The risk of an interim payment application being invalid

17 November 2020

Introduction

The Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009 and as subsequently amended) ("the Act") provides for a payment procedure to be included in each construction contract setting out what payments become due, when do they become due and what is their final date.

Section 110A of the Act requires a payment notice to be issued (either by the payer or the payee as the case may be) specifying the sum due at the relevant due date and the basis on which that sum is calculated.

Based on the provisions of the Act, the courts have taken the position that an interim application for payment must be clear and free from ambiguity in order for the parties to a contract to know what to do and when. The recent decision in the case of *RGB Plastering Limited v Tawe Drylining and Plastering Limited* [2020] EWHC 3028 (TCC) demonstrates that trend as shown below.

The case of RGB (decision published on 13 November 2020)

On 28 July 2020, RGB Plastering Limited ("RGB") sought a declaration from the High Court that Tawe Drylining and Plastering Limited's ("Tawe") interim payment application was invalid on the grounds of the latter not complying with the subcontract.

Tawe was RGB's drylining subcontractor for a project in Portsmouth. Following the said application RGB notified its intention to terminate the subcontract and there is ongoing litigation between the parties regarding the final account.

The interim application requirements

In accordance with the subcontract, Tawe was obliged to submit interim payment applications (paraphrasing):

i) on or before a specific date for each period ("Interim Application Date") set out in the subcontract payment schedule - the subcontractor missing the specified date, would result in its application not being considered and no amount becoming due for that period; and

ii) by email to a specified email address

A clause in the subcontract made clear that the subcontract terms and conditions would not be prejudiced or construed as amended by any purported approval, consent or waiver by RGB, and the subcontractor was to strictly comply with them.

Tawe submitted an interim payment application on 7 May 2019, later than the date set out in the payment schedule (28 April 2019), referring to a due date which did not match the payment schedule due date, and not to the specified by the subcontract email address.

Although Tawe contended that the application should be considered for the next payment cycle based on a note in the payment schedule relating to late submissions, HH Judge Jarman QC held that due to the lack of clarity as to which period the application was referring to, irrespective of being late or not, it did not comply with the payment schedule and the subcontract, and was therefore invalid.

Estoppel argument

Tawe argued that although the application was not submitted to the email address specified, the email address used was that of an RGB employee (whose witness statement Tawe sought permission to rely on but this was not granted by the judge on the grounds of late filing just 2 days before the hearing) and RGB knew or ought to reasonably have known what to do and when.

Tawe submitted that the evidence (the witness statement that was not accepted by the court), clearly demonstrated that "…*the parties acted on an assumed state of facts of law and that that assumption was shared by them*." Tawe sought to rely upon an estoppel argument which, according to the judge if permission was granted, despite the difficulties the estoppel claim could face, would not necessarily fail.

However, the judge, acknowledging that giving permission for the witness statement to be relied upon would substantially prejudice RGB's position (who was not prepared for an estoppel claim and did not have a chance to file evidence in response), decided, having regard to the overriding objective and the principles set out in *Denton v TH White Ltd* [2014] EWCA Civ 1537, that such permission would not be fair and should not be given.

Conclusion

By contrast to the approach taken with regards to payless notices issues, the courts seem to consider the contractual requirements relating to interim payment applications more strictly; this makes sense if we take into account what Akenhead J stated in paragraph 17 of his decision in the case of *Henia Investments Inc v Beck Interiors Ltd* [2015] EWHC 2433 (TCC), which is cited in the present decision:

"I consider that the document relied upon as an Interim Application must be in substance, form and intent an Interim Application… stating the sum considered by the Contractor as due at the relevant due date and it must be free from ambiguity… If there are to be potentially serious consequences flowing from it being an Interim Application, it must be clear that it is what it purports to be so that the parties know what to do about it and when."

In practice, it would seem somehow pointless for an interim application to be referred to dispute resolution; it would make more sense if it would be regarding the last payment application (as in NEC3) or application for final payment (as in JCT). However, there is a distinct exception in this case as, following the application in question, RGB notified its intention to terminate the subcontract and the parties engaged in three adjudications in relation to this matter before the present claim was issued.

It follows that contractors and subcontractors should be mindful of the requirements in the contract / subcontract conditions as regards the submission of interim payment applications, as any omission or ambiguity could render them invalid. On the other hand, clients / employers (or contractors as in the present case) should also be mindful of the risks of waiver or estoppel arising from their conduct.

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