

Case No: HT-2023-000446

Neutral Citation Number: [2024] EWHC 2896 (TCC)

IN THE HIGH COURT OF JUSTICE

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES TECHNOLOGY AND
CONSTRUCTION COURT (KBD)**

7 Rolls Buildings

Fetter Lane London EC4A 1NL

Wednesday, 28 August 2024

BEFORE:

MR ADRIAN WILLIAMSON KC

(Sitting as a Deputy Judge of the High Court)

BETWEEN:

MY CONTRACTS LIMITED

- and -

74 HAMILTON TERRACE FREEHOLD LIMITED

Claimant

Defendant

MR M TWIVY (instructed by Fenwick Elliott LLP) appeared for the Claimant

MR V KAPOOR (instructed by Taylor Wessing LLP) appeared for the Defendant

JUDGMENT

(Approved)

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1.

In these Part 8 proceedings, both parties seek declarations as to the proper construction of a JCT contract. The claimant is a contractor and the defendant a developer of premises in St John's Wood.

2.

The background is that the parties entered into a contract (which I will refer to as such) dated 2 March 2023 in which the claimant contractor was to carry out operations for the defendant developer/ employer in connection with a project at Hamilton Terrace, London NW8.

3.

The contract is based upon the JCT Design and Build Contract 2016, Articles of Agreement and Conditions with extensive bespoke amendments.

4.

In particular, the relevant provisions of the contract included Article 12, to which I shall return in a moment.

5.

By a notice of an adjudication the claimant referred to adjudication a dispute between the parties in relation to what were said to be “façade costs” as defined in the aforesaid Article 12 in relation to documents sent by the defendant to the claimant on 3 July 2023 which purported to notify the claimant of such costs.

6.

Article 12 provided that:

[1] The Contractor acknowledges and accepts that the Contractor is deemed to be responsible for the collapse of the original façade, and accepts full liability for the same. The Employer hereby waives any and all claims that it has or may have against the Shell and Core Building Contractor arising out of or in connection with the collapse of the original façade ... its claims demands rights and remedies hereafter being solely against the Contractor ...

[2]

The “original façade” refers to the existing retained façade in the planning permission dated 29 November 2019 having the reference number 19/09318/FULL. The original façade collapsed on 28 February 2022 requiring a new planning application which was granted on 24 November 2022 having the reference number 22/04522/FULL (the “New Planning Permission”). The Contractor hereby accepts all liability by way of deduction from payments due to the Contractor of all direct and consequential reasonable costs and losses incurred or to be incurred by the Employer in the obtaining and implementing of the New Planning Permission taking into account both the price and the necessity and/or urgency in respect of the costs incurred (“Façade Costs”).

[3]

Not later than 31st March 2023 the Employer shall provide the Contractor a full schedule including all relevant supporting details and accompanied by copies of all relevant supporting documents ... identifying Façade Costs incurred by the Employer (“Notification of Façade Costs”). The Employer will update it monthly ... Following issue of the Notification of Façade Costs (or any update of it) the Façade Costs that the Employer may 9 3 deduct from any payment otherwise due to the Contractor (subject

always to the Employer issuing any required Payment Notice or Pay Less Notice) shall be (a) such amounts as the Parties from time to time agree may be deducted, and if no agreement is reached (b) such amounts as any adjudicator's decision or court judgment or order determines shall be deducted ...

[4]

Unless the Employer has given the Contractor not less than 20 Business Days' written notice prior to the Employer incurring Façade Costs ... the Façade Costs incurred by the Employer after the date of this Contract shall not be compensable to the Employer by the Contractor, and shall be solely for the Employer's account.

[5]

Either party may refer to adjudication any dispute in relation to the Façade Costs and/or any Notification of Façade Costs.

[6]

The Contractor shall have no liability to the Employer in respect of any monetary amount that is not included in the Notification of Façade Costs or an update of the Notification of Façade Costs received by the Contractor not later than 4 (four) months after the date of this Contract"

(emphasis added for the critical words)

7.

One of the issues which the adjudicator had to decide was whether documents served by the defendant upon the claimant on 3 July 2023 were or were not in compliance with the time limit set out in paragraph 6 of Article 12 of the contract.

8.

The adjudicator decided that issue against the claimant, who therefore brings these Part 8 proceedings. The claimant's case is, in essence, a simple one. They submit that the words "not later than four months after the date of the contract" in paragraph 6 of Article 12 mean not later than, i.e., on or before 2 July 2023. They therefore submit that notification received on 3 July 2023 would be out of time.

9.

This submission is based upon what has been referred to by the claimant as the corresponding date rule.

10.

It is sufficient for present purposes to summarise that rule by reference to Lewison on The Interpretation of Contracts (8th Ed) which states as follows at paragraph 15.10:

" Where a contract provides for the performance of an act within a certain number of months, the period expires on the day of the month bearing the same number as the date on which the period begins or, if there is no such day, on the last day of the month."

11.

The parties agree that the corresponding date rule is applicable to Article 12 paragraph

6.

It follows that it is common ground, subject to what I mention next, that the relevant notification had to be served on or before Sunday, 2 July 2023. Thus a notification served on Monday, 3 July 2023 was **prima facie** out of time.

12.

However, the defendant takes two points in answer to this **prima facie** conclusion.

13.

The first is that the four month period must in effect be extended to allow for the four public holidays which fell within the four month period.

14.

The second point is that a notification should only have to have been received

on a working day, such that a notification served on 3 July 2023 should be deemed to be served within the four month period.

15.

In dealing with those submissions, the defendant invited me to have regard to the decision of the Supreme Court in *Wood v Capita Insurance* [2017] A.C. 1173 at [10] to [14]. Those well-known paragraphs are to be deemed to be set out in this judgment and I have had regard to them.

16.

Turning to the first point, I remind myself that the relevant “update” must be “received by the Contractor not later than 4 (four) months after the date of this Contract”. That date, it is common ground, was Sunday, 2 March 2023.

17.

The defendant, however, draws my attention to clause 1.5 of the contract which provides that:

“Where under this contract an act is required to be done within a specific period of days after or from a specified date, this period shall begin immediately after that date. Where the period would include a day which is a Public Holiday that day shall be excluded.”

(I should say that the term “Public Holiday” is defined in the contract at clause 1.1).

18.

In my judgment, this clause has no application to Article 12 paragraph 6. Clause 1.5 is concerned with “an act ... required to be done within a specified period of days” whereas Article 12 paragraph 6 deals with a period of four months (emphasis supplied in both cases).

19.

The parties could quite easily have provided that the period of four months excluded public holidays. They did not do so. Clause 1.5 cannot be used to re-write what the parties have agreed.

20.

As to the second point, the defendant in effect submits that the following words should be added to Article 12 paragraph 6, “or upon the next Business Day thereafter”.

21.

On that basis a notification served on Monday 3 July would be in time within Article 12 paragraph 6. This is on the footing that a notification could not have been received other than on a Business Day as

defined in the contract. The contract defines this term at clause 1.1 as “any day which is not a Saturday a Sunday or a public holiday”.

22.

In my judgment, such a proposition only needs to be stated in order to see that it cannot be correct. The court does not make contracts for the parties. Its role is limited to interpreting what the parties have agreed.

23.

It should be noted that the parties defined the term Business Day in the contract and used it within Article 12 itself at paragraph 4 thereof. However, they chose not to use it in Article 12 paragraph 6. That seems to me a strong indication against writing in words providing any such extension of the period.

24.

Absent the addition of the words I have mentioned, it must follow that a notification on Monday, 3 July 2023 was out of time.

25.

The parties made submissions before me as to whether a notification served on Sunday, 2 July 2023 would have been in compliance with this clause. The defendant submitted

that it would not have been in compliance and that a notification could only be properly given when the receiving party could be expected to be able to deal with it.

26.

For the reasons I have given, that point does not seem to me to arise. However, in agreement with what Constable J observed in the recent decision of Elements (Europe)

Limited v FK Building Limited [2023] EWHC 726 (TCC) at [40] to [42] I think

that a notice served by email, for example, on 2 July 2023 would have complied with Article 12 paragraph 6 and would have been “received” then, even if no-one was then able to deal with it.

27.

As to this, I agree with the claimant’s submissions that the cases relied upon by the defendant such as Rightside Properties Limited v Gray [1975] 1 Ch 73 and Pritam Kaur v S Russell & Sons Limited [1973] 1 QB 336, do not assist. Those cases are dealing with different circumstances such as limitation periods imposed by statute or contractual notice provisions where party A requires party B to take some step. Those principles are not in play in the present case, in my judgment.

28.

However, for the reasons I have given these points do not seem to me to arise in any event.

29.

I would therefore grant the declaration sought by the claimant and I will hear counsel as to the form of order and any other consequential matters which may arise.

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Lower Ground, 46 Chancery Lane, London WC1A 1JE Email: civil@epiqglobal.co.uk

This transcript has been approved by the Judge