FENWICK ELLIOTT

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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Final dates for payment
Deerns UK Ltd v VDC LHR11 Ltd
[2026] EWHC 1509 (TCC)

VDC engaged Deerns to provide engineering consultancy services. In a hearing before Eyre J, Deerns sought payment of £900k plus VAT, said to be due as a result of the failure by VDC to serve two timely pay less notices. Deerns said that the contract failed to provide a final date for payment as required by s110(1)(b) of the HGCRA, with the result that the Scheme applied. If the Scheme applied, then the pay less notices were indeed late.

Under the contract, the fee was to be paid in the instalments stated in Schedule 1. The due date for payment of each instalment was specified in Schedule 1. The final date for payment was 30 days after the relevant due date, save that if the invoice was issued late, the final date for payment would be postponed by the same number of days by which the invoice was late. If VDC intended to pay less than the notified sum, it was required to give a pay less notice not later than five days before the relevant final date for payment.

Schedule 1 provided that Deerns should submit its monthly invoices to VDC in accordance with the Schedule of Valuation Dates. If the dates expired or were not shown, then Deerns should invoice VDC at the end of each month for services performed during that month.

Both parties agreed that a contract which did not provide for an identified and fixed period between the due date for payment and the final date for payment failed to provide for a final date for payment for the purposes of s110(1). It was open to parties to have a payment mechanism which varied the due date for payment, but they had to provide for a fixed period between the due date for payment (however that date was established) and the final date for payment in order for the mechanism to comply with s110(1) of the HGCRA.

The judge referred to the comments of Coulson LJ in *Bennett (Construction) Ltd v CIMC MBS Ltd* [2019] EWCA Civ 1515 that the purpose of the HGCRA: "*was to provide for certain minimum, mandatory standards so as to achieve certainty and regular cash flow*". An element of that certainty was for the parties to know from the outset that the final date for payment would always be an identified and fixed period after the due date for payment.

VDC said that, when interpreting the contract, the judge should give priority to the Schedule of Valuation Dates. This set out a mechanism for calculation of the various relevant dates. As a consequence, the due date for payment would vary depending on the date when the payment application was issued, but the interval between the due date for payment and the final date for payment would not vary and would remain at 30 days. The Schedule identified particular dates and set out a particular method of calculation.

Deerns said that the contract could and should be read as a whole with a view to ascertaining the intention of the parties. There was no basis for giving priority to the Schedule of Valuation Dates and it was not necessary to do so in order adequately to interpret the contract.

The judge said that the starting point for the court was to ascertain the intention of the parties and to do so by considering the objective meaning of the language used when read in context. Here, the judge was satisfied that the effect of the contract, properly interpreted, was to fix the dates by reference to which instalment payments were to be made and the due dates for payment were determined, but that the final date for payment could vary depending on the date of Deerns' payment application.

The parties agreed a series of fixed dates. Having done that, they then made provision for one of those, the final date for payment, to move if the payment application was issued late, but not for the others to be changed. The payment application might be issued late but still had to relate to a particular monthly period, and that period and the due date for payment were unaffected by the late issue of the application.

It therefore followed that the final date for payment could be postponed if the payment application was issued after the date provided for in the Schedule of Valuation Dates, but no provision was made for any movement in the due date for payment in those circumstances. Consequently, it was possible for the final date for payment to be more than 30 days after the due date for payment and for the interval between the due date for payment and the final date for payment to vary. The contract therefore failed to provide a final date for payment because, although the interim valuation date and the due date for payment remained fixed, the final date for payment could vary.

As a result, the final date for payment was not determined solely by reference to the due date for payment but was dependent on a different event, namely the date when the payment application was issued. It therefore failed to provide a final date for payment as required by s110(1), which meant that the Scheme applied and the pay less notices had been served late and were out of time.

Alternatively, VDC said that the parties had operated the payment provisions in a way which was, in fact, compliant with the HGCRA. Deerns was therefore estopped from arguing that the contract was to be operated in a different way. The judge referred to the comments of O'Farrell J in *C Spencer Ltd v MW High Tech Projects UK Ltd* [2019] EWHC 2547 (TCC), where she said:

> *"Where parties to a transaction proceed on the basis of a shared underlying assumption on which they have conducted their dealings between them, neither will be allowed to depart from that assumption, even if it is shown to be wrong, when it would be unfair or unjust to do so in all the circumstances".*

The judge considered that VDC's assertion of the common or shared understanding was: "*advanced in vague and unparticularised terms*". There was no suggestion that there were any oral dealings which led to the understanding, nor was there any correspondence to this effect. Further, the alleged common understanding would amount to a marked departure from the contract terms in relation to an important matter, but it was not suggested that there was any express acknowledgement of this. The dealings between the parties, as shown in the documents, did not demonstrate that VDC had acted on the basis of the alleged understanding, and still less did they demonstrate that the understanding was shared by Deerns. There was a degree of informality in the parties' dealings, and neither side always held the other rigorously to the terms of the contract. However, this was not enough to:

> *"demonstrate that there was an estoppel by convention let alone one in the terms alleged by the Defendant amounting to a restructuring of the Contract."*

(Draft) Final accounts and conclusivity
Oakland Wantage Care Home Ltd v Stepnell Ltd
[2026] EWHC 1530 (TCC)

The question as to whether or not the final account that has been submitted is a draft or not is, perhaps not unsurprisingly, one which can only be answered by the specific facts of a case. Even so, the decision here of Judge Acton Davis KC provides some helpful insight regarding a court's likely approach.

Oakland engaged Stepnell to carry out the design and construction of a care home based on a JCT D&B 2016 Contract with bespoke amendments. The works were certified as practically complete on 26 April 2021, which triggered a 12-month rectification period.

There were negotiations in early 2022, during which Stepnell's final account was discussed. By email dated 17 February 2022, Stepnell sent the Employer's Agent a message with an attached statement dated 15 February 2022. The EA responded on 7 March 2022 disputing Stepnell's entitlement to the sums claimed. Nothing further happened until 9 February 2024, when Stepnell sent the EA a further statement.

On 25 March 2024, Stepnell began an adjudication seeking payment of the sum set out in the February 2024 Statement as a sum due in the absence of a final payment notice or pay less notice, or alternatively payment on a "*true value*" basis. The adjudicator held that the relevant statement for the purposes of clause 4.24.6 was the February 2024 Statement and that, given that there had not been any final payment notice or pay less notice, the sum set out in that statement was due and owing.

Oakland brought Part 8 proceedings, saying that the "*relevant statement*" for the purposes of clause 4.24 of the contract was the February 2022 Statement and that it had given notice disputing the sums claimed in the March 2022 Response. Alternatively, if the true final statement was the 2024 version, then this had been challenged by, amongst other documents, the March 2022 Response. Either way, the "*relevant statement*" was not conclusive as to the sum due under clause 4.24.2, and Oakland could bring proceedings in relation to the true value of the final account.

Clause 4.24.6 of the contract provided:

> *"Except to the extent prior to the due date for the final payment, the Employer gives notice to the Contractor disputing anything in the Final Statement or the Contractor gives notice to the Employer disputing anything in the Employer's Final Statement, and subject to clause 1.8.2 the relevant statement shall upon the due date become conclusive as to the sum due under clause 4.24.2 …".*

Clause 1.8 provided that, unless notice had been given under clause 4.24.2, the final statement would provide "*conclusive evidence*" that, amongst other things, the quality of the works was as described in the Employer's Requirements, all extensions of time as were due had been given, and payments of loss and/or expense had been made.

The judge noted that Carr J, in *Brighton University v Dovehouse Interiors Ltd* [2014] EWHC 490 (TCC), provided guidance on conclusivity clauses:

> *"'Conclusive evidence' clauses have a clear commercial purpose. They are intended to provide contractually agreed limits to the scope of disputes and to provide clarity as the parties' obligations once a project is complete. They allow the parties to dictate if and to what extent a final certificate is and is not to be treated as conclusive between them".*

Oakland said that the question for the court was how the February 2022 Statement would have been understood, in the particular circumstances, by a reasonable recipient aware of the surrounding facts. Those facts included that Stepnell and the EA had been in discussion regarding the final account since July 2021, around three months after practical completion. Further, the covering email attaching the February 2022 Statement specifically referred to "*the final account*" and the "*key supporting information demonstrating the changes*", as well as Stepnell's "*intention to settle the final account*".

Stepnell suggested that the decision of the adjudicator, who was described as an "*experienced quantity surveyor*", was a useful touchstone as to how a document might be understood by the objective reasonable recipient. The judge disagreed. An adjudicator, however experienced, was "*not necessarily the objective reasonable recipient*".

That said, the judge held that it was not "*plain*" that a reasonable recipient would have regarded the February 2022 Statement as Stepnell's final statement. The document itself was headed "*Draft*" and contained forecast information. It included figures which, at that stage, were draft, budget or estimate figures, and promised further information. It followed that the February 2024 Statement was the relevant statement under clause 4.24 of the contract.

Oakland said that if the February 2024 Statement was the relevant statement under clause 4.24, then that was not conclusive because there were sums in that statement that had been disputed prior to the due date. As long as there was a notice "*disputing anything*" in the statement prior to that date, the conclusivity provision would not take effect. Clause 4.24.6 did not expressly preclude prior notice being given, nor did it require Oakland to give notice that the final statement itself was disputed.

Stepnell was clearly on notice of the matters in the statement being disputed, as demonstrated by the discussions between the parties in 2022, including the March 2022 Response and the contents of the February 2024 Statement itself, which particularised the areas of dispute between the parties.

The judge went back to the wording of clause 4.24.6. To avoid conclusivity, an employer is required to give notice disputing anything "*in*" the final statement. A notice of dispute was required in relation to anything in the final statement. It was therefore a pre-condition to that notice that the final statement had actually been given. It followed that correspondence prior to the issue of the final statement could never be notice for the purposes of clause 4.24.6.

As a result, the February 2024 document was conclusive and could not be challenged further by Oakland.

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