

Construction Law Update

Set in Stone: Court Rules a Movable Final Date for Payment Falls Foul of the Construction Act

The court's decision in *Deerns UK Limited v VDC LHR11 Limited* [2026] EWHC highlights a narrow but recurring drafting trap under the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA").

Section 110(1)(b) requires every construction contract to fix a final date for payment. The dispute here centred on a clause providing for a final date 30 days after the due date, but which allowed that date to be postponed if the consultant's payment application was submitted late, meaning the interval between due date and final date could vary depending on when the consultant submitted its application.

The Court had to decide whether that kind of movable final date satisfies the statute, and if it doesn't, what falls away with it.

Key takeaways:

- **A final date for payment that can shift depending on when an application or invoice is submitted breaches s110(1)(b) HGCRA and is invalid.**
 - **Estoppel by convention needs clear, contemporaneous evidence of a shared departure from the express contract terms, and vague or after-the-fact evidence will not suffice.**
 - **Courts remain reluctant to stay execution of a smash and grab judgment on the strength of the payee's financial weakness alone, particularly where that weakness stems from the payer's own non-payment.**
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Factual Background

VDC LHR11 Limited ("VDC") engaged Deerns UK Limited ("Deerns") under a consultancy agreement to provide engineering consultancy services in relation to a development at the Chandos Park Estate in London (the "**Contract**").

The dispute arose over Deerns' interim applications for payment 7 and 8, which totalled £910,501.71 plus VAT (the "**Applications**").

Clause 7.2 of the Contract fixed the due date, but tied the final date for payment to whether Deerns' application had been submitted on time. Late submission pushed the final date back by the corresponding number of days.

VDC argued its pay less notices had been served in time on the basis that the final date was 30 days after the due date, on its interpretation of the clause in question.

In contrast, Deerns argued it was entitled to the full value of its Applications on the basis that the clause failed to provide a final date for payment at all under s110(1)(b). Because the Contract lacked the certainty the HGCRA demands, Deerns said the Scheme for Construction Contracts (the "**Scheme**") operated to fill the gap and imposed a final date of just 17 days after the due date. On that shorter timetable, VDC's notices, served on 27 February and 25 March 2026, fell outside the window for a valid pay less notice.

The primary question for the Court was whether the Contract was compliant with HGCRA and how the Scheme was to apply, if at all.

VDC raised two further defences in case its primary argument failed. It maintained:

- The parties had, in practice, operated the Contract as though the 30-day period applied and that Deerns should be estopped from now saying otherwise.
- In the alternative, if Deerns succeeded, execution of judgment should be stayed, since Deerns was in financial difficulty and might not be able to

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repay the sums due if VDC later succeeded on a true valuation of the works.

Held

The Judge, Mr Justice Eyre, found that the Contract failed to provide for a valid final date for payment and thus did not comply with s.110 HGCRA. The Scheme therefore applied. This meant VDC's pay less notices were served out of time and Deerns was automatically entitled to the full amount applied for in its Applications.

1. Was the final date for payment valid under s110(1)(b)?

Applying *Rochford Construction Ltd v Kilhan Construction Ltd* [2020] EWHC 941 (TCC) and *Lidl Great Britain Ltd v Closed Circuit Cooling Ltd* [2023] EWHC 2243 (TCC), the Judge confirmed that s110(1)(b) requires a fixed period between the due date and the final date for payment, and that a provision tying the final date to an event rather than to the due date alone fails to meet that requirement.

VDC tried to distinguish its own drafting from the clause condemned in *Lidl* by pointing out that its triggering event (late submission of the application) occurred before the due date, rather than after it as in *Lidl*. The Judge rejected that distinction as irrelevant. What mattered was that the final date depended on something other than the due date itself, which Parliament has prohibited. He found there was only one legitimate reading of the clause, so the usual principle that a Court should prefer a lawful construction where two readings are equally plausible had no application here.

2. What replaces a non-compliant final date?

Because the Contract failed to fix a compliant final date, the relevant provisions of the Scheme applied instead. Paragraph 8 of the Scheme fixes the final date at 17 days from the date payment becomes due.

VDC asked the court to substitute the parties' own agreed 30-day period rather than import the Scheme's shorter 17-day period, on the basis that

this was the minimum necessary intervention. The Court declined, holding that paragraph 8 of the Scheme imposes a 17-day period without qualification once a contract fails to provide a compliant final date, and that it had no power to impose some different solution of its own devising.

On that shortened timetable, VDC's pay less notices were out of time, and Deerns' unpaid applications became payable in full on a smash and grab basis.

3. Was Deerns estopped by convention from relying on the Scheme?

VDC argued the parties had operated the Contract on a shared, mutually understood basis that the 30-day period applied, and that Deerns should be estopped from departing from that convention. The Judge dismissed this. The evidence was vague, and the contemporaneous documentation did not support the alleged shared understanding. Establishing the convention would have required a clear departure from the express contractual terms, and no contemporaneous acknowledgement of any such departure existed.

4. Should execution of the judgment be stayed?

VDC also applied for a stay of execution, pointing to Deerns' financial pressures and arguing that Deerns might be unable to repay any overpayment if VDC's cross-claims later succeeded on a true valuation of the works.

The Judge refused the stay, noting that VDC's cross-claims remained at an early stage and that Deerns' financial difficulties were, in substantial part, attributable to VDC's own non-payment. Refusing payment now on the speculative basis that a paying party might later win a cross-claim would undercut HGCRA's core purpose of protecting cash flow.

Comment

If a payment mechanism lets the final date for payment shift depending on when an application, invoice or notice is submitted, the clause is non-compliant, and the Scheme steps in with a 17-day final date. As such, a pay less notice drafted around

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a contractual 30-day final date can find itself hopelessly late once the Scheme's 17-day period applies, exposing the paying party to a smash and grab award on the notified sum.

Employers and their advisers should treat the final date for payment as one of the few genuinely fixed points in a construction contract. Trying to build in flexibility here, even flexibility that looks favourable to the paying party, is a clear drafting risk.

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