

CONSTRUCTION : BULLETIN

The Dangers of Agreeing a Payment Schedule

Earlier this year, the case of *Grove Developments Ltd v Balfour Beatty Regional Construction Ltd* attracted a lot of attention when it was held by the court that the contractor had no further entitlement to interim payment following expiry of a schedule of interim payment dates.

This important case has now come before the Court of Appeal, with potentially serious implications for anyone working under a contract which contains a payment schedule.

Background

Grove Developments Ltd ('GDL') employed Balfour Beatty Regional Construction Ltd ('BB') to design and construct a hotel and apartments pursuant to a JCT Design and Build Contract 2011 with bespoke amendments. The Date for Completion was 22 July 2015. 'Alternative A – Stage Payments' was selected in the Contract Particulars, but no stage payments were ever agreed. Instead, the parties agreed a payment schedule (the 'Schedule') containing 23 valuation and payment dates which covered the period from September 2013 to July 2015.

Completion of the project was delayed and from about May 2015 the parties entered into correspondence to try to agree further interim payment dates which would apply following expiry of the Schedule. However, agreement was never reached.

In August 2015, after expiry of the final date in the Schedule, BB issued a further application for interim payment for £23m. GDL issued both a Payment Notice and a Pay Less Notice

in response to this interim application. A dispute arose about whether the Payment Notice and Pay Less Notice had been issued in time, with BB arguing that in the absence of any further dates in the Schedule, the payment terms were those set out in the JCT Design and Build Contract, supplemented with implied terms imposed by the Housing Grants, Construction and Regeneration Act 1996, as amended (the 'Act') and the Scheme for Construction Contracts (the 'Scheme').

GDL commenced court proceedings seeking a declaration that BB had no right to any further interim payments once the dates in the Schedule had run out.

The court agreed with GDL, finding that BB was not entitled to any further interim payments because the parties had a clear agreement for 23 interim payments only. Unsurprisingly, BB was aggrieved by the court's decision and appealed to the Court of Appeal.

The appeal

BB appealed on three grounds:

- i. The Contract expressly or impliedly provided for interim payments to be made following expiry of the Schedule.
- ii. Alternatively, the Contract did not comply with section 109 of the Act, so the Scheme applied and conferred a statutory right to monthly interim payments.
- iii. Alternatively, the parties' correspondence and conduct following expiry of the Schedule gave rise to a fresh contract for monthly interim payments.



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Contractual entitlement to interim payments beyond the Schedule

BB's main argument was that the parties had clearly intended interim payments to continue and that it would be a "commercial nonsense" to say there were to be no further interim payments following expiry of the Schedule. BB also argued that although 'Alternative A' was stated in the Contract Particulars, the parties had actually agreed to interim payments in accordance with 'Alternative B'.

In a lead judgment given by Lord Justice Jackson, the Court of Appeal rejected these arguments on a number of grounds:

- It was not possible to say that the parties had agreed Alternative B because the dates in the Schedule were completely different to the dates envisaged by Alternative B.
- The express terms of the Contract were very clear that the parties were only agreeing a regime of 23 interim payments up to the Date for Completion.
- It was impossible to work out what the payment timetable would be after expiry of the Schedule because there was more than one possible interpretation.
- There was no ambiguity in the Contract terms to enable the Court to reinterpret the Contract in accordance with what BB argued was "commercial common sense".
- There was no basis for implying a term for interim payments following expiry of the Schedule because it was not obvious what the implied term would say. Further, the Contract did not lack business efficacy or coherence without such an implied term. Terms will only be implied where they are necessary to make a contract work.

The Court pointed out that BB will receive payment for their work in due course, but they will have to wait until the final payment under the Contract becomes due. The Court described this as "*a classic case of one party making a bad bargain*". The courts cannot and will not reinterpret a contract to

rescue a party from something it has clearly agreed.

The Act and the Scheme

BB also submitted that the Contract was non-compliant with section 109(1) of the Act because it did not require interim payments in respect of all work being carried out.

Whilst the Court acknowledged that the wording of section 109(1) does refer to all work, the Court found that this did not mean every single piece of work. The Act gives contracting parties considerable freedom to agree on an interim payment regime. In this case the parties had agreed a regime of 23 interim payments and no more. The Court was satisfied that the Contract complied with section 109 of the Act, so the Scheme was not implied.

Separate agreement for interim payments after expiry of the Schedule

BB also argued that either the parties had agreed further dates for after the Schedule expired, or GDL had waived the need to agree on further dates by issuing a Payment Notice in response to the first application issued by BB after expiry of the Schedule.

The Court quickly dismissed this point, stating that it was clear from the correspondence that the parties had never agreed the terms upon which further interim payments would be made. The fact that GDL had issued a Payment Notice did not amount to a waiver; they were simply protecting their position in case their interpretation of the Contract was wrong.

Dissenting judgment

It is interesting to note that one of the three Court of Appeal judges took a different view. Lord Justice Vos held that BB's appeal should be allowed. In his view, the Contract was ambiguous and the Schedule was not clear enough to be interpreted as taking away BB's further entitlement to interim payments. He stated that clear words would be needed for such an "*uncommercial construction*" which "*would mean that BB would not be paid large sums for 2 or 3 years after the last interim payment*".

Given this ambiguity in the Contract, he took the view that the Schedule should be construed as if "etcetera" was added at the end, so that interim payments would follow on from the last date in the Schedule until actual practical completion.

Conclusion

Notwithstanding Lord Justice Vos' dissenting judgment, the Court of Appeal rejected BB's appeal by a majority, meaning that BB will have to wait until the final payment becomes due to receive any further payment.

Analysis

This Court of Appeal judgment reaffirms the importance of considering what will happen after the last date in a payment schedule. As this case demonstrates, failure to do so could result in a contractor or subcontractor having to complete their works without receiving payments for a considerable period of time. The potential cash-flow consequences of this could be devastating.

Going forward, anyone using a payment schedule should ensure the schedule includes dates which go way beyond the intended completion date and/or includes a clear mechanism for working out further interim payments following the expiry of the specified dates.

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