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PERIODIC PAYMENTS A FLEXIBLE FRIEND

Earlier today, the Court of Appeal issued its judgment in the case of *Grove Developments Limited v Balfour Beatty Regional Construction Ltd.*

For the first time, the Court of Appeal has considered whether irregular periodic payments which do not cover the whole of the works satisfy the statutory payment requirements of the Housing Grants, Construction and Regeneration Act 1996 (as amended) (the Construction Act). The decision, therefore, provides important guidance for employers and contractors, and those advising on or administering the terms of building contracts containing periodic payment provisions.

The Court of Appeal upheld the first instance decision of the Technology and Construction Court (TCC) and dismissed the appeal brought by the contractor, Balfour Beatty Regional Construction Ltd (Balfour Beatty).

Macfarlanes acted for the successful employer, Grove Developments Limited (Grove Developments).

KEY POINTS

- ◆ The Construction Act does **not** require employers and contractors to agree a regime of **interim** payments covering the **whole** of the work which the contractor performs. A payment regime comprising monthly payments until the originally anticipated date of practical completion, therefore, complied with the Construction Act. This means that Balfour Beatty is not entitled to any interim payments after the originally anticipated date of practical completion, regardless of whether or not it is responsible for the substantial delay in the completion of the works.
- ◆ The Construction Act allows parties to agree among themselves the intervals between interim payments and the amounts of interim payments. However, a payment regime consisting of one interim payment of an insignificant amount would probably not comply with the Construction Act as it would constitute a "cynical device" designed to undermine the aims of the Construction Act.
- ◆ Where wording in a contract is clear and unambiguous, the court will not save a party from a bad bargain. The court will give the words their natural meaning, and will not consider whether the words are consistent with commercial common sense.

THE DECISIONS

In 2013, Grove Developments engaged Balfour Beatty as the contractor to design and build a hotel together with serviced apartments in south east London under a JCT Design and Build Contract, 2011 edition.

Following negotiations the parties agreed a bespoke schedule providing for 23 monthly interim payments up to July 2015 (which was the anticipated practical completion date) (the Agreed Schedule). The Agreed Schedule replaced both "standard" JCT payment options (Alternative A (stage payments) and Alternative B (periodic payments)). The project did not, in fact, achieve practical completion until July 2016.

The TCC was asked to consider whether the contractor was entitled to interim payments after July 2015 (i.e. the last date in the Agreed Schedule).

The TCC decided that:

- ◆ Balfour Beatty is not entitled to any further interim payments after July 2015;
- ◆ the Agreed Schedule provided for payments up until July 2015 and nothing more;
- ◆ although the Construction Act requires parties to agree an interim payment regime, it also allows parties the freedom to agree the intervals at which interim payments must be made and the amounts which must be paid; and
- ◆ as a result, Balfour Beatty is not entitled to any further payments until the completion of the final account process, which could result in no payments being made for a period of two to three years.

The Court of Appeal (by a 2:1 majority) upheld the decision of the TCC.

POINTS OF NOTE FROM THE COURT OF APPEAL JUDGMENT

- ◆ S. 109 Construction Act says that “*A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless ...*” the works are to last less than 45 days. S. 109 also says that “*The parties are free to agree the amounts of the payments and the intervals at which, or the circumstances in which, they become due.*” Like the TCC, the Court of Appeal interpreted this provision widely, stating that it simply means that work done under construction contracts shall (except in very short projects) be subject to a regime of interim payments. However, the intervals between interim payments and the amounts of the interim payments is a matter for the parties to agree.
- ◆ The Court of Appeal **doubted** (although this remains open for debate) whether a “cynical device” prescribing one interim payment of an insignificant amount would comply with the Construction Act.
- ◆ Following recent judgments, the Court of Appeal held that where the language used in a contract is clear, a court will not consider whether the language makes commercial common sense – even if it is a significantly bad bargain for one party.

TAKE AWAY POINT

Employers and contractors should take a great deal of care when finalising the wording of payment provisions in building contracts. This is because:

- ◆ the courts are extremely reluctant to save parties from bad bargains by applying their own views of commercial common sense;
- ◆ the Construction Act requirement for interim payments will rarely save parties from bad bargains; and
- ◆ if the parties have different views about what the words they have used were intended to mean, time consuming and expensive disputes are inevitable.

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