

Somewhere in Time - Securing and Protecting your Contractual Rights

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SUMMARY

Time is money and this is no less the case on construction projects where delays are bound to cause either the employer engaging the contractor additional cost as well as the contractor because his labour and plant resources are required on the project for a longer period of time.

This paper looks at the requirements for both employers and contractors to secure their contractual rights where a project is in delay.

All too often when a project is in delay a party can lose contractual rights for time and financial reimbursement because they appear to have acquiesced to the delay, failed to give notice of the effects of an instruction or variation to the works notifying the delay or failed to adhere to the contractual requirements to establish the reasonable extensions of time required due to events causing the delay on a construction project.

This paper also considers why many, if not all, software planning programs for construction projects are unsuitable to establish extensions of time without careful analysis, as well as looking at simple methods of recording and notifying of delays contemporaneously so that extensions of time can be readily and easily assessed in an efficient and fair manner.

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INTRODUCTION

There are times when it appears that either an employer does not want the building completed, or appears to be seeking continued variations to its design that causes delay and/or the contractor does not appear to be using the proficiency expected of it to complete the construction of a building project. However, usually both employers and contractors seek to complete the building by the agreed completion date, because the employer requires it for its use, or to earn money by leasing or selling it on and the builder knows that if it does not complete the project within the optimum period possible, if earlier than the contracted completion date, then it will incur additional costs by having to retain labour and equipment on the contract for a longer period of time.

It is in both employers and contractors interests that construction projects are completed by the contracted completion dates otherwise at least one organisation, if not both, are going to incur additional costs for the project, if not losses to their respective companies.

In most contracts there are clauses which enable the employer to deduct monies from those due to a contractor for late completion of a building, which may be a pre-estimated sum of its likely cost (and in some jurisdictions it is accepted that this cost could have a penal element within it) or an employer has to ascertain its costs prior to seeking recovery of this from the contractor.

However, in those contracts there are usually clauses which protect the builder from incurring these costs, subject to contracted criteria having to be complied with, allowing the contractor additional time to complete variations of additional work instructed by the employer, dealing with belated information released by the employer, etc.

An extension of time postpones the completion date to enable the contractor to undertake the additional works without incurring any of the employer's costs for the additional time required to undertake it. It not only protects the contractor from incurring the employer's costs for delays caused by the employer but, in certain circumstances, such as a variation of additional works, also entitle the contractor to recover the additional costs for remaining on the contract for a longer period of time to be able to undertake these additional works.

However, in both instances the employer is required to give advance notice to the contractor of its intention to deduct damages for late completion and the contractor is required to give notice of the delays which it considers the employer is responsible for and the effect that those delays may have on the completion date of the building and, possibly also, an estimate of the additional cost of the delay so that the contractor can recover its costs for remaining on the building project for a longer period of time.

This sounds simple and uncomplicated. But what happens when there is an element of the construction of the building where the contractor was not as proficient as it should have been and on another element of the construction of the building the employer has caused delay by instructing additional works to be undertaken. Who then recovers what monies from who? Does the contractor have an entitlement to an extension of time?

Concurrent delays, that is a delay caused by a contractor's failings occurring at the same time as another delay caused by an employer's instruction, for example for additional works, are always the cause of potential dispute.

THE EMPLOYERS POSITION.

When an employer contracts with a contractor to build a building it normally requires the completion of that building to be made by a given date so that it has certainty as to when it can take possession of it to install its equipment to enable him to commence using the building at the earliest opportunity, or to lease it out, or sell on, as he so desires. Therefore, normally, it protects itself by incorporating clauses in the contract that enables the employer to reduce the monies due to be paid to the contractor for constructing the building and subject to the legal jurisdiction, this can be by pre-estimated costs to the employer for the delay incorporated into the contract, in the UK known as liquidated and ascertained damages, or proven costs and sometimes, where permitted by the legal jurisdiction, can have a penal element to it.

However, should an employer issue instructions that hinders the contractor completing the building by the contracted completion date, there is at least a possibility, if not probability, that the employer would be stopped from recovering these damages unless there was a mechanism incorporated in the contract for the completion date to be postponed to take into account the employer's instructions, prior to the damages being levelled against the contractor.

But this is usually insufficient to meet the employer's requirements, because if an instruction is issued by the employer, or its design team, of variation that causes delay to the construction of the building the employer does not want to have to wait to near the time when he thinks he is going to take possession of the building to find out about the delay. Furthermore, if he issues an instruction that has more serious consequences than he perceives when he issues it, he wants to be notified by the contractor of those consequences promptly so that he can reconsider whether he does want that instruction to be fulfilled, or rescinds it because it is commercially more viable for him to do so.

Therefore, in many modern construction contracts an employer incorporates clauses that requires prompt notification of delays to the contract with a possible assessment of any postponement or extension of time requirement to the completion date because of the employers' instructions.

No employer wants surprises concerning the completion of the building, or rather delays to it, it is as important for the employer to be able to plan with certainty as to when the building will be completed as it is to the contractor to complete it.

Therefore, to secure the employers' contractual rights concerning obtaining the building by the contracted completion date, or by an assessed date if it is postponed by an extension of time, the revised contracted completion date is known by the employer at the earliest opportunity.

By requiring the contractor to provide Notices of Delays within a stated period, or reasonable time, of events taking place that causes the delay, the employer's needs in this regard are usually satisfied and from a financial point of view, the employer can calculate what, if any, sum of money can be deducted from the contractor for late completion.

Cash flow is king for the employer as well as for the contractor. If the employer is not going to take possession of the completed building by a certain date, whether it's contracted or postponed in accordance with extension of time provisions in the contract, an employer has to consider the effects of this upon its cash flow and make provision for it. It therefore needs certainty in assessing what sums it is due to pay the contractor, what it is allowed to deduct from the contractor's payment because of late completion and the cost of the delays in being unable to earn income from the building due to those delays.

The employer needs to secure his rights of being notified of delays and to protect them by ensuring that there is an extension of time mechanism incorporated in the contract and also if the contractor fails to comply with the requirements of the contract regarding providing Notices of Delay and/or in requesting extensions of time, that the contractor cannot then belatedly seek to being granted the additional time and possible cost after the building is completed when no Notices of Delay and requests for extension of time have been made in accordance with the terms and conditions of the contract. Such events could cause considerable financial hardship to the employer and seriously affect the business plan it had for undertaking the construction project in the first place.

THE CONTRACTORS POSITION

Contractors are always aware that if they are on a building project for a longer period of time than intended, or allowed for within their pricing, then it will cost more and possible cause the contractor to make a loss on the contract.

However, notwithstanding this stark realism, contractors, at times, are slow to read their contracts and all too often appear to assume that because the employer causes delay to the construction, either by failing to release information at the appropriate time or by instructing variations to the permanent structure, that it will automatically receive an extension of time.

Despite contractors being generally more appreciable than employers that time is money, and ensuring that there are clauses in the contract entitling them to receive extensions of time for

stated events, all too often they ignore the notice provisions and just consider that this can be dealt with at the end of the project and are then surprised at the employer's reaction and "unreasonableness" when the employer points out that the contractor has failed to comply with the notice provisions and/or extension of time request requirements incorporated in the contract.

In English Law, as well as many other legal jurisdictions, there is a canon of law that states that a party to a contract is not allowed to profit from its own breach of the contract. In English Law it is known as the Prevention Principle. This is usually the contractor's first defence on being informed that the employer is not prepared to grant an extension of time due to the lack of Notices of Delay being given and/or a request for an extension of time at the appropriate time as stated in the contract. After all, it is the employers' instructions or failure to provide information that has caused the delay, so why should the employer not grant an extension of time when it is considered in hindsight at the end of the contract.

However, the Courts in the UK are looking closely at the notice provisions of construction contracts and the precise wording of the contract to determine whether the words indicate with certainty whether failure to issue a notice of delay and/or a request for an extension of time at the appropriate time means that the contractor is not entitled to one at all and increasingly the Courts are supporting employers where the words of the contract can be interpreted with certainty that if the provisions of the contract have not been complied with, then the contractor is not entitled to an extension of time, irrespective of the employers culpability in causing the delay.

Furthermore, having determined that contractors are not due extensions of time due to their failure to notify delays and request extensions of time in accordance with the requirements of the contract, that this not only prevents the contractor from being awarded the appropriate extension of time, which in itself causes injury to the contractor, but that the employer is still entitled to recover its damages for late completion of the contract.

Therefore, the contractor not only fails to secure an extension of time that might entitle it to additional financial reimbursement, but it has to pay the employer damages because an extension of time had not been granted meaning that, in law, the contractor should have completed the contract earlier than he did. In other words the contractor's failure to issue notices and/or request extensions of time appropriately as required by the contract, will mean that the contractor is penalised for his lack of attention to the administration of the contract.

The contractor also has a risk when issuing Notices of Delay and/or requests for extensions of time when it is culpable for delay to work on another part of the building project and the employer considers that this delay is more fundamental to the delay in the construction project, than the delays caused by the employer's failure to release information or instruct variations. Therefore, having secured acceptable conditions of contract regarding dealing with delays and extending the period of time for the contractor to complete the contract, it then fails to protect itself by its failure to administer the contract by issuing Notices and/or requests for extensions of time as required by it. Therefore the contractor stands to be

financially affected by its failures in administration to issue the correct piece of paper at the correct time.

All too often contractors' staff are so involved in building the project and dealing with a myriad of events on a project, for which the contractor may, or may not, have culpability for, that the staff do not take the contract out of the cupboard and read precisely what its obligations are regarding issuing Notices of Delay and extension of time requests, even though, because of its intimate involvement in the project, it is aware of the employers' desire to receive the completed building by a contracted date. It and individual members of staff then feel aggrieved when an extension of time is not granted.

WHAT IS A NOTICE OF DELAY

I have yet to read a construction contract which requires a Notice of Delay or a request for an extension of time being drawn up as a formal legal document. That is because usually this is not required.

A contract will state what has to be stated within a Notice of Delay and this is the minimum content that it should include. However, the more information that can be included for the employer to consider, then so much the better. It usually has to be written, therefore telephone calls between the contractor and the employer confirming delays are irrelevant, but with the advent of e-mails this has been easily overcome as e-mails are written documents, with notices being given in day to day communication between contractors and employers.

Where a contractor has found itself in the predicament of having been delayed by the employer, then finding itself because of the terms and conditions of the contract to be culpable for that delay due to its failure to issue the appropriate notices, the British Courts have proved to be as helpful as possible to the contractor in accepting contemporaneous documents as evidence of notice. British Courts have therefore accepted the most mundane of contemporaneous documents that state that an element of work for which the employer is culpable has been delayed is a Notice of that delay. This has extended to e-mails which have been purportedly issued regarding other subject matter, but contain a concluding paragraph stating that another item or element of building work is in delay because of outstanding information from the employer was accepted as due notice, daywork sheets (or sheets recording time and resources) detailing labour and equipment being used on additional work was also held to be a Notice of Delay, because whilst the labour and equipment was engaged in the additional work it could not be used on the original contract works and also it has held an Information Required Schedule to be a Notice of Delay where the contractor stated against one item that it was on the "Critical Path" and the employer failed to provide the information by the required date.

However, for clarity, the contractor is usually better off if he sends a letter stating clearly the areas of delay, an assessment of their affect upon the completion date and then concludes with a request for an extension of time to the contract completion period. However, whilst elements of building work are in delay, it is sometimes difficult to predict the effect that these

will have on the completion date of a project. This is because sequencing of works can be altered to mitigate the items that are in delay.

There is also a benefit to the contractor for including a Cause and Effect Schedule to the progress reports detailing all elements of work that are in delay with reasons, so that the employer is aware of the information requirements that the contractor has to be able to complete the building within the contracted period. Whilst this is usually seen initially as an adversarial tactic by the contractor, usually after a few progress meetings it is seen as a beneficial management tool in assisting all parties in completing the project on time, because the design team becomes fully aware of the most important items of outstanding information that are required by the contractor to enable the construction to take place with a minimal of delay.

A Cause and Effect Schedule should contain a unique item number for each item of work that is in delay, the reason it is in delay and the immediate consequence of that delay on the subsequent operation. If there are further consequences to the delay, then the immediate consequence should, in its turn, be considered a further cause of delay so that each can be dealt with individually on the Schedule.

What is most important though, is that the contractor appoints somebody to be fully conversant with the requirements of the contract for notifying delays and requesting extensions of time to ensure that the contract is complied with to enable the contractor to recover all extensions of time with the additional costs as well as providing early certainty to the employer of the date that he is actually going to receive the completed building.

Where there is an element of a construction project in delay and under the terms and conditions of the contract the contractor is culpable for the delay, then the contractor is usually better off if he is up front and states this on the Cause and Effect Schedule as well as stating what it is doing to mitigate the delay. Whilst the contractor usually has no contractual requirement to accelerate the works to overcome delays caused by the employer, or for which the employer is contractually culpable, it does have the duty and ability to accelerate works that are in delay for which it is culpable. By recording these on the Cause and Effect Schedule he can clearly demonstrate the affects that they did, or did not, have on the completion date of the project and my experience is that if the contractor has caused the delay and agreed a period of delay that it is responsible for, it is usually dealt with far more amicably with the employer and usually has a better result than having an argument concerning it at the end of the contract.

Very often elements of work are in delay because of the contractor's alterations to its method of working and then when analysed at the end of the day, these have no effect whatsoever upon the completion date of the building. But because of the contractor's lack of being forthright concerning them, considerable argument and cost is devoted to proving and evidencing that they had no effect upon the completion date and the items that did cause the delay was from events generated by the employer or its design team.

WHAT IS REQUIRED FOR AN EXTENSION OF TIME REQUEST

The precise detail that is required for an extension of time request alters from contract to contract. It is therefore important that a contractor reads the contract and complies with it.

However, rarely does it mean that the contractor has to submit a full, detailed, critical path analysis of the progress of the construction of the building to support a request for an extension of time and recently the British Courts have supported this view.

The majority of construction contracts require the contractor to detail the items in delay that will affect the completion of the project, the reasons they are in delay and an estimate of the extension of time requested. The wording of the majority of contracts is of a nature that would indicate that the assessment is subjective and that the project manager or architect responsible for granting the extension of time should also consider it in a subjective manner, although he is likely to bring to the contractor's attention delays for which the contractor is culpable.

If a contractor submits a request for an extension of time (I have yet to read a contract that refers to a contractor "claiming" an extension of time, it will read that a contractor requests an extension of time) and meets the requirements of the contract, then this is what the employer has to consider. To often a contractor submits an extension of time request only to receive a letter from the employer, or his project manager or architect, stating that he cannot consider the request as no critical path analysis has been submitted to establish that it has been correctly assessed.

My view, recently concurred with by the British Courts, is that if the employer refuses to deal with an extension of time request until an expensive analysis is compiled in support of the request for an extension of time, then this is a variation of additional work to the contract and the contractor should be reimbursed for providing the analysis requested.

Furthermore, there are different methods of analysing delay and which method is used can affect the result. It is for this reason that it is rare that a construction contract requires such analysis to be submitted with a request for an extension of time and in recent Court cases, British Courts have been reticent at accepting such analysis, and have looked at extension time disputes with a more pragmatic and common sense approach, due to the vagaries of results that can occur which are solely dependent upon the method of analysis adopted.

However, this does not deal with the situation whereby there is concurrent delay in which the contractor is culpable for delay in one portion of the works at the same time that the employer is culpable for another. Needless to say both the employer and the contractor's first desire is concerning money. The employer does not want to pay the contractor for delay where the contractor is culpable for it and the contractor requires payment for the additional costs it incurred where the employer is culpable for the delay. This is therefore a problem when there is concurrent delay with both parties having culpability for an element of the delay.

British Courts have resolved this by awarding the contractor the period of delay for which the employer is culpable, but not any cost applicable to the delay, as the contractor would have been on site in any event undertaking works because of the delay for which it was culpable.

USING COMPUTER PROGRAMS TO ANALYSE DELAY

There is not a software planning program on the market that has been designed and written to consider delay retrospectively. Every software planning program is written for the construction team to plan and programme the construction of the project in advance after consideration of the sequencing and method of working necessary to deliver the contract by the contracted completion date.

The reason that software planning programs cannot satisfactorily be used retrospectively, is because timelines usually show one line from commencement of an operation through to its completion and they do not show the level of production. For example, the contractor may have had ten tradesmen undertake 70% of an item of work and then reduce it, of its own volition, to two men to complete the remaining 30%. This does not show up on any software generated planning program.

Furthermore, if 95% of an item of work had been undertaken and the remaining 5% left until the week before the contract was completed when the contractor could have undertaken the work previously, it does not show when 95% of the work was completed in accordance with the programme with only a small 5% of the work left until the week before the contract completion. It shows a time line through to the week before the contract was completed, which is incorrect.

Also, for example, if the suspended ceilings had been completed only for the suspended ceiling tiles to be removed by the mechanical installations sub-contractor so that it could commission its works, does the computer generated programme show the suspended ceilings as being completed prior to the removal of the tiles to commission the mechanical installation, or after they are re-installed?

Software planning programs do not take into account the actual undertaking of the works, they merely deal hypothetically with delays for which an extension of time can be granted. They ignore when instructions to vary works are given. For example, an instruction to vary works not due to be commenced for another six weeks is going to have less impact, if any at all, than if an instruction was issued when those works were about to, or had, commenced. No software planning program will pick this up and allow for it. Software planning programs are designed to be compiled to assume there is only one way of undertaking a project, in accordance with the construction teams preferred method and sequencing of works and furthermore require detailed, precise and regular updating to be correct. They are therefore of little use in assessing an extension of time retrospectively.

It is for this reason that British Courts have been more and more reticent at accepting computer generated planning programs as evidence of delay and more willing to accept

extensions of time to be arrived at from contemporaneous records and facts as to what happened on site when considered with dated of instructions being issued affecting the progress of the works.

To illustrate the problems with using computer generated planning programs to analyse delay, the author was involved in an arbitration as a quantum expert in which both parties' planning experts had used different software programs resulting in completely different results as to the extension of time due to be granted to the contractor. At a directions meeting with the arbitrator, it was agreed that the two planning experts would work together on an agreed third software program to see what it determined. This was jointly compiled by both experts and ended up providing a completely different answer to either of the first two answers relied upon by the parties. This is reasonable to expect considering that no software planning program has been designed to be used retrospectively.

Therefore, extensions of time should be considered with an as-built programme that shows when precise elements of work were undertaken, the production resources used to undertake them and dates when instructions are issued by the employer. Then by using pragmatism and common sense determination of the extension of time due to the contractor, if any, can usually be agreed.

As long as the contractor takes into account areas of construction delay that it is culpable for and any failings in decisions it made as to construction of the project, then a fair and reasonable extension of time can usually be ascertained with minimal cost and more often than not amicable agreement.

BIOGRAPHICAL NOTES

Professional Qualifications: FCI Arb; FinstCES; FCIOB; MRICS

Current Position: Proprietor, Klein Consult Ltd

Practical experience: In excess of 40 years experience as a senior contractor's quantity surveyor responsible for calculating costs of construction, and assisting design teams with optimum methods of construction, compiling and maintaining construction budget plans, investigating causes of divergence and compiling cost/income results using different methods of production.

Advising developers and contracting clients with regard to entering into construction contracts for building and civil engineering work as to risk placement, terms and conditions.

Appointed as Adjudicator on construction contract disputes varying between £8,000 and £1 million and as the Expert to arrive at an Expert Determination on other disputes.

International experience: Represented Italian and German contractors in contractual negotiations and dispute resolution concerning construction contracts undertaken in the UK.

Professional Institutional Appointments: Past Chairman of the Institution of Civil Engineering Surveyors' Dispute Avoidance and Resolution Panel. Member of the Construction Industry Council's Adjudication Board.

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