

Payment schedules and cash flow - up the creek without a paddle



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I'm going to air some thoughts surrounding the importance of accurate contractual payment schedules. Why? Well because failure to ensure that you have a payment schedule which covers the length of the project can land you in some seriously hot water and may even stop interim payments for the remainder of the project. A potential cash flow nightmare!

So, to get our bearings, let's be clear on what I'm referring to. The payment schedules in question are those between a payer and payee (a contractor and their sub-contractor for example) that identify due dates and final dates for payment which are relevant to payment notices, when interim payments are made and how much for.

I won't ask for a show of hands but I suspect that some would admit to believing that, although the payment schedule is useful for providing clarity and making sure everybody knows the key dates, it probably isn't that important. Unfortunately, that's not the view of the courts.

I have often seen people using a payment schedule they have borrowed from the last job they worked on and just amended it slightly, if at all (probably the ones that didn't admit to thinking the schedule unimportant). Or if commencement or access dates are delayed they may not amend the payment schedule to suit the delays to the works. So if the discovery of a bat roost caused a six month delay on a project, the due dates and final dates for payment will just be pushed forward 6 months, right? If the due date on the schedule was 25th of each month and the last due date was 25th of March but the job carries on, well then it's obvious that the next due date will be 25th of April, then May and so on until practical completion is achieved...isn't it? If common sense aligned with the law, maybe. Alas, that is not always the way of things.

In the recent judgment from the Court of Appeal in *Grove Developments Limited v Balfour Beatty Regional Construction Ltd* the court chose not to reverse the Technology and Construction Court's decision that a payee is only entitled to interim payments for the length of time that the payment schedule covers, unless there are separate contract clauses that provide for continuing interim payments.

If the dates on the payment schedule expire a certain way through a project (it was after 23 interim payments in the *Grove* case) but the work is still ongoing, that may just mean tough luck and no more money until the final account. It won't matter whose fault it is that work is ongoing, whether an extension of time has been granted, or anything else that make it seem unfair or unreasonable. If you get to the end of the payment schedule, then, absent express contractual clauses to the contrary, the interim payments stop. It really is as black and white as that.

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The decision surprised many people, me included. Especially given that the rights to interim payments are underpinned by the Construction Act which was brought in to assist with issues like cash flow.

That said, Judges are being consistent. There is a lot of case law on payment notice adjudications and the courts have made it clear that in view of how onerous the payment notices can be that they will adopt a narrow interpretation of relevant words and documents. If the wording in a contract is clear and unambiguous, the courts are not going to protect a particular party from a bad bargain or to determine what is fair will typically enforce it.

So what does this mean for payees if a job overruns?

The extent of the potential effects came in to sharp focus me at a recent meeting. My client is engaging sub-contractors on a four-year multi-million pound project and I was asked to review the draft contracts. The payment schedule only covered up to the end of 2017 and there were no contractual clauses permitting further interim payments. One sub-contractor has already reviewed the terms and fed back comments, but did not notice that they would not be entitled to interim payments for the final three years of the project. Enough to sink many firms.

In the balanced style of the BBC, I should mention that my client volunteered this to the sub-contractor and amended it themselves. Partly to provide a happy ending to the tale, but also because I don't want to upset them and lose the work.

Ensuring a payment schedule extends way beyond the scheduled completion of a project is of course sensible. The surest way to protect against being starved of interim payments is to ensure there is a contractual clause providing for interim payment dates beyond the payment schedule, even if the job carries on longer than was originally anticipated.

The provision doesn't have to be anything too detailed or fancy, it just needs to clear up any ambiguity should a dispute ever arise. One paragraph or so would do the trick

So if you are a payee you will hopefully have started to realise the true importance of the payment schedule. If you fail to ensure that the payment schedule properly covers the possible entire duration of the job then you could find yourself stuck up the creek without a paddle.

