

Avoid Recipe For Disaster

Shona Frame of MacRoberts analyses the attitude of the courts to which contract terms should take precedence when they conflict in the light of a recent court ruling. Avoid mixing standard contracts and bespoke amendments, she advises.

Key Points

- Payment mechanisms were contained in JCT standard form and also Employer's Requirements
- Payment mechanisms conflicted, could not be reconciled and resulted in an 'unworkable set of contract provisions'
- General rule – bespoke terms take precedence over standard form
- Clause 1.3 in the standard form contained express terms on precedence in the event of conflict
- Did cl 1.3 negate the general rule?

Contract interpretation has long been a minefield and the subject of endless litigation and judicial commentary particularly where a contract contains conflicting or contradictory terms.

The rules

There are general rules:

- The contract requires to be construed as a whole.
- Where an incorporated document conflicts with the provisions of a written document, the terms of the written document prevail.
- Greater weight will be given to terms chosen by the parties than to standard printed conditions (see *Homburg Houtimport BV against Agrosin Private Ltd (the Starsin)* [2004] 1 AC 715)
- Typewritten words have priority over inconsistent standard printed conditions (see *Barry D Trentham Ltd v McNeil* 1996 SLT 202).
- It is not competent to consider pre-contract negotiations (see *Inglis v Buttery & Co* (1878) 5 R (HL) 87).

However these general rules are so often subject to exception it can be difficult to be certain what interpretation will be applied. For example, as Lord Wilberforce said in *Federal Commerce v Molena Alpha* [1979] AC 757, it may be that a particular clause is so clearly worded, and its purpose so clear, that it should not be limited on account of any inconsistency with the general purpose of the contract or by some other clause in the contract, or as Lord President Rodger said in *Bank of Scotland v Dunedin Property Investments Co Ltd* 1998 SC 657 at 665, pre-contract negotiations can be considered to establish parties' knowledge of the circumstances in which the words were used.

Add to the mix Lord Hoffmann's statements of principle in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UK HL 38 that the court has to construe the contract in accordance with the objective intention of the parties, allowing consideration of surrounding circumstances. Also Lord Hoffmann's statement in *Chartbrook* that:

'... it would not be inconsistent with the English objective theory of contractual interpretation to admit evidence of previous communications between the parties as part of the background which may throw light upon what they meant by the language they used. The general rule ... is that there are no conceptual limits to what can properly be regarded as background. Prima facie, therefore, the negotiations are potentially relevant background ... In exceptional cases ... a rule that prior negotiations are always inadmissible will prevent the court from giving effect to what a reasonable man in the position of the parties would have taken them to have meant.'

The construction industry adds to this debate in no small part due to its propensity to use standard forms with schedules of bespoke amendments.

The *Fenice* case

In *Fenice Investments Inc v Jerram Falkus Construction Ltd* [2009] EWHC 3272 (TCC), Mr Justice Coulson starts his judgment with a reference to Donald Keating QC's advice which was that parties who intended to sign up to construction contracts should either use and unamended standard form or their own bespoke contract conditions because to attempt a mixture of both was usually a 'recipe for disaster'.

In this case Fenice Investments engaged Falkus to design and construct five residential properties and a commercial unit at a site in North London. The disputes which arose related to Falkus' application for interim payment number 19. The issue was whether the payment notice and/or withholding notice had been timeously issued. This turned on construction of the contract provisions.

The contract incorporated the JCT Design and Build Contract (Revision 1) 2007 along with bespoke amendments. The JCT provisions in relation to interim payments provided for the final date for payment to be 21 days from receipt of the application for interim payment, a payment notice to be issued 5 days after receipt of the application for interim payment and any withholding notice to be no later than 5 days before the final date for payment.

However, the Employer's Requirements which were a contract document, also contained provisions dealing with interim payments. These included an evaluation procedure which provided for the Contractor to submit his valuation of the work three days before an agreed on site valuation meeting date. The QS was thereafter to review this and issue an interim valuation recommendation to the Employer's Agent and Contractor. The Employer's Agent was required to issue an interim certificate within 5 days of the date of issue of the recommendation. The Contractor was then to issue a value added tax (VAT) invoice to the Employer. The Employer, on receipt of the interim certificate and VAT invoice, was to pay the Contractor within 21 days of the date of issue of the interim certificate.

Falkus submitted their application 19 on 6 August 2009. On the basis of the JCT conditions, the final date for payment was 27 August 2009, 21 days later, therefore requiring any withholding notice to be served by 22 August.

On 25 August the Employer's Agent wrote to Falkus enclosing a certificate for payment bearing an issue date of 21 August and a letter which purported to be a notice of withholding. If the notice of withholding was valid, no sum was due to be paid by Fenice in respect of application 19.

Falkus argued that both the payment notice (the certificate for payment) and the withholding notice were too late. This was on the basis of the JCT provisions. Fenice however argued that the notices were on time in accordance with the procedure in the Employer's Requirements.

The starting point

As a starting point, the court had to consider to what extent, if at all, the Employer's Requirements were able to be read with the JCT provisions. This required a line by line analysis of each provision and a decision on whether each aspect of the provisions were in conflict with each other.

There was a clear conflict in relation to the timing of the OS's valuation process. The JCT provisions contained a clear requirement for the timing of a payment notice whereas the Employer's Requirements contained no specified timescale for the valuation. The requirement in the Employer's Requirements for a VAT invoice as a prerequisite to payment appeared to be modifying the JCT provisions.

The conflict in relation to the timings was regarded as being fundamental and, the judge considered, would lead to an 'unworkable set of contract provisions'. This was because of the different timing provisions' affected the starting point and therefore the end point of the payment mechanism. In the procedure set out in the Employer's Requirements, there was no time stipulated for the period between the Contractor's application and the conclusion of the QS' valuation process.

Mr Justice Coulson considered that the certainty and promptness envisaged by the JCT provisions (which reflected the *Housing Grants, Construction and Regeneration Act 1996 (HGCR 1996)*) would be lost by applying the Employer's Requirements.

Rather than a quick procedure with a clear starting date, the Employer's Requirements set out a more lengthy procedure with an uncertain start date which was in the hands of the Employer or his QS. These provisions could not possibly be read together as they were fundamentally in conflict. The JCT provisions and Employer's Requirements contained 2 different mechanisms for payment which could not be combined to come up with a rational or workable result.

In order to resolve this conflict, the court looked to cl 1.3 of the JCT provisions. This provided:

'The Agreement and these Conditions are to be read as a whole but nothing contained in the Employer's Requirements, the Contractors' Proposals or the Contract Sum Analysis shall override or modify the Agreement or these Conditions.'

On the basis of this clause, the JCT conditions would take precedence over the Employer's Requirements.

The judge then went on to consider whether there were any authorities or principles of law which would oblige him to reach a different conclusion, notwithstanding the terms of cl 1.3.

He noted that the general rule, as set out in *Homburg v Agrosin* was that a term specifically drafted for a particular contract will take precedence over a standard term. However, he then went on to note that that rule can be negated by express terms. The general rule is therefore subject to the proviso 'unless the contract provides otherwise'. In this he made reference to Sir Tim Lewison's book - *The Interpretation of Contracts* and also a number of cases – *Gold v Patman and Fortheringham Ltd [1958] 2 All ER 497* and *North West Regional Metropolitan Hospital Board v T A Bickerton & Sons Ltd [1970] 1 All ER 1039*. He considered that cl 1.3 of the JCT conditions was a proviso that negated the effect of the general rule. He did not consider there to be any unfairness or injustice in holding parties to the terms of cl 1.3.

Fenice's argument

Fenice's argument to the contrary was not successful. They relied on *English Industrial Estates Corporation v George Wimpey & Co Ltd [1973] 1 Lloyds Rep 118* where there was discussion of the question of whether the terms of the bills could be considered for the purpose of interpretation of cl 16 of the contract where cl 12 provided that nothing in the bills could override, modify or affect the contract terms. That case was not considered to be of assistance. In fact reference was made by the judge to a passage from Stevenson LJ's judgment:

'To apply the general principle that type should prevail over print seems to me to contradict the express provision of clause 12 that the reverse is to be true of this particular contract...'

Fenice's argument was that Lord Hoffmann's approach in *Investors Compensation* and *Chartbrook* was to be followed, namely construing the contract in accordance with the objective intention of the parties. On this basis, suggested Fenice, the 'homemade' provision in the Employer's Requirements should trump the printed contract terms, including the precedence clause in cl 1.3.

The difficulty with that argument was considered to be that it meant that the Employer's Requirements trumped everything else to the extent that even an express precedence clause within the printed standard form would be disapplied.

The judge did not consider there was any principle or authority to support such a submission. Although *Investors Compensation* and *Chartbrook* emphasised the importance of looking all of the contract documents to work out objective intention, what Fenice appeared to be trying to do was to ignore the agreed contract term which was applicable in exactly the situation which had arisen, namely where there was a conflict between terms. The judge considered that approach to be without foundation.

Clause 1.3 was therefore taken to resolve the conflict between the terms in favour of the JCT conditions so that the notices which had been issued were too late.

Summary

Clearly, if there are to be bespoke amendments to standard forms, whether through schedules of amendments or in other contract documents, careful drafting will be

required to avoid conflicts such as the one which arose here. The other option, of course, would be to follow Donald Keating QC's advice and avoid the 'recipe for disaster'.

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