

# CONSTRUCTION : BULLETIN

## Payment Schedules – Run Out of Dates and You May Run Out of Payments!



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It is a classic scenario; a schedule of interim payment dates is drawn up, but the works continue beyond the last date in the schedule – what is the remedy? The recent case of *Grove Developments Ltd v Balfour Beatty Regional Construction Ltd* explains what happens. The results could have serious consequences for contractors and sub-contractors and is likely to have many people rushing to look at their contracts!

### Background

Grove Developments Ltd (“GDL”) employed Balfour Beatty Regional Construction Ltd (“BB”) to design and construct a hotel and serviced apartments pursuant to a JCT Design and Build Contract 2011 with bespoke amendments. The Date for Completion was 22 July 2015.

### The contract

In the Contract Particulars, “Option A – Stage Payments” was selected, but the space to insert a brief description of the stages and the cumulative value was left blank. Instead, the words “*To be agreed within 2 weeks from date of contract*” had been inserted.

In fact, stage payments were not agreed. Instead, the parties agreed a schedule of 23 valuation and payment dates, which covered the period from September 2013 to July 2015 (the “Schedule”). The Schedule was titled “*...Interim Valuation/Payment Dates 2013-2015/Valuation Application on Third Thursday of the month*”.

The payment provisions of the contract were amended so that a Pay Less Notice could be given no later than 3 days before the final date for payment.

### The dispute

On 21 August 2015 (after the expiry of the final date in the Schedule), BB issued a further application for interim payment for £23m (“IA24”). On 28 August 2015, GDL served a Payment Notice and then on 15 September 2015 it issued a Pay Less Notice for the sum of £440,000, which it paid on 18 September 2015.

On 30 September 2015, BB wrote to GDL and argued that in the absence of any further dates in the Schedule, the correct approach was to revert to the terms of the JCT contract and to supplement its provisions with the Housing Grants, Construction and Regeneration Act 1996 (the “Act”) and the Scheme for Construction Contracts (the “Scheme”). On BB’s analysis, the due date for payment in respect of IA24 was 21 August 2015, the last date by which GDL could give a Payment Notice was 26 August 2015 and the last date by which GDL could give a Pay Less Notice was 4 September 2015. BB therefore contended that GDL’s Payment Notice and Pay Less Notice had both been given out of time.

BB started an adjudication on this basis and the adjudicator found in BB’s favour, deciding that GDL was to pay BB a further £2m on top of the £440,000 GDL had already paid.

Shortly after commencement of the adjudication, GDL started court proceedings to obtain a declaration that BB had no contractual right to make any further claim for payment once the payment dates in the Schedule had expired.

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## To what extent does the Scheme apply?

Section 109 of the Act provides that a party to a construction contract is entitled to payment by instalments, stage payments or other period payments, unless the contract is for less than 45 days. If the parties do not agree the amounts of the payments and the intervals at which, or circumstances in which, they become due, the Scheme will apply. However, the Scheme is not incorporated into a contract as a whole unless the contract entirely fails to include a compliant payment procedure. Where the contract complies partially with the Act, the “provisions of the Scheme as to Payment will only be imported and apply so as to govern the legal relations of the parties to the extent that they have not already concluded binding contractual arrangements that can remain operative.”

BB argued that s109(1) of 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, BB was entitled to interim payments for all of its works as the contract was for works lasting longer than 45 days. The court disagreed, stating that “this would be a draconian restriction on the freedom of commercial parties to contract on terms of their choosing”. It is for the parties to agree stage payments by reference to whatever stages and amounts they see fit. For example, if the parties wish to agree a single stage payment during the course of a project, that is their choice.

The court added “the mere fact that the agreement does not provide for interim payments covering all of the work under the contract is no reason to import the provisions of the Scheme to supplement their agreement so as to generate interim payments covering all the work that their agreement does not cover”. Put simply, a contract that only provides for one interim payment, or in this case, 23 interim payments, will comply with the Act even if there are periods during which the contractor is doing work and not receiving interim payments.

## Did BB have a contractual right to make and to be paid in respect of IA24 or any subsequent application?

Despite what was stated in the contract, the parties had not agreed “Alternative A – Stage Payments” and had instead entered into an agreement for periodic payments by agreeing the Schedule. The effect of this was to act as an amendment to the JCT contract. The court stated “the parties’ agreement was clear and provided for 23 interim payments on the dates set out in the agreed Schedule and no more... By the agreed Schedule, read in conjunction with the surviving terms of the contract, the parties agreed the intervals at which payments would become due and identified the mechanism (i.e. submission of valuations, payment certificates and so on) by which the amounts were to be calculated”. The provisions of the Scheme did not need to be implied into the contract at all.

BB tried to argue that the inclusion of the words “Valuation Application on Third Thursday of the Month” in the title of the Schedule meant that valuations 1-23 were no more than examples and the true meaning of the Schedule was that it continued on beyond the last stated valuation date. The court disagreed with this argument, stating that it was “an impossible submission given the specificity of the rest of the agreed Schedule which, on its proper construction, was a list of all the interim payments that were agreed”.

BB’s final argument was that a term should be implied into the contract that the interim payments continued past the 23<sup>rd</sup> valuation date. The court found that implying such a term would be inconsistent with the express terms of the Schedule. Furthermore, there was no basis to imply such a term. The court rejected BB’s argument that it would be contrary to commercial common sense for payments to cease before the completion of the works, stating that it would have been foreseeable that the works might be delayed and the payment dates could expire. It was a mistake on BB’s part that BB had failed to negotiate payment terms which would protect it

against the risk of the works overrunning.

In conclusion, the court found that BB had no contractual right to make or be paid in respect of IA 24, or indeed any subsequent application for the remainder of the works.

## Analysis

This case demonstrates that if you agree to a payment schedule in your contract, it is **essential** to make provision for what will happen if the dates in the schedule expire. Failure to do so may well result in the contractor (or sub-contractor) having no further entitlement to interim payment at all. This can have disastrous consequences in terms of cash-flow.

The best way to overcome this risk is to agree a schedule of dates which continues far beyond when the works might be expected to complete. A buffer of at least another year’s worth of dates would seem to sensible. Alternatively, very clear wording would need to be added to the payment schedule to explain how further interim payments are to be calculated if the stated payment dates expire.

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