

# New Tech, Old Rules



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Recently a subbie client of mine came to us for advice on what they should do when a main contractor refused to pay. Our client had been contracted under a design and build contract. Following lack of payment mid-way through the project they came to us for advice on next steps.

As we were discussing options, our client dropped in that it had informed the main contractor that it would refuse to release the design drawings until payment was made. This is all too familiar, and sometimes a client's first response when non-payment becomes an issue. It questions if it is right to withhold a work product following non-payment.

This question was recently posed in the judgment *Trant v McDonald* [2017] EWHC 2061 (TCC). Trant was engaged by the Ministry of Defence (MOD) as main contractor for the Mid Atlantic Power Project. Mott McDonald was appointed to provide design services and was also the BIM coordinator for the project and was tasked with controlling access to the Common Data Environment (CDE).

Mott MacDonald suspended its services and blocked Trant's access codes to the CDE, leaving Trant unable to access the design materials and ultimately leaving it unable to continue with the project. The Technology and Construction Court (TCC) had to determine whether an interim application for an injunction to restore client access to the CDE should be granted.

Among other things, the court held that

the balance of convenience lay with granting an injunction, partly because there was a "high degree of assurance" that the client was entitled to the design data in the BIM model. The client had already made some payment for that data and the court could order it to pay damages if that payment turned out to be inadequate.

The case suggests that access cannot be revoked once a design has passed into the shared folders. This is a common sense approach. Before BIM and the technological advances of the 21st Century, if this dispute had arose, the contractor would not have been able to visit an employer's office to retrieve a hard copy of the design drawings.

As this was the first reported case which dealt with an issue regarding BIM there was widespread interest in the judgment. However, the judgment in *Trant v McDonald* just enforced the existing law. It was always the law that the contractor cannot hold work items for ransom in the event of a contract breach.

Turning again to our client, it would likely to be ordered to supply the employer with the design plans and could be liable for damages for withholding them and suspending the project. This would have the opposite effect of what they were trying to achieve as it would put them in a further cash deficit.

This case highlights the importance of agreeing the fundamental obligations of the parties at the outset of the agreement and in turn ensuring that what is agreed is reflected clearly in the contractual terms.