

# CONSTRUCTION : BULLETIN

## Applications for Payment – Get the Dates Right or Risk Losing Out!



Hawkswell Kilvington

It is quite common for the parties to construction contracts to depart from the payment dates set out in the contract for their own convenience or in the interests of helping each other out. However, this can have unintended consequences and there can be risks to both parties in adopting alternative arrangements.

The risks were demonstrated in the recent case of **Leeds City Council v Waco UK Limited**, which concerned the validity of an application for payment which had not been submitted on the correct date.

### Background

On 16 March 2012, Leeds City Council (“LCC”) entered into a JCT Design & Build Contract 2005 Edition Revision 2 2009 (the “Contract”) with Waco UK Ltd (“Waco”) for certain works at a primary school in Leeds.

During the course of the works, Waco made monthly applications for interim payment which were paid by LCC, despite the applications usually not being submitted on the correct date as stated in the Contract.

Practical completion of the works was achieved on 28 March 2013. The Contract stated that after practical completion, applications for interim payment should be made every two months from the date that practical completion was achieved (i.e. the 28<sup>th</sup> day of every other month).

Accordingly, following practical completion, Waco made applications for payment at intervals of broadly two months on or around the 28<sup>th</sup> day of the month. These applications for payment were often submitted several

days after the 28<sup>th</sup> of the month, but the Employer’s Agent did not take issue with the dates of the applications.

On 22 September 2014 (i.e. six days early), Waco submitted application for payment number 21 (“Application 21”) for £484,759.50. Then, on 28 November 2014 Waco submitted another application for payment (“Application 22”) for the same amount as Application 21.

In response to Application 22, the Employer’s Agent issued a Payment Notice stating that the amount due to Waco was nil.

However, LCC refused to make payment of Application 21 and no Payment Notice or Pay Less Notice was issued in response to it.

Waco referred a dispute regarding Application 21 to adjudication and was awarded payment of the sum claimed in Application 21 on the basis that LCC had failed to submit a Payment Notice and/or Pay Less Notice in response to it. Waco then applied to court for summary judgment to enforce the adjudicator’s decision, but summary judgment was not given and LCC was permitted to apply for a declaration that Application 21 was not valid and that the adjudicator’s decision was incorrect.

LCC argued that Application 21 was issued prematurely, as the Contract stipulated that it should not have been issued until six days later (on 28 September 2014). LCC therefore submitted that Application 21 was invalid because there was no entitlement under the Contract for

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applications for payment to be made on any dates other than those stipulated in the Contract.

### Decision of the court

The court noted that the payment mechanism set out in the Contract differed pre- and post- practical completion.

Before practical completion, it was common ground between the parties that all applications for payment were to be made on the 26<sup>th</sup> of each month (i.e. to reflect the date of possession which was on 26 March 2012). There was no provision in the Contract enabling the parties to substitute alternative dates, but nevertheless the parties had established a course of conduct that applications made up to three or four days late would still be paid.

After practical completion, the application dates were to be at intervals of two months “*unless otherwise agreed*”. The court found that this wording allowed the parties to agree different dates on an application by application basis.

However, after practical completion, there was no evidence of any implied agreement between the parties to vary the dates for submission of applications for payment so as to allow them to be made early. Indeed, the Employer’s Agent had emailed Waco to state that applications for payment would not be accepted if submitted prior to the relevant date, but they could be submitted “on/after” the relevant date. This was consistent with the approach adopted prior to practical completion of honouring slightly late applications, but it did not permit the early submission of applications.

Consequently, since Application 21 was made six days before the relevant date, the court held that this was not a valid application for payment and consequently the adjudicator’s decision that Application 21 had to be paid in full could not stand.

Interestingly, the application for payment Waco had submitted prior to Application 21 had also been issued

prematurely by Waco, but had been paid by LCC. However, the court did not consider that this created a course of conduct whereby applications for payment could be submitted early. Instead, the court found this to be a one-off payment which did not amount to an implied representation that LCC would waive a similar irregularity in the future. The court appeared to place value on the fact that the amount paid under that application had only been about £13,000, whereas the sum in dispute in relation to Application 21 was closer to £500,000.

### Analysis

From the point of view of employers, employer’s agents and contract administrators, this case demonstrates that it can be dangerous to honour applications for payment which are not submitted on the dates specified in the contract. If this had been a dispute about a late application rather than an early one, the course of conduct identified by the court may have caused LCC real problems if LCC had tried to argue that a late application was invalid.

Whilst the employer may consider it unreasonable to disrupt the contractor’s cash flow by rejecting applications that are only a few days early or late, departing from the express terms of the contract may potentially establish a course of conduct which could cause problems if either party seeks to rely on the express terms of the contract later on.

Employers, employer’s agents and contract administrators would therefore do well to make it clear to the contractor that the timetable for submitting applications set out in the contract must be strictly adhered to.

From the perspective of contractors and sub-contractors, this case should not be viewed as confirmation that late applications for payment are generally acceptable or permissible. Whether or not a particular course of conduct can be established will always depend on the facts of the case on question. To avoid doubt, applications for payment should always be submitted in accordance with the

contract. Indeed, it may be that, following this case, employers and main contractors begin to adopt a stricter approach by refusing to honour early or late applications to try and avoid a course of conduct being established. Contractors and sub-contractors should bear in mind that submitting applications for payment just a couple of days early or late could result in the application for payment not being accepted, with potentially serious consequences for cash flow.

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