

| NEW TEMPLE CHAMBERS

Construction | Chancery | Commercial

NTC Monthly

Construction Law
Update

April 2025

Useful
Guidance On
Payment &
Payless
Notices From
The TCC

Lessons On
Termination For
Convenience &
Recovery Of
Reasonable Costs
(FIDIC Yellow Book
1999)

Careful What
You Wish For
In
Adjudication

NEC4
Update:
Conflict
Avoidance
Clauses

USEFUL GUIDANCE ON PAYMENT & PAYLESS NOTICES FROM THE TCC

Introduction

Charles Edwards, high performing Construction Barrister reviews the Technology and Construction Court case of Placefirst Construction Ltd v Car Construction (North East) Ltd [2025] EWHC 100. The dispute between the parties and which the Court had to decide are as follows:

(1) whether the Contractor's Payless Notice was invalid because it was served earlier than required in accordance with Housing Grants, Construction and Regeneration Act 1996 (as amended); and

(2) whether the Contractor had served a Payment Notice in accordance with Part 2 of the Housing Grants, Construction and Regeneration Act 1996 (as amended).

Adjudicator's Decision

This dispute was originally decided by adjudicator in favour of Car Construction (North East) Ltd ("the Sub-Contractor"), requesting Placefirst Construction Ltd ("the Contractor") to pay the Sub-Contractor £867,031.36 in what is known as smash and grab adjudication.

Part 8 proceedings/Enforcement proceedings

The Contactor issued Part 8 proceedings in the High Court whilst the Sub-Contractor issued enforcement proceedings three days later.

Factual Background

The Sub-Contract agreement between the Contractor and Sub-Contractor comprised of a JCT Design and Build 2016 form of Subcontract (as amended) (the Sub-Contract). The gross valuation for each interim payment was to be calculated in accordance with detailed provisions in clause 4.9 of the Sub-Contract as amended which permitted the Contractor to deduct any amounts which it was entitled to withhold, deduct, or set off under the Sub-Contract.

On 24th July 2024, the Sub-Contractor emailed the Contractor its interim application for month ending 31st July 2024.

On 31st July 2024, the Contractor emailed the Sub-Contractor. This email included two attachments. The subject line of Contractor's email stated: "CAR Construction Payless Notice and Valuation 30". The attachments were identified as

"Valuation 30 – Payless Notice.pdf" and "Valuation 3.xlsm".

The Contractor's attached letter dated 31st July 2024, provided a summary as to how the gross amount had been calculated and how the amount due of -£22,812.15 was arrived at.

It was clear from the information, that the Contractor had deducted the amount of £141,501.43 for loss and expense, in order to arrive at a negative amount. The first tab in the Excel Spreadsheet contained the same information as provided in the letter, under the heading of "Summary". The second tab was titled "Payment Certificate" and the worksheet set out therein was headed "Subcontract Payment Certificate" and identified the invoice number as "val30" and the certificate number as "pf30". Further, it stated the date to be 31st July 2024 and also stated payment due no later than 28th August 2024 which was the final date for payment in accordance with the Sub-Contract.

High Court: Technology and Construction Court proceedings/analysis included

The High Court considered the relevant payment provisions of the Act, in particular, sections 110A (Payment notices: contractual requirements), 110B (Payment notices: payee's notice in default of payer's notice), 111 (Requirement to pay notified sum), and a summary of the law on the interpretation of notices set out by Joanna Smith J at paragraphs 46 and 47 of the Judgment of Advance JV v Enisca Limited [2022] EWHC 1152 (TCC) (paragraph 39 of the Judgment).



Issue 1 – Was the payless notice a valid payless notice?

It is the Sub-Contractor's case that the Contractor's payless notice was invalid because it was served before the date when it could validly have been served in accordance with Act and/or the Sub-Contract. The payless notice, issued by the Contractor, complied with the requirements in subsection 111(5)(a) of the Act in terms of form and content, the only dispute remaining was the further requirements of subparagraph (b) and that "...case referred to in subsection (2)(b) or (c), it may not be given before the notice by reference to which the notified sum is determined".

The High Court stated subsection 110A(3) applied to notices required to be given by a payee and specified the requirements with which it must comply in order to be a valid payment notice. The Court found section 110A(3) does apply for the following reasons:

"a. Under the amended form of subcontract CAR was required by clause 4.6 to submit an interim payment application which was to include "a statement of the sum that [CAR] considers to be due to him ... at the date when the relevant interim payment shall be calculated and the basis on which that sum is calculated" (emphasis added). This was subtly different to clause 4.6.2 of the standard form which, where the subcontract particulars state that it applies, the subcontractor is required to submit an application "stating the sum the subcontractor considers will become due to him at the due date and the basis on which that sum is calculated" (emphasis also added).

b. The wording as amended complies with s.110A(3)(a), whereas the unamended wording does not, because it refers to a sum the subcontractor considers will become due at a future date. In my judgment s.110A(3)(a) cannot properly be read as if it said "the sum that the payee considers to be or to have been due or that will become due at

the payment due date" (underlining added).

c. It follows that the interim payment application given by CAR in compliance with the contract as amended met the requirements of a payment notice under s.110A(3), even though it would not have the effect of a payment notice unless and until Placefirst had failed to give a valid payer's payment notice.

d. It also follows that on the hypothesis identified in paragraph 40 above, i.e. that Placefirst did not serve a valid payment notice, then s.111(2)(b) applied, because the interim payment application was the relevant notice, and it thus follows that Placefirst's payless notice was not given "before the notice by reference to which the notified sum is determined".

The Court further stated that in any event, section 110A(3) would apply indirectly via section 111(2)(c). This is through section 110B which deals with payee payment notices in default of a payer's payment notice. This section applies to this Sub-Contract because it required the Contractor to give a compliant payment notice, not later than 5 days after the payment due date and on the Sub-Contractor's analysis, it did not do so. Therefore, the requirements of subsection 110B(1) are satisfied, and thus 110B applies (paragraph 53 of the Judgement). Subsection 110B(2) of the Act allows the payee in such a case to give section 110A(3) compliant notice "at any time after the day on which the payment notice was required to be given". However, this is subject to subsection (4). Subsection (4) applies whereas in this case, the Sub-Contract permits or requires the payee to give an advanced payment notification and the payee does so. In such a case, that notification is to be regarded as a notice complying with section 110A(3) given pursuant to subsection (2).

The Contractor's argument included the submission that subsection 110B(4) and 111(5)(b) read together simply have the effect that the interim payment application is regarded as a payee notice which takes effect as such on the date

when it was in fact sent (paragraph 57 of the Judgement).

The Sub-Contractor's argument included (paragraph 58 of the Judgement):

"...is that because subsection 110B(2) only permits a payee notice to be given "at any time after the date on which" the payer's payment notice must be given (i.e. five days after the payment due date), it follows that the "deemed" notice under subsection 110B(4) must be regarded as having been given no earlier than after five days after the payment due date. His submission is that, since unless and until that date arrives and the payer fails to serve a valid payment notice, it is unknown as to whether or not the interim payment application will or will not become a deemed payee notice, it must follow that it is only on that date that it can become an effective payless notice."

Whilst the High Court found the Sub-Contractor's arguments to be ingenious, the High Court found that there were two reasons why this submission was wrong.

The rationale for a payless notice to be given before the interim payment application is clear-cut: or else there would be no known sum from which a deduction could be made. Whereas "there is no logical reason why a payless notice should not be given before the time for giving a payment notice has elapsed. As is apparent from the description in the Act (and in the subcontract), there is no difference of substance between the content of a payment notice and a payless notice. Thus, the decision whether or not to serve a payment notice and a payless notice, or just to serve only one or the other, rests entirely with the payer. [...] Indeed, if the payer had to wait until the interim payment application was deemed to have become a payee notice, that would potentially prevent the payee from obtaining an earlier payment of the amount which the payer included in its payless notice". The Court made clear that the object of the Act, which is to improve cashflow, would not be satisfied had it adopted "an interpretation which has unhelpful consequences to one or other of the parties" (paragraph 63 of the Judgement).

The Technology and Construction Court ruled in favour of the Contractor on the first issue.

Issue 2 – Did the Contractor give a payment notice on 31 July 2024?

The Court made it clear that in accordance with the Act, what is required to be stated in a payment notice and that of in a payless notice is essentially the same since both notices are required to do the same thing, i.e. state the amount that the payer or payee considers to be due and the basis on which that sum is calculated. In regard to one notice operating simultaneously as a payment notice and a payless notice, the Court cited Sir Peter Coulson "The original provisions, which entitled a payer to serve a notice, operating as both a payment notice and a withholding notice, have been deleted in their entirety. Thus the payer must serve both the payer's notice and a payless notice in accordance with the new s111 in the periods identified" (Construction Adjudication, paragraph 3.28). Further, the Court found no reason, in principle, why a payment notice and a payless notice could not be served at the same time under cover of the same email or letter (paragraph 69 of the judgment).

The court's view included:

- There was no requirement that a payment notice had to expressly state the sum stated was that which was that which the payer considered due at the 'due date'.
- The Sub-Contract in this case allowed for specific deductions to be made from the gross valuation, including loss and expense and these would not have been included unless the standard JCT Sub-Contract form had been amended.
- There is no prohibition on a payment notice being in a negative sum.

The Court also ruled in favour of the Contractor on the second issue.

Conclusion

The Technology and Construction Court, found in favour of the Contractor on both key issues. Further, it was only necessary for the Contractor to serve a valid payless notice, and the payless notice served in this case was, on a proper analysis of the requirements of the Act, a valid payless notice.

Key points to note from the judgment include:

1. The adjudicator's decision requiring the Contractor pay the Sub-Contractor £867,031.36 was not enforced by the Court as it was wrong. Adjudicators' decisions are normally enforced, even if they are wrong, so this was one of those rare cases in which the High Court did not, on the basis of the adjudicator's incorrect interpretation of the payment notices issued.
2. The Court clarified that a payment notice and a payless notice can be served at the same time by email or letter, as long as they satisfy the Act and the relevant requirements in the contract.
3. A document will not necessarily be interpreted as the title, rather the content and its form prove to be crucial in determining its validity.





CAREFUL WHAT YOU WISH FOR IN ADJUDICATION

“...‘cash flow’ in the building trade. It is the very lifeblood of the enterprise...” (As per Lord Denning M.R. in (1973) 71 L.G.R. 162, 167

Introduction

Charles Edwards, high performing Construction Barrister reviews the Technology and Construction Court case of **Bell Building Limited v T Clarke Contracting Limited [2024] EWHC 1929**. This is a case involving the enforcement of an adjudicator’s decision where the adjudicator awarded more than the Referring Party, Bell Building Limited (the “Subcontractor”) was seeking in adjudication from T Clarke Contracting Limited (the “Contractor”).

Adjudicator’s Decision

In the adjudication proceedings, concerning a project to supply substructure and superstructure for a Data Centre at Greenwich Point, London, the Subcontractor was seeking amongst other things £1,443,981.51 plus applicable VAT as a debt. The Adjudicator awarded amongst other things £2,129,672.69 plus VAT. The adjudication, as described by the Contractor, was a true smash and grab in which the sum payable was due as a result of an invalid Pay Less Notice and not because of any accurate valuation by the Contractor.

Enforcement Proceedings

The Subcontractor in enforcement of the adjudicator’s decision in the Technology and Construction Court (“TCC”) was seeking:

“(i) The sum of £2,129,672.69 plus VAT as a debt due under Payment Application No. 18 in the absence of a valid Pay Less Notice;

(ii) Contractual interest on that sum to the date of the Decision of £37,487.84 plus £437.60 per day thereafter which at the

date of the Hearing was £170,080.64 in total;

(iii) The Adjudicator’s costs in the sum of £21,000.00 plus VAT.”

The key issue between the parties in the enforcement proceedings involved whether the Adjudicator was correct in awarding the Subcontractor more than what the Subcontractor was seeking from the Contractor in the adjudication.

The Subcontractor and the Contractor entered into a Sub-Contract incorporating the JCT Design and Build Sub-Contract Conditions 2016 with a Schedule of Modifications by a Deed dated 4th November 2021 (“the Sub-Contract”). The Subcontractor, in their Notice of Adjudication, stated at paras 4.7, 5.2, 5.49 to 5.51 and 6.14 as follows:

“It is common ground that [TCL] has paid Bell the sum of £710,120.62 received on 21st June 2023 and £685,591.18 received on 17th July 2023. It is also common ground that amounts totalling £18,084,322.36

(excluding VAT and inclusive of the two amounts separately described) have been received as at the date of this Notice.”

Paragraph 5.2:

“For the avoidance of doubt, Bell does not give the Adjudicator jurisdiction to decide the “true value” of the Payment Claim and reserves the right to bring such a claim in any subsequent adjudication.”

Paragraph 6.1 under the heading “Remedy and Redress sought by Bell” provided at sub-paragraph 6.14:

“[TCL] should pay Bell the Payment Claim in the outstanding sum of £1,443,981.51 plus applicable VAT as a debt”.

The Subcontractor in their Referral stated at paragraphs 5.49 to 5.51 and 7.14 as follows:

“5.49 Bell is therefore entitled to be paid the outstanding sum of £1,443,981.51 (excluding VAT) as a result of (TCL’s) breach of the sub-contract payment provisions.

5.50 For the avoidance of doubt, Bell does not give the Adjudicator jurisdiction to decide the “true value” of the Payment Claim and reserves the right to bring such a claim in any subsequent adjudication.

5.51 For the avoidance of doubt, Bell does not give the Adjudicator jurisdiction to decide the value, true or otherwise in respect of any other Payment Claim and reserves the right to bring such a claim in any subsequent adjudication.”

Paragraph 7.14 under the heading “Remedy and Redress Sought by Bell” provides “(TCL) should pay Bell the Payment Claim in the sum of £1,443,981.51 plus applicable VAT as a debt.”

At paragraph 90 of the Adjudicator’s Decision, the Adjudicator stated:

“This is a technical adjudication concerning an Application for a Payment and the associated

service of any Pay Less Notice leading to the payment of any Notified Sum colloquially known as a “smash and grab” adjudication and does not concern the true value of the works at the relevant time.”

The Adjudicator decided at paragraph 189 of his decision that the purported Pay Less Notice issued by the Contractor on 6th June 2023 was not a valid Pay Less Notice and had no standing.

The Adjudicator decided that the Contractor should pay the Payment Claim in the sum of £1,443,981.51 plus applicable VAT as a debt. However, the Adjudicator then went on to say, at paragraphs 228 and 229, as a result of submissions made and the information presented:

“228. The Respondent [the Contractor] has challenged the Claimant’s [Subcontractor’s] calculation of the amount to be paid on the basis that it includes the Respondent’s [Contractor’s] payment regarding Application No. 19. I understand this challenge to mean that I am only dealing with the Claimant’s [the Subcontractor’s] Application No. 18 in this adjudication. It is the Respondent’s position that I cannot take into account a payment made under Application No. 19 as that will be outside my jurisdiction.

229. Following this logic taking into account the payment made by the Respondent [the Contractor] to the Claimant [the Subcontractor] in relation to Application No. 18 the outstanding amount remaining to be paid is in the sum of £2,839,793.31 less £710,120.62 being the amount of £2,129,672.69.”

As a result of the Contractor’s challenge on the calculation of the amount to be paid to the Subcontractor, the Adjudicator corrected the arithmetic, taking into account Application for Payment No. 18 only, and decided amongst other things that £2,129,672.69 plus VAT was due for payment from the Contractor to the Subcontractor and not the the sum of £1,443,981.51 plus applicable VAT as a debt as set out in the Notice of Adjudication or the Referral.

In the enforcement proceedings in the TCC, where the Subcontractor was seeking to

enforce amongst other things £2,129,672.69 plus VAT and not the original substantive sum of £1,443,981.51 plus applicable VAT as a debt, it was seeking in its Notice of Adjudication or Referral, the Contractor argued amongst other things that:

1. The reference was a true smash and grab adjudication where the sum payable was due as a result of an invalid Pay Less Notice, not because of any accurate valuation by the Contractor.
2. The Adjudicator purported to award more than the sum claimed. He considered the “calculation” of the claim which was outside his jurisdiction.
3. The Adjudicator carried out a valuation exercise which was likewise outside his jurisdiction and purported to award more than the sum claimed by the Subcontractor.
4. There was no prior suggestion from the Adjudicator that he was minded to award more than the sum claimed by the Subcontractor in the Notice/Referral. Therefore, this amounted to a breach of natural justice which was material since he relied upon it in reaching his decision in addition to his acting in excess of jurisdiction. Thus the Decision is unenforceable.

In summary, it was argued by the Contractor that the Adjudicator’s decision should not be enforced because, it is said that the Adjudicator took it upon himself to (1) value the work done in Interim Application 18 and (2) to award a sum higher than that sought in the Referral by the Subcontractor. The Adjudicator’s jurisdiction did not extend to doing either of those tasks above and/or in so doing, the Adjudicator acted outside his jurisdiction, failed to act fairly and in accordance with natural justice and this failure caused material prejudice to the Contractor.

The Subcontractor pointed out that although the dispute referred to the adjudicator concerned the sum due under Application No. 18, the Subcontractor’s claim also included the common caveat giving the adjudicator license to grant “such other relief as is necessary, just and equitable to resolve the dispute” (paragraph 7.1.8 of the Referral).



The TCC, at paragraph 19 of the Judgment, considered the relevant legal principles as to jurisdiction set out in the Judgment of Akenhead J in *Cantillon Limited v. Urvasco Limited* [2008] EWHC 282 TCC and in particular, paragraph 55:

“There has been substantial authority based in arbitration and in adjudication about what the meaning of the expression “dispute is” and what disputes or differences may arise on the facts of any given case... I draw from such cases as those the following proposition:

(a) Courts (and indeed Adjudicators and Arbitrators) should not adopt an over legalistic analysis of what the dispute between the parties is;

(b) One does need to determine in broad terms what the disputed claim or assertion (being referred to adjudication or arbitration as the case may be) is;

(c) One cannot say that the disputed claim or assertion is necessarily defined or limited by the evidence or arguments submitted by either party to each other before the referral to adjudication or arbitration;

(d) The ambit of the reference to

arbitration or adjudication may unavoidably be widened by the nature of the defence or defences put forward by the defending party in adjudication or arbitration.”

At paragraph 19 of the Judgment, it makes it clear that the ambit of a reference to adjudication may (see paragraph 55(d) of *Cantillon*) unavoidably be widened by the nature of the defence or defences put forward by the defending party, i.e. the Contractor in the adjudication proceedings in this case matter.

The relevant test for the TCC to consider for a breach of natural justice is as defined in the Judgment of Akenhead J in *Cantillon Limited v. Urvasco Limited* [2008] EWHC 282 (TCC) at paragraph 57. This was considered by the TCC at paragraph 21 of the Judgment:

“(a) It must first be established that the Adjudicator failed to apply the rules of natural justice;

(b) Any breach of the rules must be more than peripheral; there must be material breaches;

(c) Breaches of the rules will be material in cases where the Adjudicator has failed to bring to the attention of the Parties a point or issue which they ought to be given the opportunity to comment upon if it is one which

is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant;

(d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any Judge in a case such as this;

*(e) It is only if the Adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of *Balfour Beatty Construction Company Limited v. The Camden Borough of Lambeth* was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point there is no breach of the rules of natural justice in relation thereto.”*

The TCC further reviewed commentary on this aspect of natural justice in Coulson on Construction Adjudication 4th Edition including references to relevant authorities. The TCC at paragraph 24 considered the authority of *Roe Brickwork Limited v. Wates Construction Limited* [2013] EWHC 3417 (TCC) where Edwards-Stuart J cited paragraphs 24 and 25 from the extract below (other paragraphs included below to assist the reader with the background context on the law):

“The law

1. It is now well understood that the court will not interfere with the decision of an adjudicator who has answered the question referred to him (I shall use “him” throughout since this adjudicator was a man), even though the court takes the view that the answer is wrong or that the adjudicator has made an obvious mistake (I leave aside those rare cases where the resisting party brings on concurrent Part 8 proceedings for a declaration to be heard at the same time as the application for summary judgment to enforce the award).

2. It is also well understood that an adjudicator must observe the rules of natural justice. In this context, that means that he should not decide a point on a factual or legal basis that has not been argued or put forward in the submissions made to him: see *Balfour Beatty Construction v London Borough of Lambeth* [2002] BLR 288. However, this rule is often easier to state than to apply.

3. If an adjudicator has it in mind to determine a point

wholly or partly on the basis of material that has not been put before him by the parties, he must give them an opportunity to make submissions on it. For example, he should not arrive at a rate for particular work using a pricing guide to which no reference had been made during the course of the referral without giving the parties an opportunity to comment on it.

4. By contrast, there is no rule that a judge, arbitrator or adjudicator must decide a case only by accepting the submissions of one party or the other. An adjudicator can reach a decision on a point of importance on the material before him on a basis for which neither party has contended, provided that the parties were aware of the relevant material and that the issues to which it gave rise had been fairly canvassed before the adjudicator. It is not unknown for a party to avoid raising an argument on one aspect of its case if that would involve making an assertion or a concession that could be very damaging to another aspect of its case.”

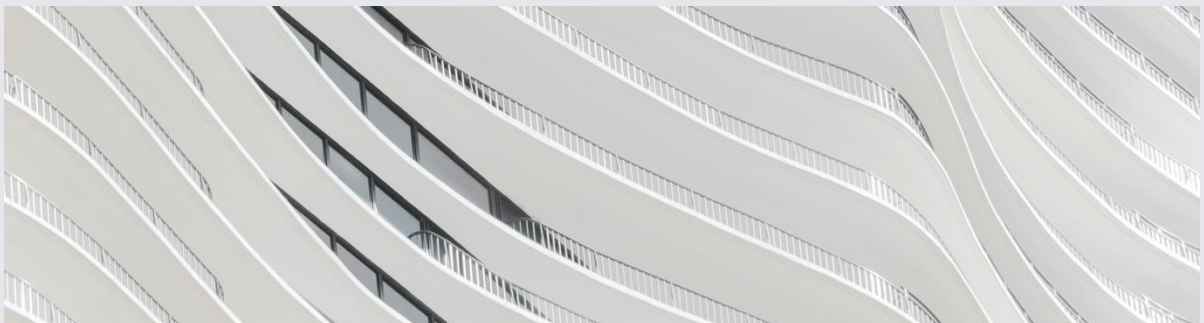
Conclusion

The Court, in enforcing the Adjudicator’s Decision, decided that there was no arguable defence to the enforcement of the Decision by the Subcontractor. The Subcontractor was entitled to summary judgment. The court noted that:

“...It simply cannot be said that this Adjudicator went off on a frolic of his own, deciding a case upon a factual or legal basis which had not been argued or put forward

by either side...Both parties were aware of the relevant material, the issues were canvassed before the Adjudicator in correspondence. He was not in breach of natural justice in reaching a decision on a point of importance on the material before him on a basis for which neither party had contended. His Decision was a product of responding to and accepting the case advanced by Contractor...”

Contrary to what was argued by the Contractor, the Adjudicator did not carry out a valuation: he corrected the arithmetic. The Contractor presented a series of defences to the quantum of the Subcontractor’s claims. The Adjudicator reached the conclusion that he had been invited by the Contractor to ignore payments made under Application No. 19. The Contractor’s submissions therefore opened up the possibility of a different, greater assessment of the sum due than claimed (see paragraph 55(d) of Cantillon). The adjudicator was therefore acting within his jurisdiction to determine the sum due as he saw fit in response to the submissions made by the Contractor.





LESSONS ON TERMINATION FOR CONVENIENCE & RECOVERY OF REASONABLE COSTS (FIDIC YELLOW BOOK 1999)

Introduction

Charles Edwards, high performing Construction Barrister reviews the Technology and Construction Court case of *Water and Sewerage Authority of Trinidad and Tobago v Waterworks Ltd (Trinidad and Tobago)* [2025] UKPC 9. The Judicial Committee of the Privy Council hearing this matter comprised of Lloyd-Jones LJ, Sales LJ, Leggatt LJ, Burrows LJ and Rose LJ. This dispute was in relation to two international projects for the design and build of water treatment plants based on FIDIC Yellow Book 1999 contracts (as amended) (the “FIDIC Yellow Book Contracts”) which were terminated for convenience by the Employer before construction started and for which the Contractor was seeking recovery of

cancellation costs incurred as a result pursuant to Clause 19.6(c) of the FIDIC Yellow Book 1999 Contracts.

Factual Background

The parties to the FIDIC Yellow Book Contracts were the Water and Sewerage Authority of Trinidad and Tobago (“the Employer”) and Waterworks Ltd (Trinidad and Tobago) (the “Contractor”). A dispute arose between the parties following termination for convenience by the Employer of the FIDIC Yellow Book Contracts pursuant to Clause 15.5, before the designs for the two water treatment plants had been finalised and any construction had begun on site. The Contractor, relying on preliminary designs, had entered contracts with a third party (the MAAK contracts) for the purchase of equipment for the construction of the plants. Although, no steps were ever taken to perform those contracts, which were terminated when the FIDIC Yellow Book Contracts were terminated.

In accordance with the Contractor’s agreement with a third-party supplier, the Contractor was liable to pay cancellation charges calculated as 30% of the total price quoted for the equipment if the MAAK contracts were terminated. This was a question which the courts below reached opposite conclusions on the Contractor’s entitlement to claim/recover the same and as to whether the costs/liabilities to pay the cancellation charges by the Contractor were “reasonably incurred by the

Contractor in the expectation of completing the Works” so as to fall within clause 19.6(c) of General Conditions of the FIDIC Yellow Book Contracts, thereby entitling the Contractor to recover such costs from the Employer.

The Key Issue

The key issue between the Employer and the Contractor to be considered was in regard to the proper interpretation of Clause 19.6(c) of the General Conditions of the FIDIC Yellow Book Contracts, which provided as follows:

“Upon such termination, the Engineer shall determine the value of the work done and issue a Payment Certificate which shall include:

(a) the amounts payable for any work carried out for which a price is stated in the Contract;

(b) the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery ...;

(c) any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works;...”

The Contractor submits that it is entitled to recover the cancellation costs of 30% pursuant to Clause 19.6(c) from the Employer. The Employer submits that such costs were unreasonably incurred by the Contractor and therefore the Contractor is not allowed to recover such costs. The Contractor seeks determination of issue following differing judgments from lower courts.

The key issues for determination by Judicial Committee of the Privy Council were as follows:

1. What was the proper interpretation of “reasonably incurred” in clause 19(c) in the FIDIC Yellow Book Contracts; “...any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works;...”.
2. Was it premature for the Contractor to purchase equipment and to enter into such contracts at this stage of the projects?
3. A review of the nature of the MAAK contracts and whether they created enforceable obligations?
4. The Contractor has the burden of proof – has the Contractor discharged its burden of proving that they reasonably incurred a cost or liability that falls within clause 19.6(c) of FIDIC Yellow Book Contracts?

Issue 1

The Contractor argued amongst other things that: “in interpreting and applying clause 19.6(c), it is important to have regard to the nature of the contract containing the clause and, in particular, to the features that the Contractor was obliged to complete the Works at a fixed price within a specified time... “in the expectation of completing the Works” and submitted that they are forward-looking and presuppose that the Works will be completed rather than terminated prematurely...Contractor argued that, given this context, there will generally be no justification for disallowing costs or liabilities incurred as a result of planning ahead and ordering materials or equipment in advance. A contractor is entitled to proceed on the basis that the entire contract will be performed and to order, for this purpose, whatever materials and equipment will be needed. For costs or liabilities to fall within the scope of clause

19.6(c), it is sufficient to show that they have been incurred in genuine expectation of completion of the works and that, had the works been completed, those costs or liabilities would have been no more than reasonably necessary to perform the contract.”

The Privy Council agreed that as a general rule, the Contractor was entitled to proceed and to incur costs and liabilities on the assumption that the FIDIC Yellow Book Contracts would be performed. Due to the allocation of risk under the contract, Clause 8.1 of the General Conditions of Contract (as modified) required the Contractor to “proceed with the works with due expedition and without delay, until completion”. To do otherwise, because of an expectation that the FIDIC Yellow Book Contracts was likely to be terminated before completion, would be inconsistent with that obligation. It would also expose the Contractor to a risk of liability to pay liquidated damages and incurring other additional costs in the event that the FIDIC Yellow Book Contracts was not terminated early, for which it would not be entitled to any compensation from the Employer. It is unreasonable to expect the Contractor to take such a risk.

However, the Privy Council pointed out that a “prudent contractor” would not generally commit itself to purchasing equipment before it is needed (taking into account delivery times) and before the designs, to which the equipment must conform, have been finalised. This was, in essence, the Employer’s primary position - that this is exactly what the Contractor done.

Issue 2

In the circumstances, the final designs had not yet been approved by the Employer and were subject to change. The Privy Council stated that it was not inconsistent for the judge in the lower court to find that prior to the final designs being approved, it was possible to identify the equipment (likely to be needed) with sufficient certainty to obtain a quotation for the cost of supplying it. This could be done on the basis of the preliminary designs available, provided the Contractor did not actually order the equipment, and subsequent changes in the designs including details which affected the exact specification of the equipment could be accommodated.

Issue 3

The Privy Council disagreed with the lower court’s judge’s analysis of the MAAK

contracts and conclusion that the MAAK contracts were not contracts for “the actual supply of the equipment”; rather, they were merely an arrangement by which the Contractor had “sourced, priced and locked in prices to the prices applicable in 2008”. The Privy Council agreed with the Court of Appeal’s judgment and held that by issuing the “purchase orders” the Contractor accepted the terms of MAAK’s quotations, as the quotations were on the face of it, offers to sell the equipment described in the quotations at the prices quoted on “Terms and Conditions...” (para 32 of the Privy Council Decision) Further, these were governed by the laws of the province of Ontario, Canada and subject to liability of 30% of the quoted price for cancellation charges.

Issue 4

The Contractor bore the burden of proof and in circumstances where only preliminary designs had been completed and much of the design work for the water treatment plants remained to be done, the Privy Council held it was on the face of things unreasonably premature for the Contractor to enter into unconditional contracts to purchase most of the equipment for the plants. The fact that nothing was done to perform those contracts reinforces that impression. Further, the Privy Council held that it was prima facie unreasonable for the Contractor to undertake obligations to pay cancellation charges if the purchase orders were cancelled when MAAK was not, so far as the evidence shows, itself incurring any costs or liabilities for which those charges could be regarded as compensation. In these circumstances to have any prospect of displacing the appearance that the liabilities to pay cancellation charges were unreasonably incurred, the Contractor needed, at least, to adduce evidence from a witness to explain its decision to enter into the MAAK contracts and why this was thought at the time to be in the Contractor’s interests. No such evidence was adduced by the Contractor (paragraphs 39 to 41 of the Judgment) and in the absence of such evidence, the submissions made on this point was based on speculation.

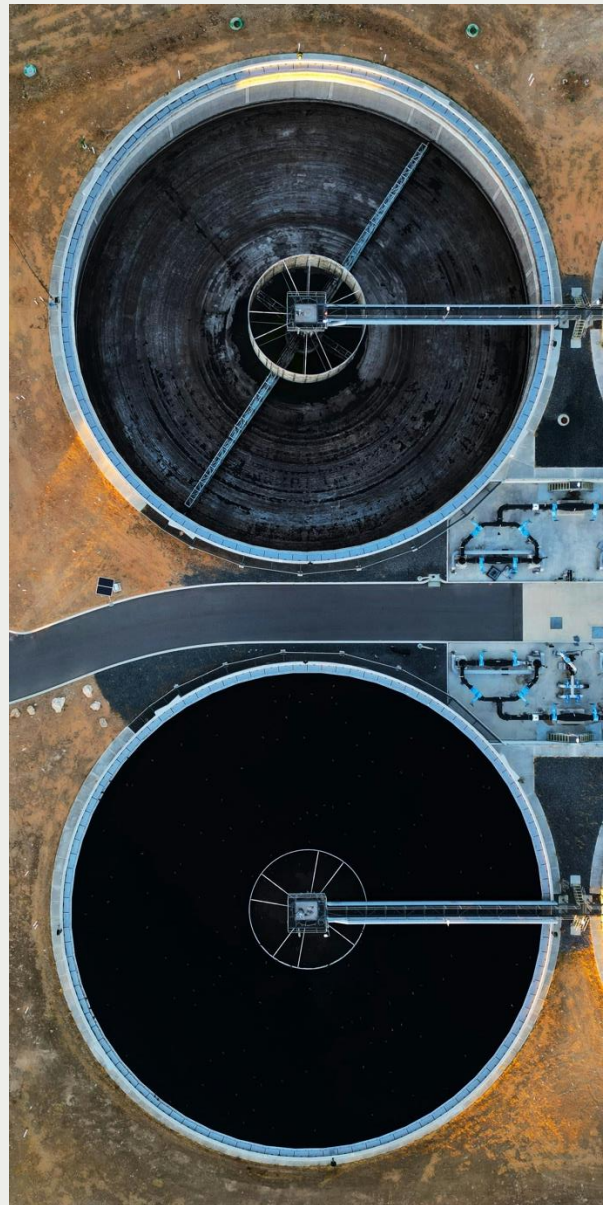
In the circumstances, the Privy Council could not find anything to displace, or as stated: which was capable of displacing, the inference that it was unreasonable for the Contractor to enter into the MAAK contracts when it did. More specifically, there was no good reason given or

shown for undertaking obligations to pay cancellation charges equal to a minimum of 30% of the prices quoted by MAAK if the purchase orders were later cancelled, regardless of whether at the time of such cancellation MAAK had taken any steps whatever to perform the contracts. In short, this was a very bad bargain for the Contractor to have made.

Conclusion

The Privy Council upheld the Court of Appeal’s judgment confirming that the Contractor’s liabilities to pay cancellation charges to MAAK did not fall within Clause 19.6(c) of the FIDIC Yellow Book Contracts. The appeal was therefore dismissed with the Contractor incurring significant costs and liability for which it was unable to recover from the Employer. The key takeaways include:

1. Contractors, when seeking to recover costs and liabilities that have been reasonably incurred pursuant to Clause 19.6(c) of the FIDIC Yellow Book 1999, will need to be able to provide credible evidence, taking into account all relevant factors to support such claims.
2. Contractors should keep clear records to support such claims.
3. Contractors should ensure that they are able to justify early procurement decisions which as in this case, attract significant costs and liabilities. Contractors must take into account other things such as the stage of the design and project when binding agreements are made with third parties for which they would seek to recover, pursuant to Clause 19.6(c) of the FIDIC Yellow Book 1999, if their contract is terminated.



NEC4 UPDATE: CONFLICT AVOIDANCE CLAUSES

In 2025, the NEC released a practice note and new guidance, titled NEC4 Engineering and Construction Contract conflict avoidance clauses, on conflict avoidance clauses which coincided with Conflict Avoidance Week 2025. This guidance note provides a procedure and relevant clauses to be used in NEC4 contracts, both main of contracts and subcontracts, to resolve disputes at an early stage by using a conflict avoidance panel. The clauses included in the practice note can be incorporated into dispute resolutions Options W1 and W2.

This is an initiative which we would encourage as it would assist in preventing protracted legal proceedings and assist parties to resolve disputes using a conflict avoidance panel at an early stage.



Thank you for reading!

Got a topic you would like us to consider or feature in our next publication?
Email us at clerks@newtemplechambers.com

Charles Edwards, Head of Chambers
E: charles.edwards@newtemplechambers.com
Tel: +44 (0) 20 3289 8000

NTC Monthly: Construction Law Update is a publication by barristers of New Temple Chambers, recognised for their excellence in construction and engineering law. This newsletter is for informational purposes only and does not constitute legal advice.

Construction Law Update:
April 2025

| NEW TEMPLE CHAMBERS
Construction | Chancery | Commercial

New Temple Chambers
28th Floor
30 St Mary Axe (The Gherkin)
London
EC3A 8BF

www.newtemplechambers.com