SUSPENSION OF WORK

By Peter Sheridan

Introduction

The remedy of suspension of work for non-payment or late payment is likely to be of increased interest as the credit crunch and the recession continue to affect the construction industry. The suspension of work provisions of section 112 of the Housing Grants, Construction and Regeneration Act 1996 (the HGCR Act) do not appear to have been widely used. This may be partly because of the substantial risk, if a party suspends work wrongly, of a claim for damages for breach of contract. It may also be partly because of uncertainty over the adequacy of the compensation payable and entitlement to extension of time even where a suspension of work does in the event prove to be justified, but work is later resumed.

Section 112 was of sufficient potential significance to be subject to amendment, intended to address the latter problems, by the Local Democracy, Economic Development and Construction Act 2009 (the LDEDC Act).1 Part 8 of the LDEDC Act, which deals with (among other things) amendments to the HGCR Act, is not yet in force.

Section 112 of the HGCR Act is set out below, with the amendments which will be introduced under the LDEDC Act shown in bold:

"(1) Where a sum due under a construction contract is not paid in full by the final date for payment and no effective notice to withhold payment has been given, the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of **any or all of** his obligations under the contract to the party by whom payment ought to have been made ("the party in default").

1 The right may not be exercised without first giving to the party in default at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.

2 The right to suspend performance ceases when the party in default makes payment in full of the amount due.

(3A) Where the right conferred by this section is exercised, the party in default shall be liable to pay to the party exercising

1 For a review (prior to enactment) of the provisions of the LDEDC Act, see Sheridan and Helps, Construction Act Review, at (2008) 24 Const.L.J. No 7 at 572.

the right a reasonable amount in respect of costs and expenses reasonably incurred by that party as a result of the exercise of the right.

3 Any period during which performance is suspended in pursuance of**, or in consequence of the exercise of** the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.

Where the contractual time limit is set by reference to a date rather than a period, the date should be adjusted accordingly."

For ease of reference, in this article a party who has not (or allegedly has not) paid a sum due under a construction contract in full by the final date for payment (and no effective notice to withhold payment has been given) will be referred to as "the paying party" and the party to whom the sum is due or allegedly due will be referred to as "the party undertaking the work".

Section 112(1)

The right to suspend work arises when there is non-payment in full by the final date for payment. Every construction contract must provide for a final date for payment of sums due under section 110 of the HGCR Act. Every construction contract must also provide for an adequate mechanism for ascertaining sums due, pursuant to section 110. These provisions have been fully discussed in CAR previously.2

Who may suspend performance?

It has been a moot point whether the HGCR Act provisions relating to sums due apply to all sums due, or only those due to the party undertaking the work.

Section 112(1) appears to have been drafted with studious neutrality; there is nothing to suggest that the right to suspend performance arises only in the event of non-payment or late payment to the party undertaking the work. However, the right to suspend performance is linked to the concept of the final date for payment. The courts have taken the view that the payment provisions of the HGCR Act at sections 109-113 are provisions about

2 See Sheridan and Helps, Construction Act Review, at (2002) 18 Const.L.J. No 2 at 124; Sheridan and Helps, Construction Act Review, at (2002) 18 Const.L.J. No 4 at 334; Sheridan and Helps, Construction Act Review, at (2007) 23 Const.L.J. No 6 at 444; Sheridan and Helps, Construction Act Review, at (2008) 24 Const.L.J. No 4 at 326.

payment to the party undertaking the work, not provisions about any other payments that may be due or made under the contract. Lord Hoffmann stated (*obiter*) in the *Melville Dundas* case that in his opinion the concept of a "final date for payment" applied only to interim payments (*i.e.* interim payments to the party undertaking the work).3 In a more detailed consideration of this issue, Coulson J stated more recently:

> "For example, sections 109, 110 and 111 of the Act deal with stage payments: when they should be paid and the regime of withholding notices. They are aimed at ensuring that the party carrying out the works receives proper stage payments. Section 112 allows the contractor carrying out the works to suspend work if the sums are not paid. Moreover, section 112(4) says that the period of suspension has to be discounted in considering questions of delay. I accept, therefore, the submission of Mr Furst that that can only make sense if it is the contractor, the person doing the work and being paid for doing the work, who is the party suspending the work if he is not paid for doing it. It is impossible to read that section of the Act as applying to payments and suspensions on the part of the employer."4

It seems settled accordingly that only the party undertaking the work may suspend performance under section 112(1); this will normally be a contractor or sub-contractor. While the statute quite clearly indicates that either party may suspend under section 112, the judiciary (or at least Coulson J) has taken a clear contrary line. With regard to Coulson J's points, while it is correct that section 109 deals with stage payments, it is not clear that sections 110 and 111 are limited to stage payments. Coulson J's further arguments are not in any way conclusive as a matter of logic. It is of course right that section 112 allows a contractor carrying out works to suspend work if sums due to him are not paid, but it does not follow that section 112 is necessarily confined to that situation and cannot apply in respect of a sum due to an employer. Further, while section 112(4) has the effect that delay occasioned by a suspension is disregarded, it does not necessarily follow that section 112(1) has no application in other situations, *e.g.* where a sum is due to an employer and no delay issue arises.

The writer simply points out the logic of the position and the neutrality of the language used in section 112(1). The interpretation placed upon it by the courts is quite robust and in the absence of any judicial guidance to the contrary may be taken to be the current law.

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3 *Melville Dundas Ltd (In Receivership) v George Wimpey UK Ltd* [2007] UKHL 18 (HL);
[2007] Bus. L.R. 1182; [2007] 1 W.L.R. 1136 at [21].

4 *Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd* [2008] EWHC 3029 (TCC) at [107]; [2009] C.I.L.L. 2660.

When remedy of suspension is likely to be used

The party undertaking the work is likely to find the right to suspend performance an effective remedy where there is no realistic prospect of obtaining further payment, for example where the employer or main contractor is insolvent or on the brink of insolvency. Where this is the position, suspension of all work is an immediately effective means of cutting costs and reducing the likely losses.

Where the party undertaking the work judges that there is a realistic prospect of obtaining further payment, suspension of work may be considered as a tactic to obtain payment. However, there are various factors which may make suspension of work an unattractive option. Where the paying party can pay but is not paying, there is likely to be some issue in dispute. This may mean there is a risk that the party undertaking the work may turn out to be wrong if it pursues the suspension route. It is likely to be sensible to obtain legal advice before suspending work, unless it is common ground that the right to suspend has arisen. Legal costs are likely to be incurred and to be difficult to recover unless there is express contractual provision providing for recovery. In addition, where there is really a dispute between the parties as to whether a sum is due or not, other remedies may be preferable, *e.g.* bringing a claim for breach of contract, which may be done in adjudication.

The repudiatory breach issue and the Mayhaven case

The following situation arose in the recent *Mayhaven* case.5 Bothma was a contractor, who suspended work for alleged non-payment, although in fact payment had been made. Mayhaven treated the suspension as repudiatory and purported to accept the repudiatory breach. The case came before Ramsey J in the form of an appeal on questions of law from an arbitral award. One of the questions of law was whether, if a contractor breaches a construction contract by wrongfully suspending the works, such conduct amounts to repudiatory breach.

It was accepted by Bothma that there was an improper suspension of the works based on non-payment, because Bothma had in fact been paid the relevant sums. The arbitrator had found that the improper suspension did not amount to a repudiatory breach. The judge found that the arbitrator had not misunderstood the law and was entitled to come to the conclusion he did. The judge observed:

> "…the answer to that question whether a contractor's wrongful suspension of the works amounts to a repudiatory breach will depend

5 *Mayhaven Healthcare Ltd v Bothma* [2009] EWHC 2634 (TCC).

> on the terms of the contract, the breach or breaches of contract and all the facts and circumstances of the case. The question is not capable of a simple answer, as a matter of general principle."6

This dictum of Ramsey J echoed the words of Lord Upjohn in *Suisse Atlantique*:

> "…there is no magic in the words 'fundamental breach'; the expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case."7

The arbitrator had also referred to the decision of the House of Lords in *Woodar v Wimpey*, and in particular the following passage in the speech of Lord Wilberforce:

> "I would add only that it would be a regrettable development of the law of contract to hold that a party who bona fides relies upon an express stipulation in a contract in order to rescind or terminate a contract should, by that fact alone, be treated as having repudiated his contractual obligations if he turns out to be mistaken as to his rights. Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations." 8

It was argued by Mayhaven that Bothma's wrongful suspension was a clear breach of an obligation in the contract to proceed regularly and diligently with the works and that such breach permitted immediate termination of the contract or went to the root of the contract, as it entailed a refusal to carry out the work or an abandonment of the work without lawful excuse. Ramsey J stated in relation to this argument:

> "I do not accept Mr Pennicott's submission that a wrongful suspension of the work under clause 4.4A of the contract which gives rise to a failure to proceed regularly and diligently under clause 2.1 amounts to a breach of a condition or fundamental term so that every such breach amounts to a repudiation of the contract. A wrongful suspension which gives rise to a failure to proceed regularly and diligently will vary in seriousness, depending on the circumstances. I do not accept that every wrongful suspension which leads to a breach of clause 2.1 will

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6 *Mayhaven*, above, at [34].
7 *Suisse Atlantique* [1967] A.C. 361 at 421 to 422.
8 [1980] 1 W.L.R. 277 at 283.

automatically be a repudiatory breach. Rather, whether such a suspension and a consequent breach does amount to a repudiation depends on the breach and the facts and circumstances of the case."9

The LDEDC Act amendment

The amendment introduced into the HGCR Act provision by the LDEDC Act gives the party undertaking the work the option of suspending some, but not all, of the works. The party undertaking the work may find suspending part only of the works effective in a case where it judges that payment will be made in due course by the defaulting party. In some instances of that type, it may be more convenient not to suspend all work. Where there is a reasonable prospect of proper payment in due course and a resumption of full performance, it may be convenient to stand down any expensive plant or sub-contractors' activities, for example, but to maintain, at least for a short period, temporary site accommodation and some staff presence.

Section 112(2)

The provision for seven days' notice before exercising the right to suspend is self-explanatory. Suspension of the work is often a serious matter for the paying party and a short period during which there is an opportunity to make payment, if so advised, may assist in the avoidance of disputes. If the paying party does not intend to pay, for example where it does not accept that payment is properly due, there is a short period of time in which to make certain arrangements, for example to insure the works, if necessary, and/or to secure the site.

Section 112(3)

The provision that the right to suspend ends when payment in full is made is self-explanatory. There is a potential practical difficulty in that payment is virtually instantaneous, whereas re-starting work may not be so. If the works involve the hire of expensive plant, for example, there will be a period of time between payment and remobilisation of the plant. It is this type of issue that has led to the new LDEDC Act provision at section 112(3A).

Section 112(3A)

This new LDEDC Act provision is intended to meet the concern of the party undertaking the works that in the event of a valid suspension, that party could still be out of pocket by reason of costs associated with the suspension. The

9 *Mayhaven*, above, at [23].

provision is very vague and leaves plenty of scope for argument and disputes. The parties would be well advised to make provision in their contract in more detail as to the financial consequences of such matters as remobilisation of plant, resumption of insurance cover and the like. However, the provision does give the party undertaking the work some basis for recovering the costs of disruption occasioned by the suspension.

The provision is not apt to provide for recovery of legal costs incurred in obtaining legal advice as to whether the party undertaking the work is entitled to suspend the work. It would be reasonable for a party considering itself entitled to suspend to take legal advice before exercising the right and to be entitled to recover those costs in the event of a valid suspension. This again is something for which the contract should make express provision.

Section 112(4)

This provision is concerned with relief from damages for delay (often liquidated damages) for the party exercising the right to suspend. The period of suspension is disregarded when computing the time taken by that party to complete the works. The provision has the same effect as an extension of time for the period of the suspension. The LDEDC Act amendment allows for relief from damages where the suspension has ended (through payment) but it has not yet proved practicable to remobilise. Where performance has been resumed but it has not yet been practicable to remobilise some plant, the operation of which is on the critical path, relief from delay damages should be available. Again, the parties would be well advised to spell out in more detail than the statute the financial consequences of such eventualities.