

Payment Schedule: The Courts approach to the correction of an error with the dates of the payment notice and pay less notice.

(Bouygues (UK) Limited v Febrey Structures Limited [2016] EWHC 1333 (TCC))

By Scott Milner
Regional Manager, Yorkshire & North East

So we now come to the issue of when we have a payment schedule that in the main complies with the payment requirements set out in the Housing Grants Construction and Regeneration Act 1998 Part 2 (as amended¹) ("the Act") that is, it states a due date, and dates for service of the respective payment notice, notice of intention to pay less and final date for payment; however, except for one month the dates are wrong. In these circumstances what might be the appropriate way to correct the error? One might be excused for forming the view that the relevant part of the Scheme would implied. Consider the facts and try again.

This very issue came before the court in Bouygues (UK) Limited v Febrey Structures Limited [2016] EWHC 1333 (TCC).

In March 2015, Bouygues employed Febrey to construct a concrete frame for a new building at the University of Bath. The agreement between the parties included a payment schedule. In the main, the payment schedule required a payment notice to be served within 5 days of a due date and set out the date for submission of pay less notice. And so payment appeared to run smoothly until around the end of October 2015.

At that point, the payment schedule stated:

- **Assessment date 2 November 2015**
- **Due Date 16 November 2015**
- **Payment notice by 23 November 2015**
- **Final Date for payment 23 November 2015**

- **Pay less notice 20 November 2015**



Febrey submitted an application for payment for £144,582.06 and Bouygues served a payment notice on 23 November 2015 for minus £2,041.27.

What's the issue, Bouygues had done exactly what the payment schedule required? Well, the problem is that the payment schedule contained two errors:

- **The date for the payment notice (23 November 2015) is in excess of the five days after the due date stipulated under the Act; and**
- **The date for the pay less notice (20 November 2015) was prior to the date for the payment notice.**

The Judge considered the application of the relevant parts of the Scheme:

- **by changing the payment notice to five days after the due date (which results in 21 November 2015)**
- **by changing the pay less notice to 7 days before the final date for payment (which results in a pay less notice by 16 November 2015).**
- **The final date for payment remaining at 23 November 2015**

However, the Judge appreciated that this did not work because it is not permissible to have: (a) a pay less notice date before the payment notice date; and (b) a pay less notice after the final date for payment.

Bouygues argued that the proper solution is to change both the pay less notice date and the final date for payment and make the contract compliant with the Act

¹ By the Local Democracy, Economic Development and Construction Act 2009

or, alternatively, adopt the approach taken by Edward Stewart J in *Manor Asset Limited v Demolition Services Limited* [2016]² and leave the final date for payment as it was but to treat the prescribed period for the pay less notice as nil (i.e. the pay less notice may be submitted on the same day as the final date for payment).

The Judge may have been troubled by that approach as he went onto review the dates in the payment schedule for the months preceding November 2015. He identified that in the preceding months the deadline for payment notices and the pay less notice were the same – and complied with the Act. That is, the payment notice was in five days of the due date and the pay less notice was 2 or 3 days before the final date for payment. In light of this, he could see no good reason why the parties would intend the consistent pattern of payment notice and pay less notice to be different for November 2015.

There was an obvious error in the payment schedule with respect to the November 2015 obligation. Correction would result in the date for the payment notice to be 20 November 2015 (thus five days of the due date). That being the decision, Bouygues payment notice of 23 November 2015 was late and thus ineffective.

The Judge noted that if the solution in *Manor Asset* was applied, the final date for payment remained at 23 November 2015 and the pay less notice is the same date. He was not content with that guidance because he was led by the dates in the payment schedule to construe the contract. In light of that construction, he held it is impermissible to imply a term (e.g. the relevant part of the Scheme) because to do so would be contrary to his finding on the payment schedule which was an express provision of the contract.

This case suggests that the Courts will not readily imply the relevant part of the Scheme if it gives an absurd result and is contrary to the parties' intention.

Although the catalyst of the dispute here was due to a drafting error in the payment schedule (that resulted in non-compliance with the Act) it probably did have major consequences: The payer being obliged to pay the amount stated in the application for payment in the due to a late and this ineffective payment notice.

If you want to ensure your proposed contract, or if you have doubts whether your current contract, complies with the Act, please contact us to arrange a review of the terms of the contract.

ABOUT THE AUTHOR



Scott Milner

Scott is a Chartered Quantity Surveyor and Solicitor (non-practising) and has over 25 years' professional experience and is a Member of the Royal Institution of Chartered Surveyors, and Chartered Institute of Arbitrators.

He has worked in international private practice, for major building and civil engineering contractors, international contract advice and claims consultancies, solicitors and as a commercial director and as a practicing solicitor (legal counsel) for an international engineering and decommissioning contractor.

Scott provides contractual advice; training; calculation, review and assessment of quantum; representation in ADR (having acted in excess of 130 adjudications).

² EWHC 222 (TCC) at paragraph 71