

## When failure to pay is deemed unreasonable

### Melville Dundas (in Receivership) and Others -v- George Wimpey (UK) Limited

This is a House of Lords decision upholding the standard JCT termination clause and provides that, where the contractor's employment has been lawfully terminated under the contract, the employer does not have to pay any further monies until after the replacement contractor has achieved making good. At that point, depending on the financial consequences of the termination, a decision is made as to whether monies are owed by the employer to the contractor or vice versa.

As is well known, the House of Lords upheld clause 27.6.5.1 and said that the employer was not obliged to pay any further monies following termination even in a case where monies had become due and payable and no withholding notice had been put in place. If monies had been outstanding for more than 28 days before the date when the employer could first have given notice to the contractor, and had those monies unreasonably not been paid, then the employer would have been liable to pay those monies.

The House of Lords judgment is complicated but Lord Hoffman decided that Section 111 (1) of the Housing Grants Construction and Regeneration Act which provides that monies cannot be withheld in the absence of a valid notice of withholding, should be interpreted as "not applying to a lawful ground for withholding payment of which it was in the nature of things not possible for notice to have been given within the statutory timeframe".

The argument seems to be that the employer did not know that the contractor was going to go bust. He could not, therefore, put in place a withholding notice until the matter had come to his attention. If this was too late for him to operate a valid withholding against the last interim payment due then, following the termination, he could invoke clause 27 to argue that no further payment was due.

### Pierce Design International Limited -v- Mark Johnston & Another TCC 17th July 2007 - Construction Industry Law Letter, October 2007

This case also concerned a termination of the contractor's employment under the JCT Standard



Form of Building Contract (with Contractor's Design) 1998 edition.

However, the circumstances were more straightforward. On the 7th March 2007, the Johnstons, as employer, served a Notice of Default and on the 30th March 2007 they determined the contractor's engagement. The Johnstons had failed to pay five different applications for payment and had failed to give Notice of Withholding against monies which were outstanding and were due more than 28 days before the right to determine arose.

To resolve the question of whether all the monies had unreasonably not been paid, Judge Coulson noted: "If there is a Withholding Notice validly served under the contract, then money no longer becomes due. If monies are otherwise due, they are reduced or extinguished by the Withholding Notice. A sum would reasonably have not been paid by the employer if there was a valid Withholding Notice. Conversely, if there was no Withholding Notice, then the sum otherwise due would unreasonably have not been paid by the employer."

He concluded: "That the sum due which has unreasonably not been paid by the employer, is a sum which the employer's agent has said is due under clause 30.3.3, which sum has not been the subject of a Withholding Notice . . . and the non-payment is therefore a breach of contract which occurred more than 28 days before the determination".

It is as simple as that - if you haven't put in a Withholding Notice, your failure to pay is unreasonable.

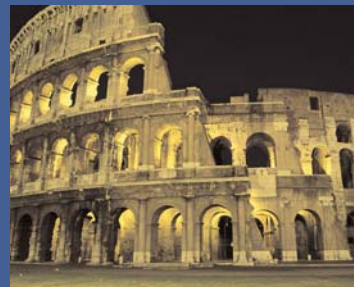
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### Employment rates update

Employment rates and limits on certain statutory payments and tribunal awards increased on February 1.

The limit on a week's pay (gross) for certain purposes has risen from £310 to £330

Unfair dismissal basic award has risen from £9,300 to £9,900.

The amount of a statutory redundancy payment has increased by the same amount.

The unfair dismissal compensatory award goes up from £60,600 to £63,000, save in certain circumstances.

Guarantee payment limit for a day's pay during short-time or temporary lay-off is now £20.40 per day, subject to a maximum of five days or £102 in any three months.

For further details please contact Ella Bond on 01926 884673.

# New duty of care?

Hart -v- Fidler, (heard by Mr Recorder Roger Stewart QC) in the Technology and Construction Court in March 2007 related to the collapse of part of the front and side facades of a building in Muswell Hill, London.

The judge was asked to decide whether Mr Fidler, the structural engineer, was liable to the employer, Hart, for failing to point out that the contractor was carrying out excavation work in a dangerous manner and failing to require the contractor to take precautions to support underpinning with propping

The judge said: *"If an engineer employed by an owner in respect of permanent works observes a state of temporary works which is dangerous and causing immediate peril to the temporary works in respect of which he is employed, he is obliged to take such steps as are open to him to obviate that danger. It seems to me that that follows, partly as a matter of common sense, but also because the engineer is, after all, instructed in relation to the permanent works as a whole. It would appear strange if he is under a duty to take such steps as he can to see that they survive for say, the next 25 years, . . . but is not obliged to take any steps to warn of an immediate danger to those works caused by an imperilling act by the contractor"*.

The judge also decided that not only was the engineer in breach of a contractual duty to the employer, he was also in breach of a concurrent duty in tort (i.e. in negligence outside of the contract).

It is important to note that Mr Fidler, had been employed both by the employer, Hart, and by the contractor, Larchpark by whom he was engaged to design the temporary works. The employer and the contractor agreed to share payment of the engineer's fees although that makes no real difference to the legal effect of the decision according to the judge.

By requiring the architect or engineer to accept responsibility for temporary works, this decision challenges a well-established line of cases at common law which could represent a new legal trend.

The common law had been characterised by a very disciplined, logical approach. This was quintessentially "the design of permanent works is the province of architects and engineers. Provided the building stands good and true at completion of the



**PHILIP HARRIS looks back at a case that has muddied the waters when it comes to who has responsibility for temporary works on a construction site.**

works, they are not responsible for how the building is built or the temporary works. Temporary works and the "how" of the building process are exclusively the province of the builder".

Two cornerstone cases which support this view are Clayton -v- Woodman & Sons Builders Limited 1962 2Q.B.553 and AMF International -v- Magnet Bowling 1968 1WLR1028.

In the Clayton case the barrister had submitted that the architect had no right to instruct the builders as to the manner in which the work was to be done or the safety precautions to be taken. The builders should decide on the necessary safety precautions and the law imposed no duty on the architect to advise builders about their safety. The judge agreed. The key passage is "so far as the law is concerned (the architect) would be within his rights were he to stand by and without protest or warning, watch the (builder) doing something which the architect knew to be highly dangerous". Although the case was concerned with the architect's duty to the contractor and not his employer, Hudson's Building & Engineering Contracts, 11th Edition, comments "that in regard to working methods or temporary works his (the architect's) power to intervene or give instructions may in any event be non-existent under many standard forms including the JCT forms, even should he wish to intervene".

In the AMF International case the court said "that an architect has no right to instruct a builder how his work is to be done or the safety precautions to be taken".

The common law position was, therefore, clear that the "how" of the building process was not the responsibility of the engineer.

Hudson does list circumstances in which an engineer might owe a duty of care to his employer to

resolve buildability issues where he had power to do so under the contract:

- a) where the contractor's methods of working are contrary to what is specified;
- b) where, in the absence of express designation of the required working methods, those being used by the contractor are likely to imperil the quality of the permanent work;
- c) the contractor's methods are unsafe and an accident would delay the project;
- d) to assist a contractor in difficulty by relaxing the specification where the owner's interest in speedy completion is sufficiently important.

This guidance in Hudson perhaps explains the judge's decision in Hart-v- Fidler.

## **A one-off decision on a particular set of facts?**

The Hart -v- Fidler case can be viewed as neither wrongly decided nor an aberration. It is simply based on a particular set of facts - that the engineer was engaged by the contractor to design the temporary works and by the client to design the permanent works. That analysis would provide a neat solution and restore order by upholding the long-standing common law. However, it is likely to require a senior judge in a subsequent case to resolve this point.

## **The common law and the CDM Regulations**

Since the CDM Regulations came into force, construction professionals have been aware of a tension, if not an anomaly, between the common law, placing no responsibility for the "how" of the building process on the engineer, and the statutory provisions under the regulations. Under the regulations a designer has a duty to have regard to the health and safety of those working on the site.

These anomalies are not yet resolved, mainly because they are different regimes operated by different bodies. The HSE and the criminal courts will give effect to CDM, whereas the Civil Courts administer the common law. The sooner there is a big case which puts Hart -v- Fidler in perspective, the better.

# How long do you have?

## When does time run out for making a claim for defective work under a contract and why?

This is not an easy question and the answer is not straightforward.

To explore the issue is to consider some important points of law.

At the most basic level, the answer is that the limitation period for a claim in contract is six years from the date of breach of contract or 12 years if the contract is a deed. However, a little knowledge is a dangerous thing and it is necessary to look deeper.

When does an item of defective work become a breach? It can be argued that a defect, if put right in a timely way, is a temporary disconformity and not a breach. That argument is countered by that bible of construction law Hudson's Building and Engineering Contracts, which says ". . . on grounds of both principle and practicality a contractor will be in immediate breach of contract whenever his work fails to comply with the contract descriptions. . .".

So, one might think, it is after all a matter of plain sailing. The defect constitutes an immediate breach. Time runs from the date of that breach. Sadly, it is not that simple.

Standard forms of contract, such as the JCT forms, state that the contractor must carry out his work in a proper and workmanlike manner and in accordance with the contract drawings. However, they also require the contractor to complete the work. Even if this was not explicit there would generally be an implied term to that effect. Therefore, there is a dual obligation, which is a continuing one, to do the work in accordance with the contract and to complete it, including putting right defective works. Since the obligation continues until completion, the start of the limitation period is not until practical completion, or perhaps even later.

There are at least two grounds on which the limitation period may extend beyond practical completion.

Firstly, reverting to Hudson, there is an additional repair obligation in the defects liability period (or rectification period) to put right defects which appear and which are notified to the contractor either during the period or in the defects list issued within 14 days of the end of the



period. The obligation is to rectify within a reasonable time. Therefore, if defects are not put right within that time there is an additional breach, carrying its own limitation period.

Secondly, in *William Tompkinson and Sons Limited -v- the P.C.C. of St. Michael* (1996), Const. LJ 319, it was decided that a defect, apparent before practical completion but not rectified, could fall within the definition of defects which appear within the defects liability period, since it was apparent within that period. It therefore had to be rectified within the defects liability period obligation to make good.

If that is right, then that obligation might be an extension of the obligation to complete the works, which continues on after practical completion into the defects liability period. There is some doubt over this since the courts have said that practical completion means completion for all the purposes of the contract; a continuing obligation to repair, after practical completion, as opposed to an additional obligation, is inconsistent with this.

Do not despair. A number of fairly clear conclusions can be drawn:

- a defect is an immediate breach of contract but there is a dual obligation to perform in accordance with the contract and to complete the works;
- there is a continuing breach in respect of defective work until it is properly completed. The limitation period, on this basis, commences at practical completion;

- there is a further obligation to remedy defects notified in or at the end of the defects liability period, within a reasonable time. This carries its own limitation period, running from the breach.

- there may be an obligation to rectify defects apparent before practical completion, if notified within or at the end of the defects liability period. Again, such defects, once notified, are to be put right in a reasonable time. The limitation period runs from the breach;
- the defects liability period is not itself an exclusion clause so contractors remain liable for defects which appear after it expires, during the limitation period.

It should be remembered that a defective repair is a new breach of contract carrying its own limitation period.

For those who draft warranties and insurance provisions, limiting liability for defects to six or 12 years from practical completion, the liability to rectify defects may extend into the defects liability period and beyond. It may be sensible to extend the limitation period at least until six or 12 years after making good is certified or formally stated to have occurred, with a provision that the limitation period recommences in respect of defective repairs.

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# High cost of obstructing the law

The idea behind adjudication is to resolve disputes quickly at a sensible cost – an objective that is generally achieved.

What happens when one party obtains a favourable decision but their opponent refuses to pay up? The successful party can enforce the adjudicator's decision through the courts but this can be belligerently obstructed by the opponent.

This situation was recently considered in *Harris Calnan Construction Co. v Ridgewood (Kensington) Limited*. In this case, Harris had obtained a decision from the adjudicator for payment of nearly £100,000 plus interest. Ridgewood failed to pay and Harris commenced enforcement proceedings. In spite of having no real defence to the proceedings, Ridgewood tried to raise a number of technical arguments at the eleventh hour. Judge Peter Coulson QC (who having



recently become a High Court Judge is now Mr Justice Coulson) dismissed each point and upheld the adjudicator's decision.

First, Ridgewood argued there was no contract in writing and alleged the adjudicator had no jurisdiction to decide the matter. Ridgewood had neither taken this point before the adjudicator nor had it reserved its position, in order to enable it to do so at a later stage. Accordingly, the judge rejected this argument.

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**MATTHEW PHIPPS points out that the penalties could be even greater for those who delay payment when an adjudication goes against them.**

Second, Ridgewood argued that, as was based in the Channel Islands, the enforcement proceedings were invalid. The judge had little hesitation in rejecting this argument as well.

A third argument concerned an alleged defect in the way the court paperwork had been served, but this was also dismissed by the judge who found that the adjudicator's decision was properly valid and enforceable by Harris.

The judge then considered an application from Harris for an order that Ridgewood should pay all of Harris's legal costs of the enforcement proceedings. Judge Coulson noted that it was not unusual for a defendant to fail to pay up on an adjudicator's decision. The outstanding sum ought to have been paid to Harris several months earlier. The judge made it clear that the courts will not tolerate this sort of time wasting behaviour. Accordingly, the judge awarded Harris all of its legal costs of the enforcement proceedings – despite various late protests that were raised on behalf of Ridgewood.

This case demonstrates the approach of the courts to enforcing adjudicators' decisions. It shows that adjudication does resolve disputes quickly and that adjudicators' decisions are taken seriously by the judges, who prefer not to interfere with those decisions. Any party on the wrong end of an adjudicator's decision and who is without a valid defence to enforcement should be extremely wary of the potential financial risks of trying to resist the decision. Misconceived arguments such as those above will be given short shrift by the courts.

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## Law Bytes 2008 seminar dates

Friday 18 April 2008

Speaker: Mervyn Raybould, Associate, Legal Support Services, Ridge and Partners LLP

Topic: 'The Mechanics of Time'

Friday 6 June 2008

Speaker: Panel – Eric Mouzer, Martin King, Nigel Ribbands and John Pettet

Topic: "Any Questions" - questions on adjudication to panel members.

Further seminars will be held on the following dates with topics and speakers to be confirmed.

Friday 11 July 2008

Friday 12 September 2008

Friday 17 October 2008

Friday 5 December 2008

A definite date for your diary is the annual Construction Update which will take place on Friday, October 3. Full details to follow.

All seminars will be held at Wright Hassall's Olympus House office off Europa Way in Leamington Spa. For further details contact:

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We look forward to seeing you during the course of the year.