Court of Appeal confirms that the Construction Act will not step in following expiry of the dates in a payment schedule.

In Balfour Beatty Regional Construction Ltd v Grove Developments Ltd [2016] EWCA, the Court of Appeal upheld the TCC’s decision that, after the dates in the agreed payment schedule expired, the Contractor was not entitled to submit further applications for payment. It is therefore very important to ensure that any payment mechanism is flexible enough to allow continuing payments after the dates have expired.

Key Facts

Grove Developments Ltd (the “Employer”) and Balfour Beatty Regional Construction Ltd (the “Contractor”) entered into a JCT Design and Build Contract 2011 Edition with amendments (the “Contract”) on 11 July 2013 for the design and construction of a hotel and apartments in south east London. Clause 4 of the Contract provided that "Interim Payments shall be made by the Employer to the Contractor in accordance with section 4 and whichever of Alternative A (Stage Payments) or Alternative B (Periodic Payments) is stated in the Contract Particulars to apply."

Initially the parties agreed that payment Alternative A (Stage Payments) was to apply and that they would agree the relevant stages within two weeks from the date of the contract. However, they were unable to do so and instead agreed that the Employer would make interim payments to the Contractor in accordance with a schedule outlined in an email sent by the Contractor to the Employer on the 30 September 2013 (the “Email”). The schedule provided for
23 interim payments to be made up to 16 July 2015 (the "Schedule"). The project was due to be completed on 22 July 2015.

It became apparent in May 2015 that the project was going to overrun substantially. However, the parties were unable to agree how the mechanism for interim payments would operate after July 2015.

On 21 August 2015 the Contractor issued an Application (Application 24). The Employer issued a payment notice in respect of Application 24 on 28 August 2015 and a Pay Less notice on 15 September 2015. The Pay Less notice stated that £439,503 was due to the Contractor after deducting £2 million from the sums claimed in respect of an extra-contractual payment. On 18th September the Employer paid £439,503.

The Contractor demanded payment of the sums claimed in Application No. 24, arguing that a term should be implied into the Contract that interim payments continued past the 23rd valuation date and/or that that s.109(1) of the Housing Grants, Construction and Regeneration Act 1996 (the "Act") should be interpreted as requiring that all work under a construction contract lasting 45 days or more gives rise to an entitlement to interim payments. In other words, the Contractor claimed that it was entitled to interim payments in accordance with the Scheme for Construction Contracts because the contract was for works lasting longer than 45 days.

The Employer argued that the Contractor was not entitled to issue any interim applications beyond the 23rd application included payment schedule or to receive continued interim payments, and therefore Application No. 24 was ineffective.

Technology and Construction Court ("TCC") Decision

The court held that the Contractor had no contractual right to be paid for any interim payment application beyond the 23rd application.

This was on the basis that a future payment provision could not be implied into the Contract as this was something which the parties could have negotiated prior to agreeing to the original payment schedule. In addition, the payment procedures in the Scheme for Construction Contracts 1998 could not apply as the parties had already agreed a schedule pursuant to which payments would be made.

“...In other words, the Contractor claimed that it was entitled to interim payments in accordance with the Scheme for Construction Contracts because the contract was for works lasting longer than 45 days.

"
Court of Appeal

The Contractor appealed to the Court of Appeal on three grounds:

1. the Schedule expressly or impliedly provided for continuing payments from August 2015 to the date of practical completion;

2. the Contract as amended by the Schedule did not comply with the Act. The Scheme therefore entitled the Contractor to monthly interim payments between August 2015 and practical completion; and

3. the parties’ correspondence and conduct gave rise to a new contract under which the Contractor was entitled to monthly interim payments.

The Court of Appeal dismissed the appeal. The Contractor would therefore not be entitled to further payment until the final account.

Continuing Payments

The Court concluded that the parties had agreed in the Schedule that the Contractor was only entitled to 23 interim valuations.

It was common ground that by agreeing to the Schedule the parties had abandoned Alternative A. Instead of adopting Alternative B, a hybrid arrangement was agreed which had elements of Alternative B and a timetable of their own invention which ended on 22 July 2015. Thereafter there was no agreement as to whether or how they would deal with interim payments. It was impossible to deduce from the hybrid arrangement the dates for valuations, Payment Notices, Payless Notices and payments after July 2015.

The majority referred to Arnold v Britton [2015] UKSC 36; [2015], which provides that the courts will only have regard to commercial common sense in interpreting a contract if the natural meaning of words used is unclear. The express words made it clear that the parties were only agreeing a regime of interim payments up to the contractual date for practical completion. Neither the Email nor the Schedule made provision for interim payments after July 2015. Accordingly, there was no ambiguity so the Court could not reinterpret the parties' contract in accordance with "commercial common sense".
Scheme

Under section 109 of the Act if the duration of the work is more than 45 days a party is entitled to instalment, stage or periodic payments “for any work”. The Court considered that this did not mean “every single piece of work”. The parties had agreed a regime for interim payments which complied with the Act.

Correspondence

The Court concluded that there had not been any agreement for monthly interim payments from the parties' conduct or correspondence. Although the parties had served notices on the assumption that interim payments were due between August and November 2015, they did not agree the application dates. It was impossible to derive any fresh agreement between the parties from their conduct or correspondence.

Practical Considerations

Payment schedules are commonly attached to construction contracts and they often do not anticipate how the process will continue after the specified dates. This case confirms that the Courts may not step in and re-write a contract in order to provide for continuing payments and rescue a party from a “bad bargain”. Only if there is ambiguity based on the natural meaning of the words will they do so.

It is vital therefore to ensure that the payment mechanism under any contract “works” and also takes into account the possibility of delay and disruption. If any payment schedule does outline specific dates for applications then it should clearly state how the payment cycle will continue after those dates have passed.

This decision also confirms following a run of recent cases that the courts will not allow a party to rely on the Act and/or the Scheme lightly; one will not be entitled to interim payments for every piece of work carried out if they have failed to agree a sufficient payment mechanism.

January 2017

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