

# WATCH OUT FOR DECEPTIVE PAYMENT SCHEDULES!

In M&E construction contracts (excluding direct to homeowner, supply-only or labour-only) invariably the Construction Act applies setting out a mandatory framework for how the payment system should operate. This gives rise to a system of dates and notices for communicating amounts due and the basis for their calculation.

To alleviate the need for complex drafting more and more parties annex a schedule of payment mapping out in a tabular format the dates under the legislation and the responsibilities for each party under each date.

MONTH	APPLICATION	DUE DATE	PAYMENT NOTICE	PAY LESS NOTICE	FINAL DATE
1					
2					
3					
4					
5					
6					

However, the question of when and if completion dates are delayed, what happens to the payment dates beyond the schedule has been opened up by the courts.

For instance, if something in the project causes a delay in the works for the next 3 months, it would be easy to assume, and generally industry always have done, that the due dates and the final dates for interim payments during the extended period for completion will have to be replicated during the 3-month extension to the contract.

Wrong - the key case mentioned below is showing us the dark side to these things.

In *Balfour Beatty Regional Limited v Grove Developments Limited* [2016] the ultimate question was:

The decision in this case appears to be very strict as the court approached it on the basis of 'what was agreed' between the

What happens if the works are delayed and neither the schedule nor the contract specifies an agreed system for when payments should be made once the completion date has passed but the works are continuing?

parties. The issue in fact was that the parties agreed their payment scheme in the contract but did not expressly contractually agree a provision for further payments, and the works became delayed.

The court ruled that the contractor was entitled only to those payments set out in the agreed scheme and were given no right to make any further applications for interim payments regardless of the ongoing works. Evidently, the effect of this case places huge pressure on most Contractors who are already struggling financially due to late completion.

In practice, the payment provisions specified in the Act should provide transparency to the payment, however if in seeking to bring clarity within a commonly used payment schedule and not contractually mentioning what happens if the works get delayed, the parties will be contractually depriving the contractor from any money during the period of contractual extension.

Following the judgement of the above case and the issue of lack of provisions in the Act in relation to delay, it is sensible for the parties to review the contract terms to ensure the payment provisions are clearly set out and agreed, and to include provisions that stipulate where a schedule is employed to map out the requisite dates, the timeframe employed in that table will continue during the period of any extension to the contract.

A clause along the following lines may be worthwhile being included to protect your position as a contractor and ensure that if the contract is extended for any reason, you are entitled to continue to receive interim payments right up until practical completion:

Should the period for completion of the Sub-Contract Works be extended hereunder, the periodic cycle of dates for payment outlined in the Payment Schedule will continue on the same interim payment periodic cycle until practical completion of the Sub-Contract Works occurs.