminate in certain circumstances upon the Employer. Clause 8.4.3 provides that:

"If the employer does not give the further notice referred to in clause 8.4.2 (whether as a result of the ending of any specified default or otherwise) but the Contractor repeats a specified default, whether previously repeated or not then upon or within a reasonable time after such repetition the Employer may, by notice to the Contractor, terminate that employment."
22. It seems to me that one should be careful not to place too much emphasis upon a different clause in the Contract when interpreting clause 8.9. In any event, the key words in clause 8.4.3 in my judgment are "does not give" as to which, similarly to clause 8.9.4, there is a requirement for the Employer to take an active step. In this respect I think that clause 8.4.3 is consistent with the construction I have indicated of clause 8.9.4.
23. More generally, Providence sought to argue that the construction of clause 8.9.4 contended for by Hexagon would produce the harsh and uncommercial result that the Employer could make every payment 27 days late and thus avoid the possibility of termination because the right to serve a clause 8.9.3 notice would never arise. As to this, I agree with the point made by Mr Lewis KC, counsel for Hexagon, that the Contractor has a battery of weapons available to him to protect his cash flow position. Those weapons include a right to suspend the Works, the payment of statutory interest, and the right to refer disputes to adjudication. It is not therefore necessary or appropriate to read into clause 8.9 a right to terminate to deal with such a situation.
24. On the other side of the argument Hexagon submit that Providence's construction of clause 8.9 would allow a trigger-happy Contractor to terminate for repeated default, even if the default was a very small underpayment or a very small delay in payment.
25. Mr Chennells KC, counsel for Providence, countered that such a situation would be met by clause 8.2.1 which provides that notice of termination of the Contractor's employment shall not be given unreasonably or vexatiously. However, I think that gives scant comfort to the Employer who would have to embark upon the tricky and nebulous task of showing that the notice was given unreasonably or vexatiously.
26. Indeed, I think that Mr Lewis is right to say that it would be surprising if clause 8.9 was so drafted that a Contractor could terminate where there was a specified default that had been cured and was then

repeated, perhaps only to a very minor extent, subject only to recourse to the contention that the termination was unreasonable or vexatious.

27. Mr Chennells also submits that Hexagon's construction of clause 8.9 produces an asymmetry in the termination rights of the parties. As to this, I agree with Mr Lewis that asymmetry is not necessarily surprising in itself but in any event, as Mr Lewis points out, clause 8.9 is drafted by the parties in a way which is more favourable to the Employer than the corresponding provisions of clause 8.4. Clause 7.1 is not, in clause 8.9, a ground to terminate as it is in clause 8.4, and the time limits in clause 8.9.3 are 28 days, whereas the equivalent period in clause 8.4 is 14 days. Thus, the parties have opted for asymmetrical termination provisions, as is their right.
28. Having said all that, it seems to me that in this case the "business commonsense" arguments do not take the matter very far one way or the other. The parties have chosen to draft clause 8.9.4 in a particular fashion which, in my judgement, is clear as a matter of language. That may produce unsatisfactory results for one party or the other, but that is the choice the parties have made.
29. For completeness, I should say that I was referred to various other materials. The first instance judgment in *Reinwood Limited v L Brown & Sons Limited* [2006] WL 4017749 was cited to me. This is a decision on different contractual terms, albeit with some similarity to the present Contract, and different facts. It is therefore of limited assistance. Likewise, the JCT Design and Build Contract Guide 2016 does not really illuminate the problem I have to deal with.
30. For these reasons, I would not grant the declaration sought by Providence, but would grant those sought by Hexagon subject to any issues as to the wording thereof. I will hear counsel on any consequential matters that arise.