Proving Extension of Time Claims

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Extensions of time are again hitting the headlines following the recent Technology and Construction Court decision in *Carillion Construction Ltd v Emcor Engineering Services Ltd*[1] *and others [2016]*, a dispute in relation to the proper interpretation of a standard form of construction sub-contract provision. Carillion contended that the nature of the particular sub-contract clause warranted a departure from the method by which extensions of time are usually applied.

However, the court rejected this argument, and found in Emcor's favour that an extension of time was to be treated in the 'usual' manner. With this in mind, what are the key parameters for determining extensions of time and what is the level of proof required?

Background

Uncertainty is endemic within the construction industry and, through a combination of many factors, construction projects do not proceed as planned with the risk that the contractual completion date will not be met. For contractors this results in a delay to the completion of the works with a corresponding liability to the employer for liquidated damages and the potential of cost overruns due to the increased costs of performance arising from prolongation. For employers, delays result in a loss of profit, loss of revenue and potential liability to the design team and other members of the professional team engaged.

The Construction Solutions team at FTI Consulting is regularly engaged to provide expert delay services in relation to formal dispute procedures but also, as a precursor, to prepare or rebut extension of time claims. In these instances contractors will frequently seek assistance in identifying and setting out its entitlement to an extension of time or an employer may seek assistance in assessing the criticality of alleged delays and the appropriate award of an extension of time.

In doing so, the key principles relating to the preparation and award of extensions of time are often misinterpreted or over simplified.

1 Carillion Construction Ltd v Woods Bagot Europe Ltd and others [2016] EWHC 905 (TCC).

The need for extension of time provisions

The prevention principle, derived from *Holme v Guppy [1838]*[2] where an employer withheld payment following delay even though it had failed to give possession of the site for 4 weeks following the execution of the contract, states that where a contractor is prevented by the act of the Employer, it is not in default.

This position was confirmed in *Peak Construction v McKinney Foundations [1971]*[3] where it was added that if, for reasons within the employer's control, the contractor is prevented from completing the works by the completion date, and there is no mechanism to extend time for performance (or it has not been properly extended), the employer can no longer hold the contractor to the original completion date. Instead there is no firm date from which liquidated damages may be calculated from and, as a result, time is then said to be 'at large'[4]. In such instances the contractor is granted a 'reasonable' time to complete the works.

Therefore the provision to award an extension of time acts as a mechanism to extend the contract completion date thus preventing the contract period becoming 'at large' and relieving the contractor from a liability to pay liquidated damages up to the extended contract completion date.

What needs to be proved?

In order to determine whether an entitlement to an extension of time exists, it is necessary to establish that:

(i) the cause of the delay was excusable, under the terms of the contract; and also,

(ii) as a consequence, there was a delay to the date for completion.

1. Identifying an excusable event under the contract provisions

In light of the judicial decision in *Peak Construction v McKinney Foundations*, express provision is now included within standard forms of construction contracts to grant time relief for delays caused by the employer (or its representatives). Moreover, today's standard forms of contract go further and allow for the granting of an extension of time for a range of specified events.

Each standard form of construction contract deals with this risk allocation/sharing differently but these excusable events (referred to as relevant events under the JCT and compensation events under the NEC) provide the contractor with an entitlement to extension of time to complete its works. A list of excusable events is set out at clause 2.29 of the JCT standard building contract, clause 60 of the NEC3, clause 8.4 of the FIDIC red book and clause 18.3 of the PPC2000.

2. Demonstrating a delay to the date for completion

In the absence of express terms to the contrary, the occurrence of an excusable event alone is insufficient to give rise to an entitlement to an extension of time. Instead, in order to successfully demonstrate such entitlement, the standard forms of construction contract (for example clause 2.28.2 of the JCT Standard Form 2011 edition, 63.3 of the NEC3, clause 8.4 of the FIDIC Red Book 1999 edition and clause 18.3 of the PPC2000) require the contractor to demonstrate that the excusable event is likely to or indeed has caused a delay to progress of the works, and consequently has impacted upon the completion date.

The burden of proof in relation to demonstrating the effect of delay requires the consideration of the following two key principles.

Critical delay-differentiating between a delay to progress and a delay to completion

For an entitlement to an extension of time to arise a delay must be critical to completion.

One accepted and approved definition[5] as to what constitutes the critical path is that it is the longest logic-linked path through a programme to the completion date. Accordingly, a delay to any of the activities on the critical path would lead to a delay to the completion date.

Where (total) float[6] exists within the overall programme against the completion date this would need to be eliminated before any critical delay is experienced. Further, where an excusable event affects non-critical activities the delay will have to be sufficient to eliminate all float before a critical delay is experienced.

Concurrent delay-often claimed, seldom properly identified

Addressing the issue of concurrent delay is one of the most important factors to consider when demonstrating an extension of time claim. As a result of this it is becoming increasingly common for concurrent delay clauses to be included within construction contracts. The absence of such provision frequently gives rise to disputes.

The commonly accepted and approved definition[7] of concurrent delay is when there are two or more delay events occurring at the same time which are approximately equal in terms of causing delay to the completion date. This narrow definition results in the occurrence of true concurrency being rare and frequently this principle is falsely alleged in instances where one of the events can properly be said to be only a minor cause of the delay, and so can be disregarded altogether, resulting in there being no concurrency.

2 Holme v Guppy (1838) 150 E.R. 1195.
3 Peak Construction (Liverpool) v McKinney. Foundations (1971) 1 BLR 111 CA.
4 Per Wells v Army & Navy Cooperative Society (1902) 86 LT 764 where it was held that if time has become at large because of some act or default of the employer, there will be no date from which the liquidated damages can run and therefore the right to claim them will have gone.
5 Burr. A. (2016), Delay and Disruption in Construction Contracts, Fifth Edition: London, Sweet & Maxwell at 1-029.
6 Float, with regards to critical path analysis, is a term used to define the period of time in which no defined work is shown to take place. Furthermore total float is used to describe the maximum amount of time an activity within a programme can be delayed before the date for completion is impacted by virtue of the logic links present.
7 John Marrin QC, 'Concurrent Delay', SCL paper 100 (February 2002) - as approved in Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848.

There are broadly three different situations in which concurrent delay could occur. Firstly, and most simply, when both an employer delay and a contractor delay each simultaneously affect an activity on the critical path and thus delay the overall project. The second is where there is an employer and contractor delay each affecting different critical paths of activities within the programme at the same time, but where the delays to each of these paths equally affect the overall completion of the project. The third scenario is where during a period of either (contractor or employer) delay there is a further delay attributable to the other party which equally causes a delay to the completion date during the period of time over which it occurs.

Following the decision in *Walter Lilly & Company Ltd v Mackay and another [2012]*[8] the preferred position[9] states that in each of these scenarios, where a contractor's delay runs truly concurrent with an employer's delay, the contractor's delay should not reduce any extension of time due.

Critical path analysis

Whilst case law suggests that there is no requirement for an extension of time application to contain a critical path analysis[10], and that instead it is possible to leave it to the employer to form an opinion as to the effect of an alleged delay with or without employing its own analysis, it would naturally be preferable for the contractor to demonstrate its claim for delay. Often a contractor's allegation that an excusable event delayed the completion date is unfounded and, upon the implementation of a proper critical path delay analysis, it becomes apparent that the critical progress of the works remained unaffected by the event being claimed by the contractor.

There are various methods of critical path analysis which exist for analysing and demonstrating the effects of delay events.

The methodology selected to objectively illustrate cause and effect within an extension of time claim is normally dictated by the timing of the analysis together with the availability of contemporaneous records and time/resource. The timing is of relevance as the use of a prospective analysis (based upon the likely effects of a delay) or a retrospective analysis (based upon actual fact) will provide different results.

The SCL delay and disruption protocol[11] provides guidance as to appropriate methods of delay analysis. In doing so it is to be noted that different methods of critical path analysis have the ability to produce very different results and the selection of a suitable technique requires careful consideration with regards to achieving the goal of demonstrating and illustrating the critical effects of the delay events complained of.

A further obstacle-providing notification of a delay

As a precursor to being granted relief for an excusable delay, most standard forms of construction contracts require the contractor to provide notification when the progress of the works is affected by a delay, excusable or otherwise, as close as possible to when the delay arises. For example clause 2.27 of the JCT Standard Form, 61.3 of the NEC3, clause 20.1 of the FIDIC red book and clause 18.4 of the PPC2000 all expressly state a requirement for such notice.

The common law position raises doubts as to whether a condition precedent, as set out within the JCT suite, is effective in dismissing the prevention principle in relation to an excusable critical delay[12], although the NEC3 and FIDIC forms expressly state that a failure to provide a timely notification dismisses any subsequent claim for an extension of time[13].

The basis for an award

If a contractor demonstrates that an excusable delay event was critical then there is an obligation upon the employer (or its representatives) to make a fair and reasonable assessment of what the excusable delay to the completion date is/was and the entitlement to an extension of time which is due.

The judgement in *John Barker Construction v London Portman Hotel [1996]*[14] sought to clarify the subjectivity of this process and set out the following criteria to be adopted in calculating a 'fair and reasonable' award:

1. application of the rules of the contract;
2. recognition of the effects of change;
3. a logical analysis, in a methodical way, of the effect of relevant events on the contractor's programme; and,
4. an objective calculation, rather than an impressionist assessment, of the delay caused by the excusable event(s).

Therefore it would follow that any extension of time application prepared by a contractor should assist the employer in carrying out the above steps. In doing so the importance of a proper critical path analysis, to illustrate the delay to the completion date experienced, cannot be overlooked.

8 Walter Lilly & Company Ltd v Mackay and another [2012] EWHC 1773 (TCC).
9 Which follows the principles set out within Henry Boot Construction (UK) Limited v Malmaison Hotel (Manhattan) Limited (1999) All ER 118.
10 John Barker Construction Limited v London Portman Hotel Limited (1996) 83 BLR 31.
11 Society of Construction Law (2002) Delay and Disruption Protocol. Printmost (Southern) Ltd, England.
12 In line with the Scottish case of City Inn Ltd v Shepherd Construction Ltd. [2007] Scot CSOH 190 and Multiplex Construction (UK) Ltd v Honeywell Control Systems Ltd [2007] EWHC 236 (TCC) which have cast doubts on whether Gaymark Investments Pty Ltd v Walter Construction Group [1999], which stated that failure by a contractor to comply with a condition precedent notifying the employer of a delay rendered the EoT provision ineffective and set time at large, is the position in English Law.
13 These clauses are drafted in line with Bremer Handelsgesellschaft MBH v Vanden Avenne Izegem [1978] 2 Lloyd's Rep. 109 which stated that precise/clear timetables must be identifiable and the result of missing this timetable must be clearly spelt out.
14 John Barker Construction Limited v London Portman Hotel Limited (1996) 83 BLR 31.

Conclusion

The majority of standard forms of construction contract enable the contract administrator to grant an extension of time where a delay occurs due to its own act of prevention or for certain other specified causes. However, before the employer can grant an extension of time, it needs to be satisfied that not only has an excusable event, as defined under the contract, occurred, but also that it is likely to cause, or has caused, the completion of the works to be delayed.

Herein lies the opportunity for the contractor to assist in this evaluation process by way of including a robust delay analysis demonstrating the causative effect of the excusable delay. The proper application of a critical path analysis, although not compulsory, can accordingly be used to effectively demonstrate the criticality of delays, either as a driving delay or concurrent delay, and the entitlement to an extension of time which is due as a result.

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