

However in a case such as this, dealing with what was found to be a form of exclusion clause, the Court of Appeal (Waller LJ giving the lead judgment) was very doubtful that the usual principles would apply at all. The effect of the pay when paid clause had such financial significance that if the party seeking to rely on it "chose a way which was not in accordance with the legislation because he mis-drafted the provision, I can see no reason why, however obvious it was that he had mis-drafted the provision, that the principles ...would come to his rescue."

The court gave what should be seen as a warning to those seeking to rely upon contractual terms which may include what they see as obvious mistakes. If the provision was drafted in a way which worked, then even if the reasonable person would guess that it was not intended by the person who drafted it to be so limited and that there has been an error, the Court of Appeal saw "even less reason for the courts to come to the rescue."

Further, where a party is seeking to enforce the terms of an exclusion clause (such as pay when paid) in which a party seeks to relieve itself from legal liability, the onus is on that party to use clear words. The Court of Appeal described this as the dominant principle. In what should be taken as a warning, the court concluded by reinforcing the principle:

"The general rule should be applied that, if a party otherwise liable is to exclude or limit their liability, they must do so in clear words; unclear words do not


suffice; any ambiguity or lack of clarity must be resolved against that party."

Taking the point further, the Court of Appeal decided that it was not therefore open to SCL to argue that there was a lack of clarity in the pay when paid clause and ask the court to give it another meaning. The clause was drafted for the benefit of SCL and it excluded a liability to pay the subcontractor. It was for the party relying on the clause to make sure it was correct if it wanted to rely on it. There was no reason to interfere with it.

An end to pay when paid clauses? Are your exclusion clauses clear?

The decision does not result in the end of pay when paid clauses. A properly drafted pay when paid clause in a construction contract is legal and enforceable. However any party seeking to rely not just on a pay when paid clause, but on any clause which seeks to relieve it from liability, of which there are many in commercial contracts of all kinds, will have to take notice of this decision to make sure contract terms are clear and unambiguous. If they are not, the courts will not readily come to the rescue.

*Joe Wilkinson, Legal Director, Construction and Engineering Group, Addleshaw Goddard. Joe Wilkinson acted for WHL in these proceedings. Counsel, Sean Brannigan QC and Glen Davis.
joe.wilkinson@addleshawgoddard.com*



FIG

Bridging the Gap between Cultures
FIG Working Week and General Assembly
18-22 May 2011, Marrakech, Morocco

www.fig.net