ARTICLE

“One man’s delay is another man’s disruption”:

Legal issues in making disruption claims

The relief available for disruption claims is different from delay claims. Delay occurs when an event adversely affects the anticipated period for completing the project. The contractor in a delay claim will therefore be seeking an extension of time (where the construction contract includes an EOT provision) and, where relevant, loss and expense. In contrast, an event of disruption adversely affects productivity whilst not having an impact on the overall period for completing the project. As a result, a disruption claim is a claim for loss and expense only.

Legal issues in making disruption claims

Whilst the relief available for disruption differs from delay, it is often difficult to distinguish between an event that will cause, or has caused, delay and an event that has merely disrupted progress. In the recent English case of *McGee Group Ltd v Galliford Try Building Ltd*,[1] Mr. Justice Coulson described any attempt to distinguish between delay and disruption as “unsustainable.” He said as follows:

“Anyone who has ever put together, argued or been obliged to decide a claim for loss and expense under a building contract, knows that no sensible distinction can be drawn between delay and disruption. One man’s delay is another man’s disruption. A sub-contractor’s failure to complete a particular part of his work may have an adverse effect on the main contractor, but whether the consequential claim is one for delay or disruption, or a mixture of the two, will depend on a raft of factors: whether or not the delay was on the critical path of the main contract programme, what other sub-contractors were affected and how, if others were also in default etc. It is impossible to divide up such claims between delay, on the one hand, and disruption, on the other. The proof of that pudding is in the eating…”

Mr. Justice Coulson’s analysis reflects a problem recognised by many contractors: it is only with the benefit of hindsight, i.e. “eating” the “pudding”, that it is possible to identify whether a specific event caused delay, disruption, or a mixture of both.

This is particularly problematic for at least two reasons: first, in the context of notice provisions; and second, in the context of limitation and exclusion clauses. It might also give rise to issues in the context of claims relating to the effects of the COVID-19 pandemic.

[1] [2017] EWHC 87 (TCC)

Notice provisions

In the context of notice provisions, the problem of distinguishing between a disruption and delay claim arises when the contractor is required to notify the employer in advance of his intention to make a claim for an EOT and/or loss and expense. In such circumstances, there is a risk that the contractor may not appreciate that productivity will be adversely affected by a specific event of disruption, and by the time he realises this, his entitlement to recover disruption costs may have been lost.

Notice clauses are often accompanied by wording intended to 'bar' the contractor from proceeding with a disruption or delay claim if the employer is not notified of the claim in a particular way within a specific period of time. A recent example of a notice provision defeating a disruption claim can be found in *Maeda Corporation & Anr v. Bauer Hong Kong Limited.*[2]

In this case, the Hong Kong Court of First Instance was asked to consider the effect of a clause requiring as condition precedents to any claim two written notices to be served within specific time periods and for the second notice to "state the contractual basis" of the claim. The contractor had served both notices claiming delay and disruption within the relevant periods, but the second notice had not stated the contractual basis of the claim, as was required. The court held that the claim was time barred as a result.

Limitation and exclusion clauses

In the context of limitation and exclusion clauses, the problem of distinguishing between a disruption and delay claim arises when attempting to define the scope of widely drafted clauses. The case of *McGee v Galliford* referred to above is a good example.

McGee v Galliford concerned a subcontract which contained a clause entitling the main contractor to loss and expense if the sub-contractor "fails to complete" the works by a specified date, and another clause which entitled the main contractor to loss and expense if the "regular progress of the [works] was materially affected."

The first clause included a sentence that the sub-contractor's liability for "direct loss and/or expense and/or damages" shall not exceed 10 percent of the value of the contract. The second clause had no such limitation.

At trial, the main contractor argued that the first clause dealt with delays, and the second clause dealt with disruption, and therefore whilst delay claims were caught by the cap on liability, disruption claims were not. The court held that no sensible distinction could be drawn between claims arising under the two separate clauses, and the cap on liability should be construed as covering all claims for loss and expense, whether from delay or disruption. It was in this context that Mr. Justice Coulson uttered the words "One man's delay is another man's disruption" and described any attempt to distinguish between the two as "unsustainable."

In the very recent Hong Kong case of *Chevalier (Aluminium Engineering) Hong Kong Limited v. Sun Properties Company Limited,*[3] the employer omitting design work from the scope of the contractor's obligations, which disrupted progress. The contractor claimed for the disruption costs and the employer sought to rely on a clause excluding "monetary claims of whatsoever nature including loss of profit due to omission of works from the contract." As in *McGee v Galliford*, the contractor argued that the exclusion should not be applied to disruption claims. The reasons given were different from *McGee v Galliford*. The contractor said that such an interpretation would run afoul of the 'prevention principle', which implies into all construction contract an obligation on each party to not prevent the other from performing that contract.[4]

The court disagreed. It held that the disruption costs related to works which were omitted from the scope of the works, and therefore liability for such costs was excluded. As for the conflict with an implied "non-hindrance" clause, the court held that no such clause can be implied when it contradicts an express exclusion of liability.[5]

---

[2] [2019] HKCFI 916

[3] [2020] HKCFI 1313

[4] Lord Asquith in William Cory & Son Ltd v City of London Corp [1951] 2 K.B. 476 at 484, CA, as quoted by the Editors of Keating on Construction Contracts, 10th Edition, at paragraph 3-070.

[5] By reference to Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72, and BP Refinery (Westenport) Pty Ltd v Shire of Hastings (1978) 52 AJLR 20. Interestingly, the court did not refer to the more recent English decision of North Midland Building Ltd v Cyden Homes Ltd [2018] EWCA Civ 1744, where the Court of Appeal held that the 'prevention principle' was an implied term which could be overridden by an express term.

COVID-19

In the context of claims relating to the effects of the COVID-19 pandemic, the problem of distinguishing between a disruption and delay claim arises when the contractor seeks to rely on a 'force majeure' clause to protect himself from disruption and delay caused by the pandemic. It is generally thought that the pandemic will fit within a catchall force majeure provision, such as one that entitles the contractor to relief for "any events beyond its reasonable control." This was confirmed in a very recent decision in the US.[6] However, numerous contract forms entitle the contractor only to an EOT for force majeure events, and not to loss and expense (e.g., the HKIA standard form). This is a major issue for pure disruption claims which, as mentioned previously, are claims for money only, and not for an EOT.

Closing remarks

There are no simple solutions to the problems caused by the difficulties in distinguishing between a delay and disruption claim. The temptation is to lump a disruption claim together with a claim for delay. However, given the different relief available for such claims, a contractor who lumps the two together runs the risk of his claim failing completely because the specific events of disruption and delay are not identified with precision and therefore the factual basis for the claim will not have been established.[7]

The key to any successful disruption claim is to plan and prepare carefully. A detailed programme, regularly updated, will undoubtedly assist the contractor to identify the different events of disruption and delay and the effects of each event, even if distinguishing between them will always prove difficult. The contractor must also study the contract carefully and be aware of the legal hurdles to disruption claims, some of which will be easier to identify than others. Seeking advice from consultants and lawyers at the earliest possible stage will generally improve the contractor's prospects of success.

---

[6] Future Street Limited v. Big Belly Solar, LLC, 2020 WL 4431764 (D. Mass. July 31, 2020).

[7] For the difficulties with making claims on a global basis, see para.9–064 of Keating on Construction Contracts, 10th Edition.

BEN BURY
Partner
Holman Fenwick Willan
+852 3983 7688
ben.bury@hfw.com