

Construction Law Update

Guidance from the TCC – No Final Account Provisions in the Contract?

In the case of *JSM Construction Limited v Western Power Distribution (West Midlands) Plc*, the Technology and Construction Court (TCC) considered whether the absence of a final account provision rendered a contractual payment mechanism inadequate.

Background

Western Power Distribution (West Midlands) Plc (“WPD”) engaged JSM Construction Limited (“JSM”) to install 132kV cables and associated ductwork pursuant to a bespoke contract dated 24 October 2016 (the “Contract”).

Following completion of the works, JSM claimed £1.5m as the alleged final balance payable, including damages and interest. WPD contended that JSM’s entitlement under the Contract was limited to a series of interim payments only and there was no final account mechanism. Therefore, WPD sought to strike-out JSM’s claim or alternatively summary judgment against JSM.

The parties’ positions

JSM argued that, although the Contract provided for interim payments, because there was no provision in the Contract for final payment for completed works, relevant terms as to final payment in the Scheme for Construction Contracts (the “Scheme”) applied. Section 110 of the Housing Grants Construction and Regeneration Act 1996 (as amended) (the “Act”) requires every construction contract to which the Act applies to provide an adequate mechanism for determining ‘*what payments become due under the contract, and when*’. JSM held that the absence of a final account provision was a good indicator that the Contract was unlikely to comply with Section 110 of the Act.

JSM also pleaded that the works were disrupted by unforeseen conditions because of WPD’s failure to carry out ground investigations, such that WPD’s

design of the works was incomplete and insufficiently developed.

WPD contended that the Contract was a lump-sum contract under which JSM could raise interim monthly invoices commensurate with the actual progress of the works. Although there was no express term entitling JSM to raise a final account, WPD contended that the absence of such a term did not render the payment regime under the Contract inadequate such that provisions of the Scheme would be implied. As such, there was no implied term entitling JSM to raise a final invoice and its claim was destined to fail.

The TCC’s judgment

The TCC held that the Contract complied with the Act, as to stage/interim payments. The TCC also rejected JSM’s submission that the absence of a final account provision indicated that the Contract was unlikely to comply with the Act.

Rather, Section 110(1)(a) of the Act required the court to take a holistic view of the overall mechanism for payments under a contract and to ask whether such mechanism is adequate for determining what payments become due under the contract, and when. Such a value judgment exercised by the court is a question of fact, and the answer will vary depending upon the circumstances and terms of the contract.

The TCC noted that there is nothing in the Act that necessarily requires parties to make separate provision for a final account, nor would a payment mechanism only be adequate if it included a provision for a final account. Accordingly, the Contract might well provide an adequate mechanism for identifying what was payable without a separate process for valuing/submitting the final account.

In this case, it was properly arguable that the Contract was essentially for a fixed price plus variations which would be valued against rates and prices agreed in the

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pricing schedule. It was also arguable that a simple payment mechanism that provided for monthly stage payments throughout the works that were commensurate with actual progress might well be adequate for establishing what payments were due.

However, as this was a claim for strike-out or summary judgment, the TCC was not invited to determine fact-sensitive issues such as the alleged inadequacy of WPD's design. So, the TCC could not be certain that JSM's claim to make a final application for payment was hopeless, nor that JSM had no realistic prospect of success. Accordingly, the TCC dismissed both the application to strike-out the claim and the application for summary judgment.

Analysis

This decision builds on existing case law in relation to the adequacy of payment mechanisms in construction contracts. The important exercise for a court is essentially a value judgment and assessment of whether a payment mechanism is adequate in determining what payments become due under a contract, and when. That is the fundamental question.

The purpose of Section 110 of the Act is to ensure that a contract has a clear, transparent, and straightforward payment mechanism, and one that meets certain minimum standards. Parties should consider this when entering into a contract, otherwise, they will risk relevant provisions of the Scheme being implied.

This case strongly indicates that the absence of a final account provision is not synonymous with a contractual payment mechanism being deemed 'inadequate'.

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