



## Time, delay and liquidated damages

by Nicholas Gould, Partner

### 1 Introduction

- 1.1 Time;
- 1.2 Money; and
- 1.3 Possession.

### 2 Commencement and Completion

- 2.1 The obligation to complete.
- 2.2 Reasonable time.
- 2.3 Is the date for completion binding?
  - 2.3.1 Acts of prevention; and
  - 2.3.2 Extensions of time.
- 2.4 Time is not of the essence.
  - 2.4.1 Time being of the essence means that a contractual provision is a condition (not a warranty or an innominate term).
  - 2.4.2 Forfeiture would be particularly harsh for a contractor, see *United Scientific Holdings v Burnley Council* [1978] AC 904 HL and *Bunge Cork v Trade SEA* [1981] 1 WLR 711 HL.
- 2.5 Generally time will be of essence if:
  - 2.5.1 The contract states that a condition must be precisely complied with; or
  - 2.5.2 There are surrounding circumstances of the contract are such that time must be of the essence.
- 2.6 Time can have been made of the essence (*Richards (Charles) v Oppenheim* [1950] 1 KB 616 CA).
- 2.7 Preserving the right to liquidated damages (*Peak Construction (Liverpool) v McKinney Foundations* (1971) 1 BLR 111 CA).
- 2.8 Advantage of extension of time provisions;
  - 2.8.1 Employer preserves right to liquidated damages;
  - 2.8.2 Contractor is relieved of liquidated damages, but can claim additional costs associated with delays; and
  - 2.8.3 Neither party is in breach of contract.

### 3 The obligation to progress and programme the works

- 3.1 The obligation to commence the works and to complete the works on specific dates. This is in reality a benefit to the contractor rather than just an obligation (see *Wells v Army & Navy Cooperative Society* (1902) 86 LT 764, where Vaughan Williams LJ stated “to my mind that limitation of time is clearly intended, not only as an obligation, but as a benefit to the builder ...”).
- 3.2 Business efficacy may require an implied term to the effect that the contractor is to proceed with “reasonable diligence” and also with momentum and reasonable progress during the contract period. How the contractor organises himself is however a matter for him.
- 3.3 There is no general implication to execute the works to an absolute standard simply to expedite and with a reasonable diligence. Neither is there a requirement to complete by key dates, unless those dates are expressly contractual (*GLC v Cleveland Bridge and Engineering* (1984) 34 BLR 50).
- 3.4 Temporary non-conformity. In other words, slowness that does not result in a delay to complete the work on time is unlikely to be a breach of contract.
- 3.5 The employer has a duty not to prevent the contractor completing the work (see *London Borough of Merton v Leach (Stanley Hugh) Ltd* 1985 32 BLR 51) but this obligation does not go as requiring the employer to support early completion by the contractor (see *Glenlion Construction v The Guinness Trust* (1987) 39 BLR 89). *Glenlion* supports the argument that under English law the employer owns the float rather than the contractor.

### 4 Completion

- 4.1 Completion perhaps really does mean entire completion. See the slightly different approaches of Salmon LJ and Lord Dilhorne in *Westminster County Council v Jarvis & Sons Limited* in Court of Appeal [1969] 3 All ER 1025 and then the *House of Lords* [1970] 1 All ER 942.
- 4.2 Most Tribunals take a pragmatic view.
- 4.3 Construction contracts refer to substantial completion, practical completion, although rarely are these terms ever defined.
- 4.4 Partial possession.
- 4.5 Sectional completion.

### 5 Extension of time provisions

- 5.1 Construed strictly *contra proferentem*.
- 5.2 Contractual logic of such a provision was considered in the House of Lords case of *Percy Bilton Limited v Greater London Council* [1982] WLR 794 HL as follows:
  - 5.2.1 The general rule is that the main contractor must complete the work by the date for completion. If not he is liable for liquidated damages;

- 5.2.2 The exception to the payment of liquidating damages is if the employer prevents the main contractor from completing his work (see *Holme v Guppy* (1838) 2 N&W 387; *Wells v Army & Navy Cooperative Society Limited* (1902) 86 LT 764); and
- 5.2.3 The general rules may be amended by the express terms of the contract.
- 5.3 The risks are therefore allocated between the parties by the particular express terms of the contract.
- 5.4 If completion takes place after the agreed date for completion then the contractor is liable for liquidated damages unless:
  - 5.4.1 Time is “at large” because of a delay caused by the employer and there remains some period of culpable delay; or
  - 5.4.2 The delay is caused by some event for which an extension of time is available (regardless of whether that event could amount to an act of prevention or a breach by the employer).
- 5.5 Clear drafting is required.
  - 5.5.1 General wording will not be sufficient. For example, “other special circumstances” is insufficient (*Peak Construction (Liverpool) v McKinney Foundations*); and
  - 5.5.2 The extension of time might need to be awarded before the completion date, unless the contract provides otherwise (*Amalgamated Building Contractors v Waltham Holy Cross UDC* [1952] 2 All ER 452 CA).

## 6 Notices and Conditions Precedent

- 6.1 The requirement for the serving of notices is usually only directory not mandatory (*Temloc Limited v Erril Properties Limited* (1987) 39 BLR 30 CA).
- 6.2 The requirements for a condition precedent under English law were established in *Bremer Handelgesellschaft mbH v Vanden Avenue Izegem PVBA* [1978] 2 Lloyd’s Rep 109, HL:
  - 6.2.1 Precise and clear timetables must be identifiable; and
  - 6.2.2 The result of missing the timetable is clearly spelt out.
- 6.3 Can a condition precedent in a building contract remove a right to an extension of time, additional costs associated with that right, and perhaps even lead to liquidated damages?
  - 6.3.1 *City Inn v Shepherd Construction Limited* [2003] Scot CS 146. In this case non compliance with the condition precedent removed the right of the contractor to an entitlement of an extension of time. As a result liability for liquidated damages arose. On appeal the point was confirmed although the strict requirement had in that case been waived;
  - 6.3.2 *Gaymark Investments Pty the Walter Construction Group Limited* [1999] NTSC 143; and

**6.3.3** *Multiplex Constructions (UK) Limited v Honeywell Control Systems Limited* [2007] EWHC 447 (TCC).

**6.4** In what circumstances might the strict requirements of a condition precedent in a building contract barring a right to an extension of time be waived? In the final judgment of *City Inn v Shepherd Construction Limited* ScotCS CSOH 190 (30 Nov 2007) the judge characterised the time bar clause as an immunity clause that could be waived. The employer and architect made it clear that the contractor would not receive an extension of time, but they did not rely on or refer to the time bar clause 13.8 as the reason. The judge said that to invoke the immunity of the time bar clause it must be referred to as the reason for not granting an extension of time.

## **7 The role of the contract administrator**

**7.1** Dependent upon the drafting of the contract, but generally to consider and make decisions upon the extensions of time.

**7.2** The obligation is to consider the extension of time within a reasonable time. What is a reasonable time depends on the circumstances (*Neodox Limited v Borough of Swinton and Pendlebury* (1985) 5 BLR 38). Failure to do that can amount to a breach in itself, although what damages flow from this breach?

**7.3** If the contractor does not accept that the extension of time is correct then his remedy is against the employer. Most standard forms state that an arbitrator has the ability to “open up, review and revise” decisions or certificates. *North Regional Health Authority v Derek Crouch* [1984] QB 644 concluded that the Court did not have the power to open up, review and revise. Section 43a of the Supreme Court Act 1981 inserted by Section 100 of the Courts and Legal Services Act 1990 partially addressed this issue. The point was then reversed by the *House of Lords in Beaufort Developments (NI) Limited v Gilbert Ash (NI) Limited* [1999] 1 AC 266.

**7.4** An arbitrator (and no doubt the Court) could therefore open up, review and revise downwards an extension of time granted by the Contract Administrator if it were excessive.

## **8 The test to be applied when considering an extension of time request**

**8.1** Reference must be made to the contract, and the precise terms of the contract.

**8.2** Generally, a contractor would need to demonstrate:

**8.2.1** There was an event recognised under the contract; and

**8.2.2** That event has delayed or is likely to delay the works beyond the planned completion date.

**8.3** Roger Toulson QC in *John Barker Construction Limited v London Portman Hotel Limited* (1996) 83 BLR 31 set out the following criteria which should be considered in order to calculate a “fair and reasonable” extension of time:

**8.3.1** Apply the rules of the contract;

**8.3.2** Recognise the effects of constructive change;

- 8.3.3 Make a logical analysis, in a methodical way, of the effect of relevant events on the contractor's programme; and
- 8.3.4 Calculate objectively, rather than make an impressionist assessment of the time taken up by the relevant events.
- 8.4 FIDIC Red Book 1999 edition requires the engineers to make a "fair determination" (Clause 3.5).
- 8.5 NEC3 tries to remove discretion where possible (see the calculation for an extension of time in respect of weather in Clause 60.1(13)).

## 9 Assessing an extension of time entitlement

- 9.1 The preference to grant a provisional extension of time and then revisit after completion.
- 9.2 An objective approach is required.
- 9.3 Various methods exist including:
  - 9.3.1 Bar chart analysis;
  - 9.3.2 Retrospective critical path analysis (CPM). As planned impacted adds employer cause delays to the planned programme, while as built but for analysis subtracts employer caused delay from the as built programme;
  - 9.3.3 Windows analysis. The construction period is broken down into multiple windows, so that each segment of the contract period can be considered; and
  - 9.3.4 Snapshot analysis.

## 10 Global Claims

- 10.1 A distinction between "strike out" cases and those dealing with final judgment is critical. In other words cases can be divided into "pleadings" (the adequacy of the pleadings) and "methodology" (how is delay to be analysed) cases. Global claims mostly involve pleadings cases.
- 10.2 Definition:

"A global claim is one in which the Contractor seeks compensation for a group of Employer Risk Events but does not or cannot demonstrate a direct link between the loss incurred and the individual Employer Risk Events".
- 10.3 The pleadings cases:
  - 10.3.1 *J. Crosby & Sons Limited v. Portland Urban District Council* 5 BLR 133.
  - 10.3.2 *London Borough of Merton v. Stanley Hugh Leach Limited* 32 BLR 51;
  - 10.3.3 *Wharf Properties Limited & Anor v Eric Cumine Associates & Ors* (No. 2). [1991] 52 BLR 1 PC. It is for the plaintiff in any action to decide how to formulate his claim. However, the plaintiff had to make good their claim at this stage by identifying a clear link between each element of their

claim and each isolated amount of delay. Also, was time and money to be treated differently?

- 10.3.4 In *Mid-Glamorgan v Devonald Williams* [1991] CILL 72 Recorder Tackaberry QC preferred the notion that time and money were to be treated differently;
- 10.3.5 *Imperial Chemical Industries Plc v Bovis Construction Limited & Ors* [1992] CILL 776; 32 Con LR 90. Judge James Fox-Andrews QC struck out the scott schedule;
- 10.3.6 *GMTC Tools and Equipment v Yuasa Warwick Machinery*. 73 BLR 102; (1995) CILL 1010 CA. It was for a claimant to set out its claim in any manner that it chose, but did not overrule *ICI*;
- 10.3.7 *John Doyle Construction Limited v Laing Management (Scotland) Limited* Outer House, Court of Session; Lord MacFadyen (2002) CILL 1870; Extra Division, Inner House, Court of Session, 11 June 2004. The claim produced by John Doyle was global, but it sufficiently identified the case against the defendant and so Lord MacFadyen allowed the claim to stand, and on appeal the Extra House approved MacFadyen's approach. At trial it might be possible to show that the dominant cause was Laing's responsibility, or the losses might be apportioned.

#### 10.4 Methodology cases:

- 10.4.1 Four important points can be extracted from the Court of Appeal decision in *McAlpine v McDermot* (1992) 58 BLR 1:
  - 10.4.1.1 The claim for an extension of time was presented by considering each variation identifying how long it took to do that variation and then simply adding up the number of days to produce an overall delay. Such an approach might be referred to as a global total time claim The Court of Appeal said that this approach was insufficient. The major defect was that it was assumed that for each day spent working on a variation the completion date of the contract was also delayed for that particular day. This was entirely incorrect.
  - 10.4.1.2 In respect of additional costs, the claimant calculated the additional labour costs by reference to the tender. The claimant calculated the number of man hours allowed for in the tender. They then divided that by the number of days for each activity as originally planned. The claimant next identified the number of man hours per day for the whole of the delayed period. Once again a global total claim, in respect of costs this time. The Court of Appeal did not accept the approach. The approach assumed that the work force for any planned activity was continuously engaged in that activity from the commencement of the activity until it was complete. They considered that this approach was entirely unrealistic.

**10.4.1.3** The Court of Appeal stated that a retrospective and dissectional reconstruction of what actually happened on site was the only real acceptable approach to the proof of delay. While the original planned intent was important, it was the blow by blow deconstruction of the actual sequence of works on site that was required in order to identify actual periods of delay that could then be assigned to the liability of each of the parties.

**10.4.1.4** Finally, the Court of Appeal considered late instructions. This is sometimes referred to as the “colour of the front door” argument. In other words, if the building was completed very late by the contractor (the delay being due to the fault of the contractor), but then the employer asks for the colour of the front door to be changed, then in that scenario is the contractor entitled to an extension of time up to the point where the work is finished? The Court of appeal dismissed the approach as absurd. If a contractor is late through his own culpable fault then it would be absurd for the employer to lose his right to damages just because he orders an extra coat of paint.

## **11 Concurrent delay**

**11.1** Conceptually challenging.

**11.2** True concurrency as distinct from the wider view that concurrency exists wherever the effects of two causes of delay are having an effect on the project at the same time.

**11.3** Really an issue as to causation. Easy to define legally (what in fact caused the loss), but in practice difficult to unravel.

**11.4** Competing House of Lords decisions:

**11.4.1** *Leyland Shipping Company Limited v Norwich Union Fire Insurance Society Ltd* [1918] AC 350; (1981) 2 All ER 752. The torpedoed ship subsequently sank in the bay during a storm. The “proximate” cause approach.

**11.4.2** *Baker v Willoughby* [1969] 3 All ER 1528. Personal injury case. “First cause” approach; and

**11.4.3** *Jobling v Associated Dairies*. (1981) 2 All ER 752. Personal injury again, this time “ultimately critical”, “dominant” approach adopted.

**11.5** See John Marrion QC’s paper to the Society of Construction Law (February 2002). He identifies the two most widely accepted competing approaches:

**11.5.1** Dominant cause (where there are two competing causes, the Plaintiff needs to establish that the Defendant is responsible for the dominant cause. This is a question of fact; and

**11.5.2** Dyson J's (as he was) approach in *Henry Boot Construction (UK) Limited v Malmaison Hotel (Manhattan) Limited* (1999) All ER 118 where he said (note that the parties had agreed to this approach):

"Second, it is agreed that if there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event."

**11.6** The application of *Malmaison* and to some extent *Doyle* can be seen in *City Inn Limited v Shepherd Construction Limited* [2007] ScotCS CSOH 190 (30 Nov 2007).

**11.7** In the final judgment of *City Inn v Shepherd Construction Limited* [2007] ScotCS CSOH 190 Lord Drummond Young had to consider the approach to be taken to delay analysis when the causes were concurrent. The approach of the judge was:

**11.7.1** Consider the dominant cause first;

**11.7.2** If it is not possible to identify a dominant cause then all concurrent causes of delay must be considered.

**11.8** The judge said that :

"Where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes; obviously, however, the basis for such apportionment must be fair and reasonable"

**11.9** The judge took the view that the apportionment would be similar to the apportionment of liability resulting from contributory negligence or contribution between joint wrongdoers. This required consideration of;

**11.9.1** The period of delay; and

**11.9.2** The causative significance of each event on the works as a whole.

**11.10** In *City Inns* the judge concluded that a claim for an 11 week extension of time should be reduced by 2 weeks. He apportioned prolongation cost in exactly the same manner.

**11.11** See also the Society of Construction Law Delay and Disruption Protocol. Perhaps an extension of time should be awarded, to relieve the contractor from liquidated damages, but no money in respect of prolongation costs?

## **12** Float

**12.1** The question is who owns it. Is it the employer (per *Glenlion*) or is it the project (whatever that means) or is it the contractor.

**12.2** Contingency allowances as discrete from float.



### 13 Disruption

- 13.1 Where no extension of time is given, disruption may still have occurred.
- 13.2 Once again difficult to prove, although the best method is possibly the “measured mile”.

### 14 Liquidated Damages

- 14.1 An amount of money paid by the contractor for completing the works late.
- 14.2 Other usages include under performance of process plant, and/or failure to provide documentation. Many other uses could of course be considered.
- 14.3 The benefit of liquidated damages is that they avoid the difficulty of proving and assessing actual loss where a delay occurs. Liquidated damages provisions are construed strictly *contra proferentem*.

### 15 Grounds for unenforceability

- 15.1 The leading case is *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Company Limited* [1915] AC 79. The test is:
  - 15.1.1 If the amount is “extravagant and unconscionable” when compared to the greatest conceivable loss the sum is a penalty.
  - 15.1.2 If the amount of money to be paid is greater than that which ought to have been paid, then it will be a penalty.
  - 15.1.3 If a single sum is to be made payable by way of compensation on the occurrence of one or more events (especially where some events may cause serious damage and others only modest damage) then the presumption is that this sum is a penalty.
  - 15.1.4 However, if it is difficult to assess the likely loss and identify the amount of liquidated damages this in itself will not make the liquidated damages a penalty.
- 15.2 A formula may well be acceptable (*Phillips Hong Kong v Attorney General of Hong Kong* (1993) 61 BLR 41).
- 15.3 *Jeancharm Limited v Barnet Football Club Limited* (2003) EWCA Civ 58. The contract provided for 20% per garment per day for late delivery. And interest at 5% per week for late payment. The claims amounted to 260% of the contract sum. The interest clause was a penalty, as it was not a genuine pre-estimate.
- 15.4 *Alfred McAlpine Capital Projects v Tilebox Limited* [2005] BLR 271. This case considered the question of genuine pre-estimates. A pre-estimate of damage does not have to be right to be reasonable. There needs to be a substantial discrepancy between the liquidated damage and the level of damage that is likely to be suffered before the pre estimate can be said to be unreasonable. The test is an objective one. The Courts prefer to uphold contractual terms fixing the level of damages for breach where possible.

## 16 Partial possession and sectional completion

16.1 This is a problematic area.

16.2 Liquidated damages are void for uncertainty if they provide for a minimum and maximum liquidated damages figure but fail to identify the procedure for identifying an actual figure within the range (*Arnhold & Co Limited v The Attorney of Hong Kong* (1989) 47 BLR 129).

16.3 In *Brammel & Ogden v Sheffield City Council* (1985) 29 BLR 73, a rate of £20 per week was provided as liquidated damages for each incomplete house. However, there was no express provision for sectional completion within the contract. As soon as the Council began to take possession of each house the Council rendered the liquidated damages clause inoperable.

16.4 In *Taylor Woodrow Holdings Limited v Barnes & Elliott Limited* [2004] EWHC 275 the contract provided for liquidated damages payable in respect of sectional completion. The Arbitrator found that the scope of the works to be completed within each section was not clear. As a result the liquidated damages clause was void for uncertainty. On appeal, the High Court agreed. The employer's requirements did not set out with any certainty what work was to be done with any particular sections. The liquidated damages clause was void for uncertainty.

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