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The construction & energy law specialists

Why Applications for Payment really do have to be correct

by Jon Miller

Introduction

1. We are all familiar with "smash and grab" adjudications where, in the absence of a Payment Notice and a Pay Less Notice, the sum applied for has to be paid. The recent High Court case of RGB Pla*stering Limited v Tawe Drylining and Plastering Limited*[1] emphasises the need to ensure that an application strictly complies with the underlying contract, even if it requires an application to be sent to a particular email address.

The payment terms

2. Tawe Drylining entered into a Subcontract with RGB with the usual provisions for interim applications to be made, but with some quite specific requirements.

2.1 Applications were to be issued on the 28th day of the month, but were to value the Subcontract Works up to a different date – the "Valuation Date".

2.2 Applications received after the 28th of each month were to be "administered" with the following month's payments.

2.3 All Applications had to be submitted to a specific email address.

Interim Application 6

3. Interim Application 6 was sent two days late, did not value the Works on the correct "Valuation Date" and was not sent to the required email address. Shortly after Interim Application 6 was received, RGB terminated the Subcontract.

4. Tawe Drylining pointed out that:

4.1 Interim Application 6 was sent using the pro forma template that had been used for previous interim applications – it was clearly in their view an application for payment.

4.2 Interim Application 6 may have been late, but it should have been "administered" as part of the following month's payments.

4.3 Previous applications had been submitted late, but were paid.

4.4 Whilst the Application had not been sent to the email address required by the Subcontract, it was, however, sent by email to RGB's employees who had dealt with previous interim applications.

1. HT-2020-CDF-000012

The need to comply strictly with the Contract

5. The Court took into account the fact that Interim Application 6 used the template that had been used for previous applications. When considering whether an application should be paid as a result of the failure to issue a Payment Notice and Pay Less Notice, the Court referred to an earlier case which held that *"the document relied upon as an Interim Application must be in substance, form and intent an Interim Application ... and it must be free from ambiguity..."*[2]. However, whilst Interim Application 6 did indeed appear to be an application for payment, it still had to comply with the Subcontract.

6. Turning to the points raised by RGB the Court held that:

6.1 Interim Application 6 had been sent late. Under the Subcontract it was to be "administered" as part of the following month's payments. Being "administered" did not mean that it would automatically be paid as part of the next month's payment cycle. The Subcontract terms would still apply and RGB were still entitled to examine the Application, and decide if it was to be paid.

6.2 Interim Application 6 valued the work up to the wrong date – it did not value the Subcontract Works up to the Valuation Date required for the month in which it was issued, or the following month.

6.3 Whilst it may have been sent by email to the RGB employees who dealt with payments, it had not been sent to the specified email address.

7. Taking all of these points into consideration the Court held that Interim Application 6 did not comply with the Subcontract, and was therefore a nullity. It turned out Interim Application 6 was not an Application at all and any attempt to "smash and grab" recover monies based on this document was bound to fail.

Previous Conduct

8. Tawe Drylining pointed out that previous Applications that were issued late, sent to the same email addresses, had been paid. As is often the case, Tawe Drylining sought to argue that RGB were prevented (i.e. "estopped") by their conduct from denying that Interim Application 6 was a bona fide application in accordance with the Subcontract.

   However, Tawe Drylining's witness statement dealing with this point was submitted very late – and accordingly the Court refused to consider this evidence.

Conclusion

9. The RGB Plastering case emphasises the need for Applications, particularly when trying to instigate payment via a "smash and grab" adjudication, to comply with all the terms of the Subcontract. Here, sending the Application late, valuing the Subcontract Works up to the wrong date and dispatching the Application to the wrong email address, all led to the Court holding that it was not in fact an Application at all.

   Following this logic it may encourage some payers to simply reject applications on the basis that they do not comply with even trivial terms of the underlying agreement – the onus is clearly on those seeking to recover funds to make sure they comply with the contract.

2. Henia Investments Inc v Beck Interiors Ltd [2015] EWHC 2433