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Does "Lack of Control" Justify Setting Times for Completion at Large?

I read the eye-catching article, entitled *Some Sharing of "Time at Large"* (June issue of *Surveyors Times*) and found the proposition in law advanced there rather strange and, to my knowledge, contrary to both principle and authority.

That proposition in law revolves around how the time for a project completion may become at large in the absence of a properly-drafted EOT clause in the contract. "Time at large" seems to have become a term of art in construction law. It has generally been used to refer to either situation in which there is no longer a date for the contractor to complete the project undertaken because the contractual date for completion no longer applies due to a delay for which the employer is legally responsible and which is beyond the scope of the time extension regime under the contract or in situations in which there is simply no contractual mechanism for adding time.

Over the years, the author has witnessed inexplicable enthusiasm among some contractor QSs and claims consultants when they embarked on the task of formulating a time-at-large argument in the event of a serious delay. They appear to regard such an approach as a panacea for relieving the contractor of liability for LD or as a substitution for a properly substantiated EOT submission.

Effort in Vain

To the author's knowledge, very rarely would such efforts produce the intended results when pursued in court or through arbitration. A notable exception is contracts that have no provision whatsoever for extending time. In such cases, the law will compel the contractor to complete the project within a reasonable amount of time. Surprising as it may seem to them, the earliest cases in which the courts held time for completion to be at large were not about brick and mortar (the first JCT form was not published until the 1930s), but ships.

Obligation to Complete within a Reasonable Time Period by the Operation of Law

Harking back to the end of the 19th Century, Britain's House of Lords already held that when a bill of lading did not state the time by which its consignee had to discharge a ship's cargo, the latter's obligation was to discharge it within a reasonable period of time, as per Lord Herchell LC in *Hick v Raymond & Reid* [1893] (AC 22).

The Article

Returning to the article in question, which suggested:

[I]f there is no provision for an EOT for a valid event (e.g. in one of my recent projects, there was no inclement weather clause in the main contract's conditions as grounds for granting an EOT), then, if the contractor applies for an EOT in response to inclement weather, the project's completion time would likely be set "at large"… (referred to below as "the Proposition").

To the Author:

1. The law never regards *"inclement weather"* as a valid event (which I assume was used to mean an *"entitling event"* for EOT), but merely as a "neutral" event.

2. Time cannot be set at large by inclement weather.

The article cites *Keating on Construction Contracts, 9th Edition (2012)*, page 276, paragraph 8-013, for the Proposition, but

strangely omitted the most important words, *"an act of prevention by the employer,"* and replaced them with *"inclement weather"* without offering any explanation for the change. As stated earlier, inclement weather cannot be an act of prevention.

The Prevention Principle

If one reads the relevant cases, one would discover that the law set the time for completion at large not because the completion was delayed by an event outside of the contractor's control, but by an act of prevention for which the employer was legally liable.

Keating (page 277, paragraph 8-014) dealt with *"The Prevention Principle",* which was founded on the principle that a promisee cannot insist upon the fulfillment of an obligation that it has prevented the promisor from delivering.

Inclement Weather: a Neutral Event

When a delay results from a neutral event (inclement weather, underground obstruction, public utility authority, etc), the occurrence of which is the responsibility of neither party, the law requires that the loss lies where it falls. This is so because there is no overriding principle existing in the UK or Hong Kong which states that the employer should always bear all the risk not caused by the contractor.

In case a job is delayed by inclement weather, it would be the contractor, not the employer, that will bear the consequences because it agreed to complete the task by a set date and the contract provided no relief from inclement weather. This is what I regard as the applicable principle.

Further on authority: the author has heard of no decided case in either the UK or Hong Kong that held inclement weather to set time for completion at large. This article suggests that the two cases cited therein, *Chun Wo Foundation, Ltd v Dorro Properties, Ltd* (2005, HKEC 1269) and *Shawton Engineering, Ltd v DGP International* (2006, 22 Const LJ 129) were authorities supportive of the Proposition. The author does not believe that the actual decisions had the suggested effect, but, most importantly, both cases contained some special features.

1. In *Dorro*, the Court of Appeal noted, *"the parties are in agreement that time was at large"* (paragraph 3), in which case the Court did not have to decide on the question of time-at-large.

2. In *Shawton*, the English Court of Appeal noted, *"[t]here was no contractual mechanism for extending time on account of the variations"* (paragraph 11).

Not only was none of these special features mentioned in the article, but the decisions were cited as those of authorities supportive of the Proposition. In other words, the time for completion would be set at large if the contract does not permit a time extension for inclement weather.

In reality, neither of the above cases is relevant to, nor decided on anything supportive of, the Proposition. In fact, it was due to the parties' own agreement in Dorro, rather than the court's finding, that time should become at large.

To the author, it is contrary to both principle and authority to suggest that inclement weather, itself a neutral event, is capable of setting time at large. So much for time being about contracts with no provision for extending time. The above cases are rather straightforward. There are more difficult cases that truly activate time-at-large, in which the EOT provisions were capable of diagonally-opposed interpretations: one would embrace, while the other would exclude, the delay in question.