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## Steven Oakes

The question for the Court: Whether the interest provided for within an amended JCT Contract for the late payment of a debt was a 'substantial remedy' pursuant to the Late Payment of Commercial Debts (Interest) Act 1998

# A point of interest

8 September 2010 | By Steven Oakes

*Yuanda (UK) Co Limited v WW Gear Construction Limited [2010] EWHC 720 (TCC)*

Recently a colleague wrote an article published in Building Magazine entitled Pause.... to the Tolent Clause. The article examined the decision of the Technology and Construction Court regarding the matter of whether a party to a construction contract could pass on the liability for the costs in an Adjudication to the other party, simply by including a clause in its contract which stated that the other party will be liable for such costs.

The decision of the Court was unexpected, given the longstanding decision in *Bridgeway ~v~ Tolent [2000]*, but given the recent decision in 'Yuanda', it now looks like the end of the 'Tolent Clause'. Nevertheless, the case in question also dealt with another important matter, that being with regard to interest on late payments.

The details of the case were that Yuanda had entered into a contract for the curtain walling works on a construction project for a substantial luxury hotel. Needless to say that a number of disputes arose during the project which resulted in Yuanda applying for a number of declarations from the Court under Part 8 of the Civil Procedure Rules.

The declarations sought by Yuanda included inter alia, that the amendment made by Gear's Solicitors to Clause 4.11.2 was void because it failed to provide a 'substantial remedy' for late payments pursuant to the Late Payment of Commercial Debts (Interest) Act 1998.

Gear's Solicitors had amended a Standard JCT Trade Contract including Clause 4.11.2 which dealt with interest on late payments. As the majority of readers will be aware, most if not all of the JCT contracts make provision for the payment of 5% interest above the Base Rate for any late payments under the contract, unless of course this has been amended.

On this occasion the 5% had been amended to 0.5%. A noteworthy point in this case was that two other contractors had managed to negotiate this percentage to 2% and 5% respectively, while Yuanda had themselves paid the amendment little or no attention until they had entered into the agreement.

Yuanda argued that 0.5%, as provided for at 4.11.2 of the contract, did not provide a 'substantial remedy' pursuant to the Late Payment of Commercial Debts (Interest) Act 1998. Section 8(4) of the Act makes any contract term void which purports to "confer a right to interest that is not a substantial remedy for the late payment of a debt".

Nevertheless, section 8(2) provides that where the parties agree a contractual remedy for the late payment of a debt this is to be considered a 'substantial remedy' for the purposes of the Act. Section 9(1) of the Act provides some guidance on whether or not a remedy should be considered 'substantial'.

Section 9(1) (a) provides that a remedy is insufficient if it fails to provide a remedy which does not compensate for the late payment and if it would be unfair or unreasonable to allow the party reliant upon the term in question to oust or vary the Statutory Interest that would normally be applied. At present the rate of Statutory Interest would be 8% above the reference rate.

The Court stated that, just because the percentage of interest was materially lower than the Statutory Rate, this did not mean that such a remedy would fail a 'substantial remedy' test. In fact the Court stated that the Statutory Rate may even be considered as a penalty for failing to provide for a 'substantial remedy' within the contract. However, the Court did in this case, based upon the facts, provide a declaration that the 0.5% was not a 'substantial remedy' within the meaning of the Late Payment of Commercial Debts (Interest) Act 1998 and should, therefore, be substituted for the 8% Statutory Rate.

It should be noted that an amendment such as the one contained within the Yuanda contract is not unusual by any means, but, in this instance, it appears that Gear would have benefited more had it accepted that the drafters of the JCT Contract considered that the 5% normally provided for would be considered a 'substantial remedy'.

Nevertheless, the Court made it clear that, in some instances, where the contracting parties had reached an agreement, a remedy as low as 3% may be considered 'substantial' for the purposes of the Act. Moreover, the Court made clear that each case in relation to this matter should be considered on its own merits, but for now at least, when faced with such an amendment in any dispute, there may be some financial worth in adopting the arguments put forward by Yuanda.

Source: Steve Oakes is a senior consultant at Hill International.

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