

CONSTRUCTION : BULLETIN

Challenging Final Certificates Under JCT

JCT contracts include a “conclusive evidence” clause which provides that the Final Certificate constitutes conclusive evidence that all sums due to the Contractor have been accounted for unless proceedings challenging the content of the Final Certificate are commenced within 28 days.

In the recent case of *The Trustees of the Marc Gilbard 2009 Settlement Trust* (the “Trust”) v *OD Developments and Projects Limited* (“ODDP”), the court considered whether the conclusive evidence clause allows the Contractor to commence one type of proceedings within 28 days and then commence a different type of proceedings much later.

Background

The Trust had employed ODDP under a JCT Standard Building Contract Without Quantities Revision 2 2009.

Clause 1.9.3 of the Contract states:

“If any adjudication, arbitration or other proceedings are commenced by either Party within 28 days after the Final Certificate has been issued, the Final Certificate shall have effect as conclusive evidence as provided in clause 1.9.1 save only in respect of the matters to which those proceedings relate.”

On 3 December 2013, the Contract Administrator issued his Final Certificate showing a sum of more than £230,000 owing to the Trust by ODDP.

On 20 December 2013, well within the 28 day time limit imposed by clause 1.9.3, ODDP commenced legal proceedings in the Technology & Construction Court challenging the Final Certificate.

However, the legal proceedings progressed very slowly. In January 2015, ODDP changed its mind about the litigation and decided that it wanted to challenge the Final Certificate in adjudication instead.

ODDP argued that this course of action was permitted by clause 1.9.3 because once any type of proceedings had been issued, the Final Certificate became inconclusive in relation to the subject matter of those proceedings. Any other type of proceedings permitted under the contract could then be issued at any time thereafter in relation to the same subject matter as the original proceedings. ODDP pointed out that there was nothing in the wording of clause 1.9.3 that prevented a switch from one type of proceedings to another. It also argued that clause 1.9.3 had to be interpreted in this way in order to allow it to exercise its legal right to adjudicate “at any time”.

The Trust argued that the correct and most sensible interpretation of clause 1.9.3 was that ODDP could only pursue the proceedings that had been commenced within the 28 day period i.e. the litigation, but not the adjudication. The Trust applied to court for a declaration to this effect.

What is the literal meaning of clause 1.9.3?

The court preferred the Trust’s interpretation of clause 1.9.3, stating that it was “*wholly contrary to the conclusivity provisions in the contract*” to interpret clause 1.9.3 as meaning that any sort of proceedings commenced within 28 days would render the Final Certificate inconclusive in any other proceedings commenced months, or even years,



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later regarding the same dispute. The court could not find anything in the wording of clause 1.9.3 which permitted the commencement of a series of subsequent proceedings both prior to and after the expiry of the 28 day time limit. It was clear from the clause wording that any and all proceedings which ODDP wished to commence (which might have included both starting an adjudication and issuing legal proceedings in order to protect its position if the adjudication went wrong) had to be commenced within the 28 day time limit in order to avoid the Final Certificate becoming conclusive.

What is the common sense meaning of clause 1.9.3?

It is established law that where a clause has more than one possible meaning, the court is entitled to choose the meaning which is more consistent with business common sense.

The court noted that the purpose of clause 1.9.3 is to provide clarity and certainty to the parties. This was best achieved if clause 1.9.3 only permitted the parties to commence proceedings within the 28 day period. It simply did not make business common sense to allow for more than one set of proceedings to be commenced within an unknown timeframe.

Was ODDP's right to adjudicate "at any time" affected?

The court rejected ODDP's argument that clause 1.9.3 would prohibit it from referring a dispute to adjudication "at any time" if the adjudication had to be commenced within the 28 day time limit.

First of all, even though the Final Certificate had become conclusive, there was nothing to prevent ODDP from commencing an adjudication challenging it outside the 28 day period. It was just rather fruitless to do so, given that the terms of the contract made the Final Certificate conclusive and unchallengeable.

In addition, the fact that it was now rather pointless to commence an adjudication was purely due to ODDP's own actions, as ODDP had chosen to

litigate rather than adjudicate within the 28 day time limit. It would have been open to ODDP to start both an adjudication and legal proceedings within the 28 days if they had wished to keep their options open.

Finally, the Construction Act does not provide an unfettered right to adjudicate which exists independently of other contractual terms. The terms of the contract imposed a clear constraint on the ability to adjudicate.

Analysis

The 28 day period following the issue of the Final Certificate is a critical one for the Contractor, who has to decide very quickly whether the Final Certificate should be challenged, and if so, what type of proceedings should be commenced for that purpose.

This case confirms that the time limit imposed by the JCT conclusivity provisions is set in stone. The Contractor cannot start one type of proceedings and then later change to another, even if the subject matter of the proceedings remains the same. This case therefore emphasises to Contractors that their actions and decisions in the period following issue of the Final Certificate are critical. All options and strategies should be considered before it is too late.

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