



Welcome to the September 2016 edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

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Terminating for failure to proceed regularly and diligently - what could go wrong?¹

This edition of *Insight* reviews what constitutes a "failure to proceed regularly and diligently" in the context of JCT standard form contracts.

It then suggests some practical advice for Employers deciding whether they can terminate the Contractor's employment (and the risks of doing so) on that ground. Conversely, it also provides guidance for Contractors seeking to establish that the Employer has repudiated their contract, or will do so, if it seeks to terminate their employment on that ground.

Does the Employer have the right to terminate the Contractor's employment for failure to proceed regularly and diligently under a JCT standard form contract? This is never an easy question, either from the Contractor's view or the Employer's view. Assessing whether the definition of failing to proceed regularly and diligently has been satisfied is very much a question of judgement and must be assessed against the backdrop of what evidence is available to prove a lack of diligence.

The consequences of getting it wrong can be high. If the final notice is found to have been issued without the requisite grounds being satisfied, the contract will have been repudiated leaving the Employer open to claims for loss of profit at precisely the same time that they are seeking to get the job finished by others. Get it right and clause 8.7 provides a useful toolbox for the Employer for getting on with the works and the ability to postpone paying any monies which may be due to the Contractor until after the completion of the works and the making good of defects.²

What is a failure to proceed regularly and diligently?

In *West Faulkner v London Borough of Newham*,³ the Court of Appeal examined a nearly identical clause to that in the JCT standard forms and concluded:

"Taken together the obligation upon the contractor is essentially to proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion substantially in accordance with the contractual requirements to time, sequence and quality of the works." [Emphasis added]

Importantly then, a failure to proceed regularly and diligently with the works has to be judged against the contractual requirements of the contract as a whole and not just in terms of timing.

The case of *Vivergo Fuels v Redhill Engineering Solutions*⁴ provides a useful insight into how a court is likely to evaluate whether there has been a failure to proceed regularly and diligently.⁵ In that case Mr Justice Ramsey viewed a lack of productivity as being "the best evidence" of a failure to proceed regularly and diligently. However, he also noted that the failure to provide a proper programme (and one in accordance with their contractual obligations) "undoubtedly" resulted, in that case, in an inability to "proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works towards completion".⁶

In contrast, Mr Justice Ramsey did not consider that a lack of supervision (without

more evidence in support) would be enough to found a separate ground for establishing a failure to proceed regularly and diligently.⁷ Similarly, allegations of poor material controls, rework of defective fabrication and inadequate management of scaffolding resources were deemed not to add much further to the evidence already put forward.

What is clear then is that delay on its own is not a failure to proceed regularly and diligently. This makes sense given a Contractor has the right (unless the contract provides otherwise) to sequence and progress the works as it sees fit and in the context of a contract with detailed provisions for extension of time claims and for the imposition of liquidated damages if there is delay.

With this in mind, we look at the kind of evidence that an Employer should collect if the worst happens and the Contractor is failing to proceed regularly and diligently (often in practice accompanied by signs that their financial status is less than ideal).

Assembling the evidence (the Employer)

For an Employer wishing to terminate for a failure to proceed regularly and diligently, gathering the evidence to support the termination in advance is absolutely key to a successful result, should the termination be challenged. Even if it is patently obvious to the project team that the Contractor is in financial difficulties and will struggle to continue with the job, proving it to an adjudicator or to the court is not an easy task. All too often a vital few weeks of evidence gathering can be missed. Waiting until after the first "warning" notice has been issued under clause 8.4.1 to start assembling the evidence to support it is far from ideal.

Conversely, Contractors can more easily dispute the validity of the first notice and/or argue it was issued unreasonably or even vexatiously⁸ if the initial notice is a bare allegation.

So what evidence should be obtained? Evidence of delay when compared to a contract programme is always going to be helpful but, as set out below, is not on its own sufficient. Signing-in sheets, photographs (date and time stamped) and video evidence showing a lack of resource on site and diminishing resources are extremely helpful. Video evidence should be obtained over a period of time and should ensure wide coverage of the site.

In *Vivergo Fuels Limited v Redhill Engineering Solutions Limited*⁹ the TCC stated that a failure to provide the level of resource shown in a programme would itself be



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evidence of a failure to proceed regularly and diligently. Mr Justice Ramsey stated:

"Redhall's failure to achieve the productivity required to complete the works to the Rev 3 Programme and to achieve the programmed productivity was a failure by Redhall properly to resource the Project and one for which they alone were responsible. That I consider is the best evidence in this case of a failure by Redhall to proceed with the works regularly and diligently, as that phrase was defined in West Faulkner."

If the Contractor has provided evidence of the resource that they intended to provide, then a comparison which shows it is far less will be invaluable. Equally if the resources are as planned but there is still delay, then this may be used by a contractor to evidence they are proceeding regularly and diligently.

Getting your notices right

The next step is to serve the requisite notices in accordance with the terms of the contract. The JCT form provides for a two-stage process. The first notice (the default notice – otherwise known as a "hurry-up notice"¹⁰) sets out the failure to proceed regularly and diligently, whilst the second notice (only to be issued if the same behaviour continues for 14 days from the default notice and within 21 days of that) terminates the Contractor's employment under the contract.

So what could go wrong? A surprising amount is the answer.

The simple rule on notices of termination is that you cannot be too careful. As Lord Hoffman stated in *Mannai Investments Co Ltd v Eagle Star Assurance*:¹¹

"If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper..."

The form, content, timing and method of service set out in section 8 of the JCT and the notice provisions more generally¹² must be followed to the letter. Have the 14 days expired since the default notice was properly served? If so, are you still within the 21-day period following that?

The other mistake that is very easily made is the wrong person or entity issues the notice(s). For example, under the Standard Building Contract form the Architect or Contract Administrator gives the default notice but it is the Employer himself who

must serve the final termination notice. Get this wrong and the Contractor's employment will not have been terminated but the Employer may be in repudiatory breach of contract.

The Contractor will then have the opportunity to claim for damages, including compensation for loss of profit.

Finally, the wording of the final notice should include reference to common law rights to terminate (reserved under clause 8.3.1 of the JCT Standard Building Contract) and an appropriate reservation of rights.¹³

The deed is done – next steps?

For the Contractor the next step will, in all likelihood, be to assert that their employment under contract has not been terminated properly because they had not failed to proceed with the works regularly and diligently and/or the notices were not properly issued. If correct, then the Employer is in repudiatory breach of contract and the Contractor is entitled to claim damages. For the Contractor, ensuring you have the necessary records to support any claims going forward, and taking steps to minimise any financial losses by, for example, terminating your subcontractors as soon as possible,¹⁴ is crucial.

The Employer, in contrast, will need to secure the site, employ others to carry out the works,¹⁵ and determine if they need to require the removal of any plant, tools, etc. from the works or the assignment of the benefit of any agreements for the supply of materials or goods for the execution of any other works.¹⁶ In doing so, bear in mind you may well end up with a pile of unpaid invoices if you do choose to take on any suppliers or subcontractors who were previously on the project. You will have to wait until the works are completed and any defects have been made good before claiming monies back from the Contractor (if the works have cost more to complete than they would have done under the original contract) but, thanks to clause 8.7.4, if your notices were valid then you won't have to pay any outstanding monies due to the Contractor.

Unfortunately, the reality is that the final termination notice is often only the start of a dispute between the parties. For the Employer who has ensured they have the records necessary to demonstrate a failure to proceed regularly and diligently, they will at least be in a better position to fight and hopefully minimise any distraction from completing the works. For the Contractor, if such evidence has not been taken, then half your job has already been done for you.

Footnotes

1. By Claire King with assistance from Stacy Sinclair and Laura Bowler.
2. See, for example, clause 8.7.4 of the JCT Standard Building Contract without Quantities 2011.
3. [1994] 71 BLR 1.
4. [2013] EWHC 4030 (TCC).
5. *Ibid.*, paragraph 402.
6. *Ibid.*, paragraph 404.
7. *Ibid.*, paragraph 405.
8. Under clause 8.2.1 of the JCT Standard Form of Building Contract 2011, a notice for termination must not be given "unreasonably or vexatiously". In *Reinwood Ltd v L. Brown & Sons Ltd* [2007] BLR 10 a detailed six-stage test was set out in the context of a contractor who had issued a termination notice. However, essentially the termination notice must have been given with an ulterior motive to oppress, harass or annoy.
9. [2013] EWHC 4030 (TCC).
10. See *Leander Construction Ltd v Mulalley & Co Ltd* [2011] EWHC 3499 (TCC).
11. [1997] 2 All ER 353 at 377.
12. See for example clause 1.7.4 of the JCT Standard Building Contract without Quantities 2011 which specifies, amongst other things, that the notice should be delivered by hand, sent by Recorded Signed For or Special Delivery post. If delivered by hand or special post, unless "subject to proof to the contrary", the notice is deemed to have been received on the second business day after serving.
13. Wording along the lines of: "further or in the alternative [the employer] gives [the contractor] notice that it is accepting at common law [the contractor's] repudiation, renunciation or abandonment of its contractual obligations".
14. See clause 7.9 of the JCT Standard Building Sub-Contract Agreement 2011 which provides for automatic termination of the Sub-Contract where the Main Contract has been terminated.
15. See clause 8.7.1 of the JCT Standard Building Contract without Quantities 2011.
16. See clauses 8.7.2.1 and 8.7.4.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Claire King. cking@fenwickelliott.com. Tel +44 (0) 207 421 1986

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