Neutral Citation Number: [2024] EWCA Civ 962

Case No: CA-2023-002323

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)
Mr Adrian Williamson KC (sitting as a Deputy Judge of the High Court)
[2023] EWHC 2965 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 August 2024

Before:

LORD JUSTICE COULSON
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE STUART-SMITH

- -

Between:

PROVIDENCE BUILDING SERVICES LIMITED
Claimant / Appellant

-and-

HEXAGON HOUSING ASSOCIATION LIMITED
Defendant / Respondent

- -
- -

Mark Chennells KC (instructed by **Clyde & Co**) for the **Appellant**
Jonathan Lewis KC and **Nicholas Kaplan** (instructed by **Devonshires Solicitors**) for the **Respondent**

Hearing date: 30 July 2024
- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 15 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Stuart-Smith:

1. This appeal raises an issue about the proper construction of the 2016 Edition of the JCT Standard Form of Design and Build Contract ["the JCT Form"] that is simpler to state than it is to resolve: can the Contractor terminate its employment under clause 8.9.4 of the JCT Form in a case where a right to give the further notice referred to in clause 8.9.3 has never previously accrued?

2. In a judgment delivered on 7 November 2023, the experienced Deputy Judge (Mr Adrian Williamson KC) found in favour of the Employer ["Hexagon"] and held that the answer to this question was "no". The Contractor ["Providence"] now appeals to this court.

3. For the reasons set out below, I would allow the appeal.

The factual and contractual background

The terms of the Contract

4. In February 2019, Hexagon and Providence entered into a contract for the construction of a number of buildings in Purley ["the Contract"]. The Contract incorporated the JCT Form as amended by the parties. The original Contract Sum was approximately £7.2 million.

5. Section 4 of the JCT Form provided for interim payments to be made by Hexagon. Clause 4.9 provided that the final date for payment of each Interim Payment should be 21 days from its due date. Clause 4.11.1 provided that, if Hexagon "fails to pay a sum payable to [Providence] in accordance with clause 4.9 … by the final date for payment and the failure continues for 7 days after [Providence] has given notice to [Hexagon] of [its] intention to suspend the performance of any or all of [its] obligations under the Contract and the grounds for such suspension, [Providence], without affecting its other rights and remedies, may suspend performance of any or all of [its] obligations until payment is made in full."

6. Section 8 made provision for termination by either Hexagon or Providence. Clause 8.2.1 provided that notice of termination of Providence's employment should not be given "unreasonably or vexatiously."

7. The main provision for termination by Hexagon was Clause 8.4, which relevantly provided:

> "**Default by Contractor**
>
> 8.4.1 If, before practical completion of the Works, the Contractor:
>
> .1 wholly or substantially suspends the carrying out of the Works or any material part thereof save pursuant to clause 4.11; or
>
> .2 fails to proceed regularly and diligently with the performance of his obligations under this Contract; or

> .3 refuses or neglects to comply with a notice or instruction from the Employer requiring him to remove or rectify any work, materials or goods not in accordance with this Contract and by such refusal or neglect the Works are materially affected; or
>
> .4 fails to comply with clause 3.3 or 7.1; or
>
> .5 fails to comply with clause 3.16,
>
> the Employer may give to the Contractor a notice specifying the default or defaults (a 'specified' default or defaults).
>
> 8.4.2 If the Contractor continues a specified default for 14 days from receipt of the notice under clause 8.4.1, the Employer may on, or within 21 days from, the expiry of that 14 day period by a further notice to the Contractor terminate the Contractor's employment under this Contract.
>
> 8.4.3 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."

8. It is sufficient to note that Clause 3.3 prohibited Providence from sub-contracting the work or its design without the consent of Hexagon; Clause 3.16 required the parties to comply with applicable CDM Regulations; and Clause 7.1 prohibited either party from assigning the Contract or rights thereunder without the consent of the other. It is not necessary to set the clauses out in full.

9. The main provision for termination by Providence was Clause 8.9, which relevantly provided:

> "**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; or
>
> .2 [Number not used]; or
>
> .3 fails to comply with clause 3.16,
>
> the Contractor may give to the Employer a notice specifying the default or defaults (a 'specified' default or defaults).
>
> 8.9.2 If after the Date of Possession (or after any deferred Date of Possession pursuant to clause 2.4) but before practical

> completion of the Works the carrying out of the whole or substantially the whole of the uncompleted Works is suspended for a continuous period of [2 months] by reason of any impediment, prevention or default, whether by act or omission, by the Employer or any Employer's Person, then, unless it is caused by the negligence or default of the Contractor or any Contractor's Person, the Contractor may give to the Employer a notice specifying the event or events (a 'specified' suspension event or events).
>
> 8.9.3 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.
>
> 8.9.4 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 a specified suspension event is repeated for any period, such that the regular progress of the Works is or is likely to be materially affected thereby,
>
> 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."

Hexagon's defaults

10. On 25 November 2022, the employer's agent issued Payment Notice 27, pursuant to which Hexagon was required to pay £264,242.55 on or before 15 December 2022. Hexagon failed to pay the sum due by that final date. The following day, 16 December 2022, Providence served a notice under Clause 8.9.1 ["the December Notice"]. The terms of the December Notice included:

> "You have not paid us the amount due to us under Payment Notice No. 27, i.e. £264,242.55, by the final date for its payment, i.e. 15 December 2022.
>
> We therefore give you this Notice of Specified Default under clause 8.9.1 of the Contract."

11. On 29 December 2022 Hexagon paid the sum of £264,242.55 in full. It is common ground that, because payment was made on that date, the specified default did not continue for 28 days from the receipt by Hexagon of the December Notice. Accordingly, it was not and never became open to Providence to serve a further notice pursuant to Clause 8.9.3 in respect of that late payment.

12. On 28 April 2023, the employer's agent issued Payment Notice 32, pursuant to which Hexagon was required to pay £365,812.22 on or before 17 May 2023. Hexagon failed to pay the sum due by that final date. The following day, 18 May 2023, Providence issued a further notice, this time under Clause 8.9.4. ["the Notice of Termination"]. The Notice of Termination referred back to the December Notice and relied upon Hexagon's non-payment of the sums due on 17 May 2023 as a repetition of the specified default that was the subject matter of the December Notice. Accordingly, Providence gave notice that Hexagon had repeated a specified default and stated that it terminated its employment under the Contract pursuant to Clause 8.9.4. Without prejudice to its asserted contractual termination of the Contract, Providence said that 19 of the 32 payments that Hexagon had been required to pay had been made late and stated that it accepted what it characterised as Hexagon's repudiatory breaches of contract so as to rescind the contract and terminate it in accordance with its Common Law rights.

13. On 23 May 2023, Hexagon paid the sum of £365,812.22 in full. The next day, 24 May 2023, Hexagon disputed the lawfulness of the Notice of Termination and asserted that Providence had repudiated the Contract. A week later, on 31 May 2023, Hexagon wrote again to Providence, accepting what it characterised as Providence's repudiatory breach.

The procedural background

The issue

14. Hexagon referred the dispute to adjudication. In July 2023, the adjudicator found substantially in favour of Hexagon. On 28 July 2023 Providence issued these proceedings under CPR Part 8. It identified the dispute between the parties as "whether a right to terminate under Clause 8.9.3 must first have accrued before Providence could have any right to terminate under Clause 8.9.4." We are not required to consider whether either of the parties' reciprocal assertions of repudiatory breach are made out.

The judgment of the court below

15. The Judge identified relevant principles of construction by reference to the summary contained in the judgment of Sir Geoffrey Vos MR in *Lamesa Investments Limited v Cynergy Bank Limited* [2020] EWCA Civ 821 at [18]; and he stated that contractual termination clauses are to be strictly construed and must be strictly complied with. He regarded his "first and probably only task" as being to ascertain the natural and ordinary meaning of clauses 8.9.3 and 8.9.4 of the contract. In pursuit of that aim, he expressed his views very concisely. Clause 8.9.3 he regarded as straightforward. Turning to Clause 8.9.4, he said at [17] that the words "does not give" in the context of a clause 8.9.3 notice:

> "envisages 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."

16. Continuing in the same line of reasoning, the Judge then said of the words "for any reason":

> "18. … All these 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."

17. The Judge regarded this conclusion as sufficient to dispose of the proceedings. But in deference to the arguments before him, he dealt with some of the other points that were raised in remarks that were self-evidently obiter. He was cautious about placing too much emphasis on the different wording used in Clause 8.4.3, though he considered that Clause to be consistent with the view he took of the phrase "does not give".

18. Turning to Providence's submission that Hexagon's construction would produce harsh and uncommercial results, he accepted Hexagon's submission 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 [a situation where the Employer makes every payment 27 days late]." On the other hand, and notwithstanding the presence of Clause 8.2.1, the Judge thought it would be surprising if Clause 8.9 meant that a Contractor could terminate where there was a specified default that had been "cured" and was then repeated, perhaps only to a minor extent. That said, he did not think the "business commonsense" arguments took the matter very far, one way or another, reiterating that, in his view, clause 8.9.4 was clear as a matter of language.

Providence's submissions on appeal

19. Providence's central submission, presented in a number of different ways, is that the words of Clause 8.9.4 are clear but not in the way that the Judge thought. Providence submits that the words "for any reason" cover the case where the reason why the contractor does not give the further notice referred to in Clause 8.9.3 is that the circumstances associated with the original specified default do not give rise to an accrued right to do so. Accordingly, Providence submits that the Judge's references to "taking an active step" and "deciding to give" a Clause 8.9.3 notice are inapposite and, if anything, assume rather than prove the proposition that a right to give such a notice must have accrued (so giving rise to a question of "choice" or "deciding" to take the active step). In Providence's submission, there is nothing in Clause 8.9 that implicates notions of "choice" or "decision": the only relevant question under Clause 8.9.4 is whether the Contractor has or has not given the further notice.

20. Turning to the commercial implications of the parties' contentions, Providence submits that (a) the "battery of weapons" to which the Judge referred are little or no comfort to a Contractor faced by an Employer who arrogates to themselves the extra time (falling just short of 28 days from receipt of the Notice of Specified Default) and (b) Providence's interpretation has the advantage of certainty, without which the Parties would be left with the time- (and money-) consuming uncertainties of alleging and

proving repudiatory conduct, particularly in a case such as the present where there is alleged to be a serial failure to pay on time.

Hexagon's submissions on appeal

21. Hexagon asserts that the use of the words "If …" and "then …" in Clause 8.9.4 supports the inference that Clause 8.9.4 presupposes the prior existence of an accrued right to have given a notice to terminate under Clause 8.9.3. Similarly, the words "for any reason does not give the further notice referred to in clause 8.9.3" imply that it was possible for the Contractor to have given that notice but the Contractor did not do so. During oral submissions, different weight was attached to different words or collections of words within the clause, including emphasis on the word "the" as indicating that there was such a notice that was capable of being given. Hexagon submitted that the use of the words "does not give" rather than "could not give" supported its interpretation and was inconsistent with there being no power to have given notice under Clause 8.9.3 in the first place.

22. As a second line of argument, Hexagon submitted that, when viewed in context, the terms of Clause 8.9 could be seen as a waterfall or cascade of provisions progressing from the existence of a default such as the failure by Hexagon to pay sums due by the final date for payment (Clause 8.9.1) to the Contractor's right to terminate on repeated default (Clause 8.9.4). On this analysis, Clause 8.9 can be seen as a sequence of intertwined provisions with each step (or failure to take a permitted step) forming part of the sequence. Hexagon described this sequence as providing a series of opportunities for Providence to notify Hexagon of its defaults and provides Hexagon with a corresponding series of opportunities to remedy those defaults. Hexagon submits that it is only if Hexagon does not avail itself of those opportunities that Providence acquires a right to terminate. On this analysis, if the default is remedied (e.g. by late payment within the 28-day period) the process flowing from a subsequent default goes back to the beginning and restarts at Clause 8.9.1.

23. Hexagon explained the commercial logic behind this arrangement as being that, if the right to terminate accrued under Clause 8.9.3 but Providence did not give a further notice under that clause, the contract would then continue "at Providence's indulgence". Hexagon is therefore more understandably put at risk of termination in the event of repetition of the specified default than if its original default had never been prolonged so as to give Providence the right to terminate. Conversely, Hexagon submits that it defies common sense for Providence to have the right to terminate on repetition of the specified default even where a previous right to terminate has not arisen. No question of indulgence arises and there is said to be no logic in putting Hexagon at risk of termination of the contract where (a) none had previously existed and (b) the repetition of the specified default may be minor.

The applicable legal principles

24. There are now so many well-known iterations and summaries of the principles applicable to the interpretation of commercial contracts that it is not necessary to set them out yet again in this judgment. Each new iteration tends to provide some particular shade that may be referable to the facts of the given case (including where the contract in question is a standard form contract); but the fundamentals are well

known, and no new point of principle arises. The summary from *Lamesa* to which the Judge referred is one such iteration and was a suitable summary for the Judge to adopt.

25. For present purposes I would only mention that, where dealing with a standard form of wording, the interpretation is unlikely to be affected by the context in which the parties concluded their particular contract: rather the process of interpretation will ultimately depend upon an intense focus on the words used: see *Lamesa* at [19]. As always, the Court must consider the quality of drafting of the clause and the agreement in which it appears: see *Lamesa* at [18 (vii)].

26. There was an apparent disagreement between the parties about the extent to which, as a matter of principle, prior versions of the Standard Form could be admissible as an aid to construction. I would endorse and adopt what was said by Moore-Bick LJ in *Seadrill Management Services Ltd v OAO Gazprom* [2010] EWCA Civ 691, [2011] 1 All ER (Comm) 1977 at [17]:

> "In cases where it is possible to identify with a degree of confidence the reason for a particular amendment to a standard form, for example, where a change has been made to respond to the effect of a particular decision of the courts, a change in legislation or a widely publicised event, that may be appropriate. Such cases are usually well known within the industry and are often documented in the trade press. Both parties are therefore likely to be aware of them. I am doubtful, however, whether it is legitimate simply to compare the earlier and later versions of the contract form on the assumption that the parties consciously intended to achieve a particular result by adopting the later version."

27. I would also endorse the note of caution adopted by Aikens LJ at [30] of *The Rewa* [2012] EWCA Civ 153, [2012] 2 All ER (Comm) 447, when invited to look at previous versions of standard terms and the drafting committee's commentary as aids to construction:

> "Whilst there may be occasions when this has to be done in order to assist in solving a problem of an ambiguous wording, I would generally discourage such exercises in "the archaeology of the forms". In most cases it makes the task of interpretation of contractual wording unnecessarily over-elaborate and it can add to the expense and time taken in litigating what should be short points of construction."

Discussion

28. As a preliminary point, it is common ground that what constitutes the "specified default" in question is the failure to pay by the final date for payment the amount due to the Contractor in accordance with Clause 4.9. The fact that it occurred in the context of Payment 27 is not a constituent element of the specified default: if it were otherwise, it would not be possible for the Employer to repeat the specified default on a later occasion in the context of a different payment.

29. The correct place to start is with the words that are to be interpreted themselves. Viewed in isolation, the natural meaning of the conditional words at the commencement of Clause 8.9.4 are clear: "If the Contractor … does not give the further notice referred to in Clause 8.9.3" are broad enough to cover any state of affairs other than one where the Contractor does give notice. Put another way, unless the Contractor gives the further notice referred to in clause 8.9.3, the condition is satisfied. Viewed in isolation there is no basis for a submission that the conditional words imply anything about whether the Contractor could or could not have given the notice. That natural meaning is reinforced by the words "for any reason", which (at risk of paraphrasing) mean that there is to be no exception based upon the reason why the Contractor does not give the notice. Even assuming that the reason why the Contractor does not give the further notice is that the right to do so has not accrued under Clause 8.9.3, that remains within the meaning of the phrase "for any reason". The first step, therefore, is that the natural meaning of the words in Clause 8.9.4 viewed on their own does not give rise to an inference or an implication that the Contractor could have given a further notice but did not do so. When the words are viewed in isolation, the gloss for which Hexagon contends is not supportable.

30. It is, however, necessary, and vital to view the words in context. While the whole of the contract provides potentially relevant context, there are two features of the context that must be closely scrutinised. The first is the full terms of Clause 8.9; the second is the terms of Clause 8.4. This scrutiny forms part of the iterative process of interpretation, though I take them in turn.

31. It is incontrovertible that Clause 8.9 sets out to define the circumstances in which the Contractor can terminate its employment as a consequence of the Employer's default. I would also accept that the Clause sets out a sequence of events that may properly lead to termination, with sub-clauses 1 to 3 dealing with the consequences of continued specified default and sub-clause 4 dealing with the consequences of repeated specified default. That of itself does not answer the question at issue in these proceedings. That answer depends on whether the context supports an interpretation that excludes from the scope of Clause 8.9.4 a case where the Contractor has not had an accrued right to serve a notice under Clause 8.9.3. In order to support such an interpretation there needs to be a sufficient linkage between Clauses 8.9.3 and 8.9.4 so as to imply that Clause 8.9.4 means "if the Contractor … *had or has an accrued right to but* does not give the further notice *under* Clause 8.9.3". In favour of such an interpretation is that Clause 8.9.4 follows immediately after Clause 8.9.3: and it may be argued that "the further notice referred to in clause 8.9.3" (with particular emphasis on the word "the") supports an inference that it is referring to a notice that the Contractor is entitled to give under Clause 8.9.3 since there is no other notice referred to in that clause. However, to my mind, that inference, though supportable, is not compelling, not least because of the words "for any reason", which remain broad enough to catch a case where the reason why the further notice may not be given is that there is no accrued right to give it. On that approach, the conditional words of Clause 8.9.3 are satisfied even where the Contractor had no accrued right to give the further notice referred to in Clause 8.9.3. I do not find that the Judge's references to the Contractor "taking an active step" or "deciding" not to give a Clause 8.9.3 notice helpful. To my mind, they distract attention from the true meaning of the words that fall to be interpreted. The question to be addressed is simply and only whether the Contractor has given further notice, not

whether the giving (or not) of the notice can be given the (non-contractual) description of being the result of a decision or the taking of an active step.

32. It is, however, possible to test Hexagon's proposition that Clause 8.9.4 only applies where the Contractor had an accrued right to give a Clause 8.9.3 notice by reference to Clause 8.4. Clauses 8.4 and 8.9 are structurally similar, while not purporting to give reciprocal or symmetrical remedies to the Employer (under Clause 8.4) and the Contractor (under Clause 8.9). Of most structural significance is that both clauses adopt the same structure in the provisions that are critical for the present issue of interpretation. Clauses 8.4.2 and 8.9.3 each specify the circumstances in which the Employer or Contractor (as the case may be) may serve a further notice, while Clauses 8.4.3 and 8.9.4 specify what may happen if no such notice is given. It is therefore relevant and material that the main conditional words in Clauses 8.4.3 and 8.9.4 are the same: "If the [Employer/Contractor] does not give the further notice referred to in clause [8.4.2/8.9.3]".

33. To my mind it seems clear that this congruence of structure and conditional words means that the conditional words must carry the same meaning in each clause. Where the clauses differ is in their references to the reasons for not giving the further notice. In Clause 8.4.3 the words "for any reason" are not used. In their place are "whether as a result of the ending of any specified default or otherwise". Two things are clear. First, the reference to "the ending of any specified default" is unqualified and is broad enough to cover cases where the specified default ends either (a) 14 days or more after receipt of the notice under clause 8.4.1 or (b) less than 14 days after receipt. It therefore covers both a case where the right to give a further notice had accrued and a case where it had not. It follows that Clause 8.4.3 must include in the conditional words a case where the further notice has not been given because there had been no accrued right to give it. Second, since the words "for any reason" are at least as broad as the words "whether as a result of the ending of any specified default or otherwise", the same result must follow for Clause 8.9.4.

34. For these reasons, though I would accept that the drafting could have been of better quality, I come to the provisional view 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 and the possible inference to the contrary, to which I referred at [31] above, must give way to the analysis that I have just set out.

35. Like the Judge, I do not find the competing arguments based on commercial sensibility compelling. There is sense behind Providence's complaint that Hexagon's interpretation allows a serial defaulter to escape any meaningful consequences of their defaulting on payment if they manage to end their defaults before the 28th day after the final day. Conversely, there is sense behind Hexagon's suggestion that requiring an accrued right to serve a further notice makes for the more realistically serious prerequisite to the operation of Clause 8.9.4. Neither argument is compelling; but neither is without any commercial sense. On either interpretation the intention of the Clauses is the same, namely, to encourage and cause the party concerned to comply with their contractual obligations (in this case the obligation to pay by the final date), and a repetition of a previous specified default is the trigger entitling the wronged party to terminate.

36. The parties provided the Court with extracts from the equivalent clauses from the 1998 and 2005 versions of the JCT Form and commentaries from time to time which one or other party suggested was either consistent with their interpretation of the JCT Form or inconsistent with that of the other party. The current wording took shape in 2005: see Clauses 8.4 and 8.9. In the 1998 version, the provisions were structured differently. Clauses 28.2.3 and 28.2.4 stated:

> "28.2.3 If
>
> - the Employer continues a specified default, or
>
> - a specified suspension event is continued
>
> for 14 days from receipt of the notice under clause 28.2.1 or clause 28.2.2 then the Contractor may on, or within 10 days from, the expiry of that 14 days by a further notice to the Employer determine the employment of the Contractor under this Contract. Such determination shall take effect on the date of receipt of such further notice.
>
> 28.2.4 If
>
> - the Employer ends the specified default or defaults, or
>
> - the specified suspension event or events cease, or
>
> - the Contractor does not give the further notice referred to in clause 28.2.3
>
> and
>
> - the Employer repeats (whether previously repeated or not) a specified fault, or
>
> - a specified suspension event is repeated for whatever period (whether previously repeated or not), whereby the regular progress of the Works is or is likely to be materially affected
>
> then, upon or within a reasonable time after such repetition, the Contractor may by notice to the Employer determine the employment of the Contractor under this Contract. Such determination shall take effect on the date of receipt of such notice."

37. None of the archaeological digging by the parties shows or suggests that the change in wording in the 2005 edition was made in order to respond to the effect of a particular decision of the courts, a change in legislation or a widely publicised event, such as could cast light on the proper interpretation of the new wording. Nor, to my mind, do the various commentaries take matters further.

38. The only point of interest to emerge is that it is common ground that the 1998 version of the JCT Form, as set out above, had the effect that Providence contends should be

attributed to the current Standard Form. We were taken to two cases which considered the 1998 version, neither of which suggested that the termination provisions in that version were uncommercial or otherwise inappropriate.

39. In *Reinwood Ltd v L Brown & Sons Ltd* [2007] BLR 10 the Contractor gave notice to terminate approximately a week after the repetition of default in making payment. The Employer argued that notice had been given "unreasonably or vexatiously", which was rejected after detailed consideration by the Judge. The Judge's approach to the termination provisions was summarised at [34] and [40]:

> "34. Clause 28.2.4 is in my judgment clear and unambiguous and it provides that a notice of determination may be given as soon as the specified default has been repeated. There is nothing unreasonable in that, since the employer has already received a warning in respect of the previous default and must be taken to know that if he repeats the default he runs the risk that the contract may be determined either forthwith or within a reasonable time after the repetition of the specified default.
>
> …
>
> "In giving a notice of determination under clause 28.2.4, the contractor in my judgment is entitled to have regard to his own commercial interests. It should be remembered that under clause 28.2.4 a notice of determination may only be served if the employer has … repeated a breach of contract about which he previously received a warning under clause 28.2.1 … . It is clear from clause 28.2.1 that a failure on the part of an employer promptly to pay the amount properly due under a certificate … is regarded under the contract as a serious breach on the part of the employer and that the contractor may determine the contract if that breach is repeated provided only that the contractor is not acting vexatiously or unreasonably. The contractor is entitled to be paid by the due date and he is not, for example, bound to incur the expense of pursuing other remedies such as adjudication or arbitration in order to obtain payment but may determine the contract."

40. Furthermore, while the Judge, HHJ Gilliland QC, accepted that it was "a serious matter for a contractor to determine a contract under clause 28.2 for a delay in making two payments under two different interim certificates", that was what the contract permitted, subject only to the issue of unreasonableness or vexation: see [64].

41. In *Ferrara Quay Ltd v Carillion Construction Ltd* [2009] BLR 367, in the context of an application to discharge an interim injunction restraining the contractor from determining its employment, HHJ Toulmin CMG QC said at [88]-[89]:

> "88. … I note in relation to [*Reinwood*] that the specialist editors of the Building Law Reports … says that an employer who has defaulted once on his payment obligations is skating on thin ice.

> 89. The scheme of the contract is that in the event of a default in stage payments, the contractor is entitled to give formal notice. If the default is not rectified or there is a further similar default, the contractor is entitled to give notice of termination. The purpose of the provision is to ensure that the contractor is paid in accordance with the payment provisions. The provisions give the contractor the power to terminate if the payment terms are not complied with … ."

42. In my judgment, the stance adopted by these two Judges, each of whom was steeped in this field of the law, lends some support to Providence's submission that the commercial consequences of their preferred interpretation are acceptable and not, as Hexagon would have it, a reason for rejecting it. For my part, I agree that the commercial consequences of Providence's interpretation represent a contractual allocation of risk that is commercially acceptable, even though it renders the Employer's ice thinner from the outset than would be the case if Hexagon's interpretation were to be adopted.

43. Nor am I persuaded by the Judge's reference to the "battery" of other remedies. While they may ameliorate the position to some extent, none provides a satisfactory and immediate solution to the typical case of late payment: each involves a measure of delay and, in the case of suspension or resorting to adjudication, additional cost and uncertainty for the contractor in pursuing them.

44. Standing back and reviewing the case as a whole, I am persuaded that the plain meaning of the words "does not give", the congruence of those critical words in Clauses 8.4.3 and 8.9.4, and the presence of the words "for any reason" in Clause 8.9.4, when seen in the full context of the terms of the contract and the previous versions of the JCT Form, lead to the conclusion that Providence's interpretation is to be preferred. I reject the submission that the commercial consequences of the rival interpretations should lead to a different result. Accordingly, I would allow Providence's appeal.

Lord Justice Popplewell

45. I agree.

Lord Justice Coulson

46. I also agree.