

# IS THERE A NEED FOR A FINAL ACCOUNT PROCESS IN CONSTRUCTION CONTRACTS?

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In *JSM Construction Limited v Western Power Distribution (West Midlands) PLC*<sup>1</sup>, a recent and important decision of the English court for all construction professionals, Mr Justice Pepperall considered whether an adequate mechanism for payment under construction contracts must contain a final account process pursuant to the Housing Grants, Construction and Regeneration Act 1996 (as amended) (the “Construction Act”). The case highlights the difference between the Construction Act, which provides the absolute minimum requirements for construction contracts, and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (as amended) (the “Scheme”) which contains very prescriptive requirements.

"Every construction contract shall- (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and (b) provide for a final date for payment in relation to any sum which becomes due."

s.110, Housing Grants, Construction and Regeneration Act 1996

## THE FACTS

Western Power Distribution (West Midlands) PLC (“Western Power”) engaged JSM Construction Limited (“JSM”) to install two cables and associated ductwork in Birmingham in October 2016. The contract was made up of an ad hoc agreement for underground works and Western Power’s detailed terms (the “Contract”).

The Contract price comprised JSM’s total tender value, just shy of £4m, if the works followed the “Main Route”, and contained prices and rates for additional works and extra materials. Further, Western Power was to ascertain and determine the value of the works.

After the works were completed, JSM issued what it described as its “final application” for payment in July 2019 for approximately £1.5m (bringing its total gross value for the works, variations and damages to just over £5.5m). No payment was made, so JSM commenced proceedings. Western Power applied to strike out the claim, or for summary judgment to be entered. The sole issue was whether or

not there was an implied term pursuant to s. 110 of the Construction Act enabling JSM to make its “final application”.

## THE LAW

As a refresher, s. 110 of the Construction Act states:

“(1) Every construction contract shall-

(a) provide an adequate mechanism for determining what payments become due under the contract, and when, and

(b) provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment...

(3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1), the relevant provisions of the Scheme for Construction Contracts apply.”

To summarise, the basic requirement is that construction contracts provide a mechanism to determine what payments become due and when.

However, the Scheme, which is implied if a construction contract does not have an adequate mechanism for payments, includes a final account provision. The question was therefore, if the Scheme provides a model of the adequate mechanism under s. 110 of the Construction Act, does the absence of any provision in a construction contract that is found in the Scheme render the contract non-compliant with the Construction Act, for example, if it does not include a final account provision?

## DECISION

Mr Justice Pepperall held that the threshold question is to consider whether the contract provides an adequate mechanism for determining what payments become due under the contract, and when. If it does, then there is no question of implying default terms under the Scheme.

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There is nothing in s. 110 of the Construction Act which necessarily requires parties to make a separate provision for a final account. Therefore, although the Scheme contains a final account provision, that does not mean a final account process is required under the Construction Act.

Further, as the question of whether there was an adequate mechanism was a question of fact, not law, then the issue could only be properly determined at trial. Therefore, Western Power's application to strike out JSM's claim or for summary judgment to be entered in its favour was dismissed.

## CONCLUSION

This decision highlights the differences between the Construction Act and the Scheme. The Construction Act merely provides the minimum requirements necessary in order to uphold party autonomy and freedom of contract. It is only if the minimum requirements are not met that the more prescriptive terms of the Scheme will be implied.

**"If a construction contract does not provide a final account process, then there is more pressure for accurate valuations as the works progress."**

In many construction contracts, parties agree that interim applications may be submitted in respect of a then estimated value of the works, with the true value of the works to be determined at the final account stage. This provides a fair system of monthly progress payments to the contractor and ensures adequate cash flow. However, not all construction contracts require such mechanisms. Simple, straightforward construction contracts may provide for a lump sum to be paid in stages. In theory, there may therefore be no need for a complex final account process. It is a question of fact in each case whether a construction contract has an "adequate mechanism" for payment.

In practice, if a construction contract does not provide a final account process, then there is more pressure for accurate valuations as the works progress, which follow a prescribed valuation method agreed at the outset. As a result, claim regimes in construction contracts such as the NEC suite incorporate time bars to ensure claims are dealt with on an interim basis, rather than saved until final account stage. JCT 2016 contracts contain final account provisions after completion of the works to give the contractor time to adequately prepare its final claim and retrospectively assess all its claims during the works. These provisions give the contractor the benefit of a sweep up provision, but at the cost of delayed final payment.

Notably NEC3 provided interim only payment provisions but the draftsmen introduced a final account mechanism in NEC4. However, the intention of NEC contracts, along with FIDIC 2017 and PPC2000, is for contemporaneous assessments of claims so that the final account should not strictly be used as a way to retrospectively value claims.

[1] [2020] EWHC 3583 (TCC)

## KEY CONTACTS



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