

Construction Law Update

Payment Applications – The Devil’s in the Detail

In the recent case of *RGB Plastering Ltd v TAWÉ Drylining and Plastering Ltd*, the TCC considered an application by RGB Plastering Limited (“**RGB**”) for a declaration that an application for payment submitted by TAWÉ Drylining and Plastering Limited (“**TAWÉ**”) was invalid due to it not being compliant with the subcontract.

Background

On 17 December 2018, RGB engaged TAWÉ as its drylining subcontractor for a project in Portsmouth. The subcontract incorporated a set of terms which included a mechanism for interim payment. The terms stated “*the Sub-Contractor shall submit to RGB applications for payment which accurately reflect the sums due to it on the Interim Application Date refer payment schedule...*”.

The payment schedule set out two dates relevant to each payment cycle, a date by which an application must be issued (the “**issue date**”) and a date the works must be valued up to (the “**valuation date**”). For the April 2019 payment cycle, the issue date was 28 April 2019 and the valuation date was 3 May 2019. For the May 2019 payment cycle, the issue date was 29 May 2019 and the valuation date was 2 June 2019.

The payment schedule also included a note which provided that any applications received after the 28th day of each month “*will not be considered*” and that all applications must be submitted electronically via a specific RGB email address for applications.

TAWÉ’s application

TAWÉ issued an application for payment titled ‘valuation number 6’ to RGB (the “**Application**”) which it alleged related to the May 2019 payment cycle. The Application was non-compliant with the subcontract terms because it was issued on 7 May 2019 (one week too late to form part of the April payment cycle, but 3 weeks too early to form part of the May payment cycle); it included works valued up to 30 April 2019

(which was before the specified valuation date for the April or May payment cycle); and it was not issued to the specific email address stated.

The relevant law

The TCC considered a number of cases which examined the requirements of a valid payment application. In short, an application must comply with the requirements of the contract and be properly clear as to what it purports to be, so that the parties know what to do about it and when. This includes being clear and unambiguous as to which particular month the application is for so that a reasonable recipient can understand which due date is applicable.

Parties’ positions

RGB argued that the Application was invalid due to not complying with the requirements of the subcontract and that, in any event, a reasonable recipient would have viewed it as a late April application, *not* an early May application (as TAWÉ submitted it was).

TAWÉ argued that the Application was clear and that the parties, in fact, did know what to do about the application.

Decision and Analysis

The TCC decided in favour of RGB and granted a declaration that the Application was invalid due to being non-compliant and ambiguous. This serves as yet another reminder to contractors to ensure that their payment applications are clear, unambiguous and fully comply with the detail of the contract.

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