

No Entitlement to Payment After Agreed Payment Schedule has Expired



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The Technology and Construction Court (“TCC”) in the recent case of *Grove Developments Limited –v- Balfour Beatty Regional Construction Limited [2016] EWHC 168 (TCC)* looked at whether or not a contractor was entitled to interim payments for works carried out after an agreed payment schedule between the parties had expired.

The parties entered into a JCT D&B Contract 2011 (DB11), with amendments from the Employer. The works were for the design and construction of hotel and serviced accommodation beside the O2 Complex in London. The contract value was in the region of £121m. Works began in July 2013 and were to be completed by July 2015.

The parties had agreed there would be stage payments in accordance with Alternative A of the JCT DB11. These stage payments stated that there would be 23 no. payments throughout the duration of the contract, between July 2013 and July 2015 when the works were to be completed. On 21 August 2015, one month *after* the works were to have been completed, the Contractor issued an interim application, for Payment No. 24. This application was valued by the Contractor in the region of £23 million and made pursuant to the payment regime under the Housing Grants, Construction Regeneration Act 1996 (“*the Act*”). Grove Developments (“Grove”) responded to Balfour Beatty stating that they had no contractual right to issue Interim Application 24, and that the payment regime under the Act was irrelevant as the Contract has established a mechanism and dates for payments. In any event, Grove also argued that a valid payless notice had been issued.

Balfour Beatty commenced adjudication proceedings and in January 2016 the Adjudicator issued his decision stating that Grove should pay Balfour Beatty a further £2 million, in addition to the sums already paid, thus approving payment Application No. 24.

However, in December 2015, whilst the adjudication was still on-going, Grove started Part 8 Proceedings in the High Court. Part 8 proceedings are for declaratory relief, and in this instance Grove sought the Court’s determination that Balfour Beatty had no right to be paid for Application No. 24 as the parties had already agreed under contract that there would be only 23 staged payments throughout the duration of the Contract.

In making his decision Stuart-Smith J referred to the Act, which provides the statutory payment regime that applies to construction contracts. This is read in conjunction with Part 2 of the Scheme for Construction Contracts (England and Wales) Regulations 1998.

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Sections 109 – 110 of the Act state that 1) there is an entitlement to stage payments and 2) that there must be an adequate mechanism for determining when these stage payments would apply. Stuart-Smith J considered recent case law, including his own judgement in *Yuanda*, stating that if there are existing contractual arrangements that are capable of coexisting with the Scheme, being that there are adequate provisions for interim stage payments, then it is unnecessary to import the Scheme's payment provision as a whole. This is what Balfour Beatty was attempting to do for payment application No. 24.

Ultimately, Stuart-Smith J concluded that as the parties had agreed to the interim staged payments, as well as the amounts of each interim payment, the fact that the agreement did not provide for interim payments covering work taking place **after** the stage payments, was not enough to import the Scheme's payment provisions to supplement the agreement already in place. Essentially this would have created a contract with two payment regimes, a contractual and a statutory one existing parallel with each other.

The lessons to learn from this decision are two-fold. First contractors must ensure they understand the payment terms and schedule for payments they sign up to. Second, if there is a specific schedule of interim payments agreed at the outset of the contract, contractors will need to ensure that where work is carried out after the stage payments expire, there exist provisions to apply for additional payments. From a strict interpretation of the Court's decision, which some may consider harsh, the contractor shall have no contractual right to apply for further payments for work carried out after agreed interim stage payments have expired until the final payment mechanism kicks in after practical completion. Even though the Grove failed to include such a provision, this was not enough to allow the Contractor to import the Scheme's payment provisions to supplement what had been fairly and adequately agreed.

This decision ultimately highlights the importance and need for contractors to be diligent and clear in their understanding when agreeing to scheduled stage payments, as well as the requirement for them to have an agreed mechanism for additional payments whenever work is carried out beyond the agreed Schedule.

Main contractors must be aware when agreeing to staged payment schedules, as if these payment terms are not imposed downstream to subcontractors and supply chains, main contractors will stand to be exposed and at extreme risk of cash flow irregularity.



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