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# Providence Building Services Ltd v Hexagon Housing Association Ltd [2024] EWCA Civ 962: Court of Appeal Hands Contractors a Loaded Gun (with Strict Instructions Not to Shoot Themselves in the Foot)

## *Providence Building Services Ltd v Hexagon Housing Association Ltd* [2024] EWCA Civ 962

**Date**: 15 August 2024

**Judges**: Lord Justice Coulson, Lord Justice Popplewell and Lord Justice Stuart-Smith

***Keywords:***

*JCT Standard Form of Design and Build Contract (2016 Edition), Clause 8.9.3 (Right to Terminate upon continued specified default), Clause 8.9.4 (Right to Terminate upon repeated default without prior right under 8.9.3), Default by Employer (Non-payment by final date), Specified Default and Repetition of Default, Contractor's Right to Terminate, Strict Construction of Termination Clauses, Commercial Construction Contracts, Cash Flow Protection Measures, Repudiatory Breach of Contract, Common Law Rights of Termination, Standard Form Interpretation Principles, Sequential Contractual Remedies, Comparative Analysis of Clause 8.4 (Employer Default) and Clause 8.9 (Contractor Default), 1998, 2005, and 2016 JCT Form versions, Commercial Consequences and Risk Allocation*

**Summary**

This case examines the termination rights of contractors under the JCT Standard Form of Design and Build Contract 2016 edition ("JCT Form"). The Court of Appeal, overturning the lower court's decision, determined that a contractor can terminate its employment under clause 8.9.4 even if the right to issue a further notice under clause 8.9.3 has never arisen.

***Case Law/ Authorities:***

1. *Lamesa Investments Limited v Cynergy Bank Limited* [2020] EWCA Civ 821 – Key reference on principles of contract interpretation in standard forms.
2. *Seadrill Management Services Ltd v OAO Gazprom* [2010] EWCA Civ 691 – Authority on use of previous versions of standard forms and drafting history in interpretation.
3. *The Rewa* [2012] EWCA Civ 153 – Note of caution on 'archaeology of the forms' in contract interpretation.
4. *Reinwood Ltd v L Brown & Sons Ltd* [2007] BLR 10 – Interpretation of JCT 1998 Clause 28.2.4

and the right to terminate after repeated default.

5. *Ferrara Quay Ltd v Carillion Construction Ltd* [2009] BLR 367 – Interpretation of JCT 1998 provisions and the contractor's right to terminate.

**Background**

Hexagon Housing Association Ltd (“Hexagon”), the Employer, contracted with Providence Building Services Ltd ("Providence"), the Contractor, for construction work using the JCT Form. The contract included clauses outlining termination rights related to suspension of works (clause 8.9) and non-payment (clause 8.9.4).

Delays arose in the project, leading Providence to issue a notice under clause 8.9.1 regarding suspension of works due to Hexagon's alleged impediment, prevention, or default. Subsequently, Providence also issued a notice under clause 8.9.1 related to late payment. While the payment issue was resolved, preventing the need for further action under clause 8.9.3, the suspension issue remained unresolved.

Following another alleged instance of non-payment, Providence served a notice of termination under clause 8.9.4. Hexagon argued that this termination was invalid because Providence never gained the right to issue a further notice under clause 8.9.3 related to the initial suspension notice.

***Key Themes***

1. ***Termination Rights Under JCT Contracts****: The case focuses on the conditions under which a contractor can terminate its employment under the JCT Standard Form of Design and Build Contract 2016, specifically clause 8.9.4.*
2. ***Interpretation of Contract Clauses****: The Court of Appeal examined the language and structure of clauses 8.9.3 and 8.9.4, rejecting a literal interpretation in favour of a commercially sensible approach that reflects the parties' intentions.*
3. ***Contractor's Discretion to Terminate****: The judgment clarifies that clause 8.9.4 provides the contractor with a discretionary right to terminate for specific breaches (such as non-payment), regardless of whether earlier suspension notices were served under clause 8.9.3.*
4. ***Commercial Reasonableness****: The decision highlights the importance of interpreting contractual provisions in a way that avoids unreasonable commercial outcomes, such as forcing contractors to continue working under repeated breaches.*

**The Lower Court's Decision**

The High Court ruled in favour of Hexagon, finding that clause 8.9.4 could only be triggered if a right to issue a further notice under clause 8.9.3 had previously existed [15]. The court interpreted the language "at any time thereafter" in clause 8.9.4 as implying a previous opportunity to serve a clause 8.9.3 notice.

**The Court of Appeal's Reasoning and Decision**

The Court of Appeal disagreed with the lower court's interpretation, finding it overly literal [25]. The court emphasised that contractual interpretation should focus on giving effect to the parties' intentions as reflected in the natural meaning of the words used, considering the contract as a whole and relevant background [25].

The court highlighted that:

- The language of clause 8.9.4, referring to "the event or events entitling the Contractor" to terminate, encompasses various scenarios, including non-payment and suspension, regardless of any prior notices [36].
- Clause 8.9.4, stating the contractor "may…terminate," grants a discretionary right to terminate for specified breaches, regardless of whether other termination rights are available [36].
- The interpretation adopted by the lower court would lead to commercially unreasonable outcomes, such as requiring the contractor to continue work despite repeated breaches [38].
- The previous 1998 JCT Form explicitly allowed termination for non-payment after a suspension notice, while the current wording, despite being reorganized, does not suggest an intention to remove this right [38].

Considering these factors, the court concluded that Providence's interpretation of clause 8.9.4 was more commercially reasonable and aligned with the contract's natural meaning.

**Conclusion**

The Court of Appeal held that Providence could validly terminate the contract under clause 8.9.4 despite not having a prior right to issue a further notice under clause 8.9.3. This decision provides clarity regarding termination rights under the JCT Form, allowing contractors to terminate for specific breaches even if other termination avenues are not available. This interpretation promotes fairness and avoids compelling contractors to continue working under untenable circumstances.

***Key Takeaway:***

*The Court of Appeal clarified that under the JCT Form, contractors can terminate their contract under clause 8.9.4 for specific breaches like non-payment, even if the right to issue a further notice under clause 8.9.3 has never arisen. This interpretation supports contractors by providing more flexibility in terminating contracts when facing breaches, promoting fairness and preventing contractors from being locked into unworkable situations.*

***Parting thoughts***

*And so, the Court of Appeal—armed with nothing more than the cold steel of linguistic precision and an unflinching eye for commercial pragmatism—has resolved what the lower court found to be a more intricate question than first appearances might suggest.*

*Clause 8.9.4, once thought by some to be a safety net only deployable after the contractor had diligently set up all the hurdles of clause 8.9.3, has been revealed in all its blunt glory to operate independently. Providence was, the court confirmed, entirely within its rights to pull the termination lever on the grounds of a repeated specified default, even if the contractual dance of notices and deadlines under clause 8.9.3 had never truly commenced. The contractor does not, it turns out, need to wait patiently by the stopwatch, staring at the 28-day clock, while the employer conducts what might charitably be described as a 'late payment performance art installation'.*

*This judgment gives contractors exactly what they crave in their darker moments: a cleaner, sharper mechanism to bring serial non-payment sagas to an end without the joyless ritual of jumping through procedural hoops that the other side has already tripped over. The employer, for their part, is left with the time-honoured comfort of statutory interest, adjudication, and, of course, the knowledge that if they pay late, they do so now skating on ice so thin it makes the Arctic look like reinforced concrete.*

*In the end, the court applied what could best be described as the 'common sense of the commercially literate adult' standard. Which, while disappointingly rare in some parts of the construction industry,*

*appears to have survived intact—at least for now.*

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