



Assessing Delay Compensation



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Mark Clinton
Partner, Irwin Mitchell LLP

Extensions of Time

- Extension of time clauses are primarily concerned with the Employer's delay compensation
- The prevention principle:
 - The employer cannot insist on completion by the stipulated date if he has prevented the contractor from completing by that date
 - *(i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause the delay beyond the contractual completion date. (ii) Acts of prevention by an employer do not set time at large, if the contract provides for an extension of time in respect of those events. (iii) Insofar as the extension of time clause is ambiguous, it should be construed in favour of the contractor.* (Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2) [2007] BLR 195)
 - North Midland Building Limited v Cyden Homes Ltd [2018] EWCA Civ 1744
- **An appropriate extension of time mechanism overcomes this problem**



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Liquidated Damages and Penalties

- Damages recoverable in English law are generally only compensatory
- Penalties are anathema to that approach
- A genuine pre-estimate is not a penalty
- (Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79)
- Is the sum exorbitant or unconscionable having regard to the innocent party's interest in the performance of the contract? (Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67)



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LDs and notices under JCT

- JCT contracts require 3 notices:
 - Notice of non-completion
 - Notice that the Employer may require payment of or withhold/deduct LDs (warning notice)
 - Notice that the Employer requires payment of or will withhold/deduct LDs (deduction notice)

• *Grove Developments v S&T [2018] EWHC 123 (TCC)*

- The deduction notice was sent seconds after the warning notice
- The contract does not stipulate any interval between the two notices nor does it stipulate that the warning notice must be received before the deduction notice is sent
- Question: should a term be implied to the effect that there must be a reasonable interval between the two notices?

• *Grove Developments v S&T [2018] EWHC 123 (TCC)*

- Answer: 'no'
 - It is not necessary give the contract efficacy
 - It would introduce uncertainty – what is a reasonable period?
 - That would make the contract impossible to operate sensibly

Practical Completion

Should you try to define it?

University of Warwick v Balfour Beatty Group Ltd [2018] EWHC 3230 (TCC)

- *The contract provided:*
- **"Practical Completion"**: *a stage of completeness of the Works or a Section which allows the Property to be occupied or used and in which: ...*
- **"Property"**: *the property comprised of the completed Works.*
- **"Works"**: *the works briefly described in the First Recital, as more particularly shown, described or referred to in the Contract Documents, including any changes made to those works in accordance with this Contract.*
- **Q:** *Can Practical Completion of a Section occur before Practical Completion of the whole?*

What does it mean?

Mears Ltd v Costplan Services and others [2019] EWCA Civ 502

- Practical completion is easier to recognise than to define; there are no hard and fast rules
- Patent defects and incomplete works are treated in the same way
- The works are to be completed free from patent defects other than any to be ignored as trifling
- 'Trifling' is a matter of fact and degree to be measured against the purpose of allowing the employer to take possession and use the premises as intended, but ...
- That does not mean that the fact that the employer could take possession and use the premises as intended means they are practically complete
- The fact that there may be a defect that is incapable of remedy does not, on its own, mean the works cannot be practically complete

Delay Notices - JCT

- When?
 - Whenever it becomes reasonably apparent that the progress is being or is likely to be delayed
- What?
 - The material circumstances, including the cause or causes of the delay, identifying any event he considers is a Relevant Event
 - In notice or as soon as possible thereafter, particulars of the expected effects including estimated delay to completion with updates forthwith of any material change
 - Such information as the Employer may from time to time require

Delay Notices - JCT

- Are such notices a condition precedent to entitlement?
- No – see post PC review under clause clause 2.28.5
- Failure to comply with notice provisions is a breach and may have a financial consequence
- Note also the provisos at clause at 2.28.6 requiring Contractor to use best endeavours to prevent delay to progress and completion and to do all reasonably required to the satisfaction of the the CA to proceed

Extensions of time and contractor compensation under JCT

- Separate processes although there is some overlap between Relevant Events and Relevant Matters
- Processes are combined under NEC

Direct loss and/or expense under JCT

4.20.1 If in the execution of this Contract the Contractor incurs or is likely to incur any direct loss and/or expense as a result of any deferment of giving possession of the site or part of it under clause 2.5 or because regular progress of the works or any part of them has been or is likely to be materially affected by any Relevant Matter, he shall, subject to clause 4.20.2 and compliance with the provisions of clause 4.21 be entitled to reimbursement of that loss and/or expense.

Direct loss and/or expense under JCT

- 4.20.2 No such entitlement arises where these Conditions provide that there shall be no addition to the Contract Sum or otherwise exclude the operation of this clause 4.20 or to the extent that the Contractor is reimbursed for such loss and/or expense under another provision of these Conditions.

Direct loss and/or expense under JCT

- 4.21.1 The Contractor shall notify the Architect/CA as soon as the likely effect of a Relevant Matter on regular progress or the likely nature and extent of any loss and/or expense arising from deferment of possession becomes (or should have become) reasonably apparent to him.

Direct loss and/or expense under JCT

- 4.21.2 That notification shall be accompanied or, as soon as reasonably practicable, followed by the Contractor's initial assessment of the loss and/or expense incurred and any further amounts likely to be incurred, together with such information as is reasonably necessary to enable the Architect/CA or Quantity Surveyor to ascertain the loss and/or expense.

Direct loss and/or expense under JCT

- 4.21.3 The Contractor shall thereafter, in such form and manner as the Architect/CA may reasonably require, update that assessment and information at monthly intervals until all information reasonably necessary to allow ascertainment of the total amount of such loss and expense has been supplied.

Direct loss and/or expense under JCT

- 4.21.4 Within 28 days of receipt of the initial assessment and information and 14 days of each subsequent update of them the Architect/CA or Quantity Surveyor shall notify the Contractor of the ascertained amount of the loss and/or expense incurred, each ascertainment being made by reference to the information supplied by the Contractor and in sufficient detail to enable the Contractor to identify differences between it and the Contractor's assessment.

Common heads of claim

- • increased preliminaries
- • overheads
- • wasted management time
- • loss of profit
- • loss of productivity or uneconomic working
- • increased costs resulting from inflation
- • interest for non-payment of money
- • finance charges

Increased preliminaries

- Prolongation
 - When the delay occurred not the extended period
 - Evidence of actual resources
- Thickening
 - Evidence of original allowance
 - Adequacy of original allowance
 - Causation
 - Evidence of increase
- Both types
 - Risk of duplication

Overheads

- Fluor v Shanghai Zhenhua Heavy Industry [2018] EWHC 1 (TCC)
- the contractor can recover head office overheads and profit lost as a result of delay on a construction project caused by factors which entitle it to loss and expense
 - the contractor must prove on the balance of probabilities that, if the delay had not occurred, it would have secured work or projects which would have produced a return (over and above costs) representing a profit and/or a contribution to head office overheads
 - the use of a formula, such as the Emden formula, is a 'legitimate and indeed helpful way' of ascertaining a party's entitlement on the balance of probabilities

Wasted management time

- Need to show:
 - diversion of staff time and extent
 - that it caused significant disruption to the business
- Proof by:
 - Documents (eg time sheets)
 - Estimate of proportion of time spent
 - Retrospective assessment
 - Recollection
- Quantification
 - Often on basis of time spent and relevant remuneration

Loss of profit

- Similar considerations to those applying to overheads
- Often combined
- What profit could the contractor have earned elsewhere but for the delay?

Loss of productivity

- Measured mile
- Tender assumptions v Actual
- Comparison to industry norms and benchmarks
- Global Claims
 - *Walter Lilly & Co v Mackay and DMW Developments [2012] EWHC 1773 (TCC)*
'Some of the cases ... were concerned with linking actual delay and the alleged causes of delay. Simply because a contractor claims all of the costs on a construction project which it has not yet been paid does not necessarily mean the claim is a global or total cost claim, although it may be. What is commonly referred to as a global claim is a contractor's claim which identifies numerous potential or actual causes of delay and/or disruption, a total cost on the job, a net payment from the employer and a claim for the balance between costs and payment which is attributed without more and by inference to the causes of delay and disruption relied upon'
 - *Sisk and Son Ltd v Carmel Building Services Ltd (in administration) [2016] EWHC 806 (TCC)*

Global Claims

- **Current position, per Walter Lilly:**
 claims by claimants for delay or disruption related loss and expense must be proved as a matter of fact. The claimant must demonstrate on a balance of probabilities that:
 - events occurred which entitle it to loss and expense
 - those events caused delay and/or disruption, and
 - such delay or disruption caused it to incur loss and/or expense (or loss and damage as the case may be)
 The claimant can prove these three elements with whatever evidence will satisfy the tribunal and the requisite standard of proof (balance of probabilities). There is no set way for claimants to prove these three elements.

Finance Charges

- Claim for the additional cost of financing the loss and expense, or
- The earnings foregone on the same sum
- Burden of proof on contractor

Concurrent delay

- Two concurrent independent causes of delay/loss one the responsibility of the employer, the other the responsibility of the contractor
- Time – *Malmaison approach*
 - Contractor is probably entitled to an eot
- Money
 - Contractor probably has to satisfy the ‘but for’ test

But it all depends on the contract ...

North Midland Building Limited v Cyden Homes Ltd [2018] EWCA Civ 1744

- Amendment to JCT contract provided:
 - ‘2.25.3(b) any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account’
- Court of Appeal upheld decision that the provision was effective, saying:
 - ‘I can see no basis on which clause 2.25.1.3(b) could be struck down or rendered inoperable by the prevention principle. The clause is clear and unambiguous and it does not cut across clause 2.26.2.5 (which prima facie entitled the contractor to an extension of time for anything that might be considered an act of prevention by the respondent). The only thing the clause does is to stipulate that, where there is a concurrent delay (properly so called), the contractor will not be entitled to an extension of time for a period of delay which was as much his responsibility as that of the employer. That was an allocation of risk which the parties were entitled to agree ...’
