



# Construction Law

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## “Please Sir, may I have some more?”

This article looks at The Late Payment of Commercial Debts (Interest) Act 1998 following its review in the recent TCC judgment in Yuanda (UK) Co. Limited v WW Gear Construction Limited [2010] EWHC 720, together with a development in the use of “Tolent” clauses from the same case.

Yuanda was one of some 30 trade contractors engaged by Gear for the construction of a luxury hotel. The form of contract was a JCT Trade Contract with a schedule of bespoke amendments prepared by Gear. Yuanda was the curtain wall trade contractor. It brought a claim in the TCC for various declarations relating to its contract. In particular it asked:

*“Does clause 4.11.2 provide a substantial remedy for late payment within the meaning of The Late Payment of Commercial Debts (Interest) Act 1998 or should the statutory rate be substituted for it?”.*

In other words, the JCT form had been amended by Gear so that the interest chargeable for late payment was altered from 5% over Base Rate, to just 0.5% over Base. In contrast the statutory rate is 8% over Base. At the time the contract was made the Base Rate was 5.5%. It is now 0.5%. Yuanda had not sought to challenge the amendment at tender stage, but it did seek to challenge it through the court no doubt prior to bringing a large payment claim through adjudication.

s8(1) of the “Late Payment” Act makes void any contract terms to the extent that they “purport to exclude the right to statutory interest in relation to the debt, unless there is a substantial contractual remedy for late

*payment of the debt”.* s8(4) provides that any interest clause is void to the extent that it purports to “confer a contractual right to interest that is not a substantial remedy for late payment of the debt”.

s9 states that a contractual remedy for late payment shall be regarded as a substantive remedy unless:

*“(a) the remedy is insufficient either for the purpose of compensating the supplier for late payment or for deterring late payment; and*

*(b) it would not be fair or reasonable to allow the remedy to be relied on to oust or (as the case may be) to vary the right to statutory interest that would otherwise apply in relation to the debt.”*

Interestingly, the 1998 “Late Payment” Act has received little attention from the courts so this appears to be the first time that s9 has been tested. Regard has to be given to all the relevant circumstances at the time the term in question was agreed.

Mr Justice Edwards-Stuart’s view was that the “Late Payment” Act does not automatically substitute the statutory rate for any lower rate of interest provided in the contract: it does so only if the contractual rate does not afford a “substantial remedy”.

He noted that the rate in the standard JCT Contract was 5% over Base and saw no reason why 5% could not be regarded as a substantial remedy even though it is 3% less than the statutory rate. He thought even 3% or 4% over base might provide a substantial remedy. Taking into account all the factors he said it was clear that 0.5% over Base Rate cannot be regarded as a substantial remedy. He then considered whether there was any reason why it would be fair or reasonable to allow Gear to rely on the remedy to oust the statutory rate. He could see none.

So it seems Gear scored an own goal by drastically reducing the interest rate in Yuanda’s contract. As the judge commented “putting it crudely, it seems to me that the imposition of the statutory rate is the penalty that a contracting party pays for failing to provide in its contracts a fair remedy for late payment to suppliers”.

This decision will be important for all commercial contracts, not just construction cases. It is particularly pertinent in times of falling interest rates. Yuanda are now entitled to 8.5% on any payment held to have been paid late, compared to 1% as set out in the contract. Many unpaid debt claims are likely to see a revised interest claim being argued as a result of this case.



### “Tolent” clauses

Readers will recall the case of Bridgeway Construction Limited v Tolent Construction Limited [2000] where the contract contained a clause which made the referring party in any adjudication liable for both parties’ costs and the adjudicator’s fees. That clause was upheld as being compliant with the 1996 Construction Act.

In Yuanda the amendment to the JCT Trade Contract read:

*“...the Trade Contractor agrees that should he make a reference to Adjudication under the terms of this Contract then he will be fully responsible for meeting and paying both his own and the Employer’s legal and professional costs in relation to the Adjudication.”*

Yuanda argued that this wording did not comply with s108 of the “Construction” Act 1996, and that the whole adjudication clause should be replaced by the Scheme. The Judge agreed. He considered that the clause was a very real fetter on Yuanda’s ability to refer a dispute to adjudication. He respectfully disagreed with the conclusion reached in Tolent (the difference here being that the Tolent clause was reciprocal whilst in Yuanda only Yuanda was penalised in costs), saying: *“If the effect of the contract drafting is to “clearly discourage a party from exercising its right to refer disputes to adjudication” then it must be for consideration whether a provision so drafted is contrary to the requirements of the Housing Grants Construction and Regeneration Act.”*

He considered the clause would in practice limit Yuanda’s freedom to refer a dispute to adjudication at any time and, in some circumstances – to deprive it of a remedy altogether. He then reviewed the cases on whether s108(5) should be construed so as to replace non-compliant adjudication provisions by the Scheme’s Part 1 provisions in their entirety, and concluded that it was settled law that the whole of the adjudication provisions are brought in – lock, stock and barrel.

As a footnote it should be noted that we now have conflicting first instance decisions on Tolent clauses as the drafting of the two clauses is slightly different. The damage done by a pure Tolent clause has of course been redressed by the Local Democracy, Economic Development and Construction Act 2009, s141 but it is still not known when this will come into force.

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*This “reliable group of highly skilled construction lawyers” draws praise for “its ability to break down complicated legal issues and convey them in a readily understandable way”.*

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