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Are you still entitled to interim payments if your schedule of payment dates runs out?

Balfour Beatty Regional Construction Ltd v Grove Developments Ltd [2016] EWCA Civ 990

If you've signed up to a contract which has a schedule of payment dates, do you know what happens to interim payments if the project is delayed beyond the dates in that schedule? The answer the court gave in *Balfour Beatty Regional Construction Limited v Grove Developments Limited* is surprising as it is so different from the construction industry's view.

Background

Balfour Beatty were employed by Grove Developments (a developer) to design and construct serviced apartments adjoining the O2 complex on Greenwich Peninsula.

The contract was based on the JCT Design and Build Contract 2011 and incorporated bespoke amendments. The defined date for completion of the works was 22 July 2015, but at the point the judgment was issued (February 2016) they still had not been completed. This is not a totally unheard of scenario!

The contract provided for stage payments. Balfour Beatty and Grove Developments agreed a schedule of valuation and payment dates, but it only covered the intended period of the work, which was between September 2013 to July 2015. On 21 August 2015 (so after the dates in the agreed schedule had run out) Balfour Beatty issued an application for a further interim payment.

Grove Developments refused to pay, so Balfour Beatty started an adjudication claiming payment of the sum applied for, because it alleged Grove Developments had failed to issue the proper notices. Grove Developments tried to stop the adjudication in its tracks by asking the court to make a declaration that because the dates in the schedule had run out, Balfour Beatty had no right to issue an application for payment and therefore no right to be paid.

Balfour Beatty originally argued that the schedule provided for interim applications on the third Thursday of every month, with the other relevant payment dates to suit so those periods should just run on after the schedule ran out. Balfour Beatty then changed its argument to state that after the dates in the schedule had run out, the dates in the Scheme for Construction Contracts applied.

Decision

The first instance court considered all of those arguments (and more) and came to the conclusion that the parties had agreed a specific schedule of dates, so those dates (and only those dates) were the dates to be used. That means that Balfour Beatty had no contractual right to that interim payment, and is likely to mean that it is not entitled to any future interim payments!

Balfour Beatty appealed and the Court of Appeal upheld the decision of the TCC. The Contract as amended by the schedule of valuation dates did satisfy the requirements of the Construction Act, so there was no need to import the provisions of the Scheme to add more interim payment dates.

Balfour Beatty argued that this interpretation of the contract defied commercial common sense, but that did not affect the Court of Appeal's decision – it was unwilling to depart from the clear words of the schedule of valuation dates in order to save Balfour Beatty from the consequences of its bad bargain.

Key advice

The key advice to take away from this case to avoid having to have these sorts of expensive arguments is to make sure that when signing up to a contract you do not agree to a payment schedule. If you have no option but to agree a payment schedule you must:

- Ensure that the dates in the payment schedule cover a sufficient period so that you will still be entitled to payment, even if the work overruns by a long time; or
- Ensure that the contract states what will happen after the dates in the payment schedule run out. For example, it might contain default monthly dates for the due date, final date for payment, and the dates for payment notices and pay less notices.

Whilst there is additional detail in the judgment that gives loopholes that may not mean that all such schedules are interpreted in the same way, prevention is always better than cure – it is far and away the best course of action to ensure that your contract is clear and accurately reflects the agreement that you have made and what you intend to happen.

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