

NO RESPITE FROM A BAD BARGAIN

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Legal Briefings

The Court of Appeal in *Grove v Balfour Beatty* (13th October 2016) refused to relieve a party to a construction contract from a bad bargain, even where this left it out of pocket for the period between the original contractual completion date and the final account. The Court also decided that nothing in the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act") prevented the parties from agreeing such terms.

GROVE V BALFOUR BEATTY

Facts

The parties had entered into a JCT Design & Build Contract 2011 version with bespoke amendments for a hotel and serviced apartments development in a contract sum of £121 million.

The parties initially contracted on Alternative A (Stage Payments) but switched to an adaptation of Alternative B (Periodic Payments) as they could not agree a list of stages. They agreed that interim payments would be made to the Contractor in accordance with a schedule running from the commencement date to the contractual completion date.

It became clear the Project was going to overrun substantially beyond the contractual completion date, but the parties could not agree on the appropriate dates for applications, valuations and payments. The Employer contended that the Contractor had no contractual right to make further interim applications and therefore no right to be paid any further sums beyond the original contractual completion date until the final account stage. This was likely to be a period of some 2-3 years.

The Decision

The Court rejected the Contractor's argument that the parties had agreed how to deal with interim payments after the original date for completion. It decided that the parties needed to know with certainty the applicable dates for valuation, payment notices, pay less notices and payments in the post completion period. The schedule provided no such information.

The Contractor also submitted that it was "commercial nonsense" to interpret the contract as the Employer contended but the Court decided "this is a classic case of one party making a bad bargain" and it would not rescue that party from the consequences of what it had clearly agreed. There was no ambiguity which would enable the Court to reinterpret the parties' contract in accordance with "commercial common sense".

The Court also rejected an argument that the 1996 Act could assist the Contractor insofar as it refers to entitlement to payment "by instalments...or other periodic payments for any work under the Contract". The Court held that this did not mean that "all" work must be subject to periodic interim payments but simply that work done under a construction contract should generally be subject to a regime of interim payments.

Consequences of this decision

The Contractor received no interim payment for work carried out between the original contractual date of completion and the final account stage, which was a substantial period. It follows that when negotiating contractual terms, consideration must be given to possible future events such as extended times of completion.

The 1996 Act did not assist the Contractor. The requirement in the 1996 Act is only for an interim payment system to be established. The detail is left to the parties, although the Court doubted, without deciding the point, that a "cynical device" such as only one interim payment of an insignificant amount could be compliant with the 1996 Act.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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