



LEGAL BULLETIN

The Effect of Suspending Work for Non-Payment

by
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Section 112 of the Housing Grants, Construction and Regeneration Act 1996 (“the Act”), gives the contractor the right to suspend performance of his work on the ground that the paying party has failed to pay a sum due under the contract and has failed to give an effective notice of withholding in respect of the sum he has failed to pay. The majority of the Standard Forms of Building and Engineering Contract also contain this provision.

Where the contractor's right to receive payment is disputed by the paying party, the exercise of the right of suspension is laden with risk. This is because an adjudicator, an arbitrator or the court might subsequently decide that the paying party was right to withhold payment and that the contractor making the claim unlawfully suspended the performance of his works. In these circumstances, the suspending party will be liable in damages for wrongful non-performance.

The question therefore arises whether the exercise of the right to suspend work on the ground of non-payment is less risky when it follows an adjudicator's decision that the sum claimed should be paid.

If the decision of the adjudicator is confirmed in subsequent court or arbitration proceedings there will be no difficulty. In those circumstances, the suspension will clearly have been justified. However, what happens if the suspension is justified by an adjudicator but not by the court or by an arbitrator in proceedings brought to finally determine this and other issues or disputes between the parties?

For instance, suppose a sub-contractor decides to suspend his work following the main contractor's failure to make payment of a sum it is ordered by an adjudicator to pay the sub-contractor but in subsequent court or arbitration proceedings it is decided that the adjudicator got it wrong and that the main contractor was entitled to withhold the amount of the sub-contractor's claim. Does this mean that the sub-contractor unlawfully suspended work? Will the sub-contractor have to make payment of damages to the contractor for the unlawful suspension? Or can the sub-contractor argue that the suspension was not unlawful because he was justified in suspending the work by the decision of the adjudicator? Regrettably, these specific questions have not been addressed by the Act and the answers to these questions are by no means clear.

One possible answer to these questions might be as follows. On the basis that the parties contracted and were required by the Act (and additionally by their contract) to accept the decision of an adjudicator and to comply temporarily with his decision until the dispute is finally determined in subsequent court or arbitration proceedings, the contractor will be in breach of contract by reason of its failure to comply, albeit on an interim basis, with the decision of the adjudicator to pay the sub-contractor.

On this reasoning, the suspension would have been justified under the contract, not by reason of the contractor's failure to comply with the adjudicator's decision (it having been decided in the subsequent court or arbitration proceedings that the sum was not due to the sub-contractor in the first place) but by reason of the contractor's breach of the obligation to temporarily comply with the (incorrect but binding) decision of the adjudicator.

The position is by no means clear and is in need of resolution by the courts.

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