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*HONG KONG INSTITUTE OF SURVEYORS*  
*QUANTITY SURVEYING DIVISION*  
*Pre-qualification Structured Learning –*

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**Liquidated Damages and Extension of Time**

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**Contents**

1. EOT clause, listed events
2. Act of prevention, time at large
3. Liquidated damages
4. Challenges to LAD
5. Notices, requirements and conditions precedent
6. Presentation of notices of claim and EOT claim




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**Extension of time clause**

Extension of time provisions

- for the benefit of the employer, in order to allow the contract administrator to extend the time for completion due to delays for which the employer is responsible and to preserve his right to LAD

Effect:

- enables the employer to extend the time for completion for any delay for which he is responsible or under his control.
- to maintain the contractor's obligation to complete within a defined (extended) time.

Failure by the contractor to complete within the contract time or extended time?

- Liable to damages




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## Reasons for EOT clause



**Without the EOT clause,**  
Once the employer causes a delay,

1. Contractor:
  - no longer be bound to complete the work by the contract completion date
2. Employer:
  - cannot claim for liquidated damages
  - Only general damages are allowed

*Example: "Holme v. Guppy (1838) 3M &W 387"*

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## Listed events for EOT

Listed events for extension of time

- Specify the causes of delay for which the Contractor is allowed EOT
- "qualified events"
- In order to be entitled to an EOT, the delay must be one of the "listed events"

If there is **no provision** for that delay event,

- The Contractor may not be entitled to EOT
- If he can prove that such event is one for which the Employer is responsible, time may become "at large"

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## Listed events for EOT

Listed events under the HKSFCB 2005 and 2006 editions	Employer / Architect	Third party	Neutral
(a) Force majeure*			V
(b) Inclement weather conditions (c) The hoisting of tropical warning signal No.8 .....			V
(d) The Excepted Risks	V		V
(e) Loss of damage caused by a Specified Peril**			V
(f) Discrepancy and divergence between the documents	V		

\* Under the French Civil Code, *force majeure* circumstances independent of the will of man, and which it is not in his power to control. It is wider than "Act of God":  
 (i) made performance impossible;  
 (ii) was unforeseeable;  
 (iii) was unavoidable in occurrence and effects.

\*\* Specified Peril: "fire, lightning, explosion, storm, tropical cyclone, flood, bursting or overflowing of water tanks, apparatus or pipes, earthquake, aircraft and other aerial devices or articles dropped from them".

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### Listed events for EOT

Listed events under the HKSFBC 2005 and 2006 editions	Employer / Architect	Third party	Neutral
(g) Opening up for inspection	V		
(h) Architect's instruction requiring a variation	V		
(i) Architect's instruction resulting in an increase in work that causes delays	V		
(j) Postponement and suspension of works	V		
(k) Architect's instruction requiring the Contractor to permit examination, excavation or removal by a third party of an object of antiquity found on the Site	V		

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### Listed events for EOT

Listed events	Employer / Architect	Third party	Neutral
(l) Late instructions from the Architect	V		
(m) Delay caused by a delay on the part of a NSC or NS		V	
(n) Delay caused by a Sub-contractor or supplier nominated by the Architect despite the Contractor's valid objection	V		
(o) Delay caused by the re-nomination of NSC or NS	V		
(p) Delay caused by a Specialist Contractor	V		
(q) Delay caused by a statutory undertaker or utility company		V	

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### Listed events for EOT

Listed events	Employer / Architect	Third party	Neutral
(r) The failure of the Employer supply or supply on time materials, goods, plant or equipment that he agreed to provide	V		
(s) The failure of the Employer to give possession of the Site	V		
(t) Delay to the Works due to time not reasonably foreseen by the Contractor in obtaining approval or consent from the government		V	
(u) A special circumstance considered by the Architect as sufficient grounds to fairly entitle the Contractor to an EOT			V
(v) An act of prevention, a breach of contract or other default by the Employer or any person for whom the Employer is responsible	V		

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## Act of prevention

Act of prevention

- Employer's act or acts for which he or his agents are responsible
- Preventing the contractor from completing the work on time

*Lord Fraser's comment in Bilton (Percy) v. GLC (1982) sums it up:*  
 "..... The general rule is that the contractor is bound to complete the work by the date for completion stated in the contract. If he fails to do so, he will be liable for liquidated damages to the employer. That is subject to the exception that the employer is not entitled to liquidated damages if by his acts or omissions he has prevented the contractor from completing his work by the completion date. These general rules may be amended by the express terms of the contract ....."




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## Time at large

- The contractor's obligation is to complete the works within a reasonable time.

In the absence of EOT provisions,

- Delay due to defaults caused by the Employer / persons for whom the employer is responsible.
- Time may be put at large



If the Contractor then fails to complete within a reasonable time

- Liable to general damages only




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## Time at large

Time is said to be 'at large' where:



1. No specific time for completion
2. The previously fixed time for completion no longer applies
3. No mechanism for revising the previously fixed time case of an act of prevention
4. The mechanism is inoperative
5. The terms do not properly provide for the delaying event
6. The architect has not correctly operated the terms.




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### Time at large - Multiplex v Honeywell [2007]

- Claimant: Multiplex Construction (UK) Limited – Main contractor
- Defendant: Honeywell Control Systems Limited – Sub-contractor

**Main issue:**

- whether time has been put at large
- whether act of prevention by Multiplex involved

**Background:**

- Multiplex and Honeywell entered into a sub-contract for Systems and Communications at the National Stadium at Wembley. During the construction period, Multiplex issued three programmes to Honeywell, delays to Honeywell's works were therefore resulted. By that time, Honeywell issued delay notices which were then rejected by Multiplex as not comply with the requirements of clause 11 (EOT). Without valid notices and information required, Multiplex was unable to assess the entitlement to EOT. However, Honeywell claimed that it was impossible to provide such information required.




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### Time at large - Multiplex v Honeywell [2007]

**Arguments**

**Multiplex:**

- the three programmes were issued in the form of a direction under clause 4.2, Honeywell was obliged to comply with those directions.

**Honeywell:** time shall be put at large

(a) Construction point

- Any direction under clause 4.2, which affects the completion date, puts time at large

(b) Operational point

- Multiplex has by its conduct made the extension of time machinery is inoperable

(c) The Gaymark point

- Even if the clause 11 mechanism can still be operated, nevertheless Honeywell's non-compliance with the condition precedent in clause 11.1.3 puts time at large




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### Time at large - Multiplex v Honeywell [2007]

**Held:**

- Time had not been set at large.
- The programmes were acts of prevention, therefore, Multiplex shall give an entitlement of an EOT under the Sub-Contract




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### Time at large - Multiplex v Honeywell [2007]

Rational behind court's decision:

(a) **Construction point**

- Multiplex's directions under clause 4.2 issuing the three programmes are Relevant Events entitling Honeywell to EOT.
- Accordingly, the issues of those directions did not set time at large.

(b) **Operation point**

- Based on Mr. Pearson's evidence, Honeywell had done its best to comply with clause 11.1.3. Honeywell had served such delay notices as it properly could serve and it had provided such supporting info. as was available. Honeywell intended to furnish the remaining details about causes of delay as identified in clauses 11.1.3 and 11.2., when it became possible to do so.
- Accordingly, the clause 11 machinery remains operational and is indeed being operated.




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### Time at large - Multiplex v Honeywell [2007]

Rational behind court's decision:

(c) **The Gaymark point**

- In Gaymark non-compliance with the notice clause exposed the contractor to an automatic liability for LD.
- In this case, non-compliance with clause 11.1.3. has no such automatic consequences.
- Even if Honeywell forfeits any entitlement to EOT that does not automatically make Honeywell liable to pay damages for delay.
- If the facts are that it was possible to comply with clause 11.1.3, but Honeywell simply failed to do so, then those facts do not set time at large.

(d) **Act of prevention**

- Since Multiplex issued a direction under clause 4.3 which constitutes a variation and which leads to completion on a later date, thus such variation was considered as an act preventing Honeywell from completing on the due date.




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### Liquidated damages

Liquidated damages

- a fixed and pre-agreed sum of compensation for a breach of contract
- not necessarily related solely to delay
- can be set for any kind of breach or default stated in the terms

Unliquidated damages

- a sum which is neither fixed nor agreed, but must be proved in court.



Reasons behind LD

1. Without LD, it is necessary to:-

- prove the contractual obligation of the defendant to the plaintiff
- prove that the particular amount of damages is caused by the defendant.




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### Liquidated damages

General expression of provision

- The contractor must pay a certain sum to the employer for every week/ day by which the original completion date is delayed and for which the contractor is not entitled to EOT.
- The sum must represent a **genuine pre-estimate of the loss** which the employer is likely to suffer
- Damages can be expressed other than as money, e.g. a transfer of property




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### Liquidated damages

Difference between liquidated damages and penalty

LD: compensatory in nature

Penalty: as a punishment, regardless of the probable damages itself



In *Dunlop Pneumatic Tyre Co Ltd v. New Garage & Motor Co Ltd* (1915), Lord Dunedin said

- The **essence of a penalty** is payment of money stipulated as *in terrorem* of the offending party
- The **essence of LD** is a genuine covenanted pre-estimated of damage.
- If the sum is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed the breach, it will be regarded as a penalty and unenforceable.




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### Liquidated damages

- 4 principles set out by the Court of Appeal
- to differentiate LD from a penalty in *Jeancharm Ltd. V Barnet Football Club Ltd* [2003]

- (1) The parties intentions must be identified - by examining the substance rather than the form of words used
- (2) The sum would not be a penalty where a genuine pre-estimate of loss had been carried out
- (3) The contract should be construed at the time the contract was made, not at the time of the breach.
- (4) It would be a penalty if the amount was extravagant or unconscionable compared to the greatest foreseeable loss.




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## Liquidated damages

Rules of deciding whether a sum is to be considered LD or penalty  
 Formulated by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*.

*“Though the parties to a contract who use the words penalty or liquidated damages may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages.”*




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## Liquidated Damages

Advantages of liquidated damages provision

- Per Lord Woolf in *Philips Hong Kong Ltd v. The Attorney General of Hong Kong* (1993):  
*“Since it is to the parties’ advantage that they should be able to know with a reasonable degree of certainty the extent of their liability and the risk which they run as a result of entering into the contract. This particularly true in the case of building and engineering contracts. In the case of those contracts provision for liquidated damages should enable the employer to know the extent to which he is protected in the event of the contractor failing to perform his obligations.”*




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## Liquidated damages

LAD based on a percentage of the contract sum?

- Definition of LD is a genuine pre-estimate of loss is **arguable**

Argument :

- An estimate only of the value of work cannot be a genuine pre-estimate of damage.

*J.F. Finnegan v. Community Housing* (1993)

- The calculation of LD included the following formula:  
 $LD = (\text{estimated total scheme cost} \times \text{corporation lending rate} \times 85\%) / 52$
- Held: the formula was a genuine attempt to estimate in advance the loss the defendant would suffer from late completion.





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### Liquidated damages

If the employer suffers no loss :

*BFI Group of Companies v. DCB Integration Systems Ltd (1987)*

- Provided in the contract, employer **can deduct LAD** even in the event he has suffered no loss.

Implications:

1. Challenge the sum calculated and stated in the contract as LAD
  - before the contract is signed.
2. Post contract challenges to LAD
  - poor record of success in the courts




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### Liquidated damages

Employer's power to recover damages, etc.



Refer to SFBC Clause 40(1)

- The Employer may make any deduction authorized by the Contract or at law (including deductions for costs, damages, liquidated and ascertained damages, debts, expenses or other sums for which the Contractor is liable to the Employer) from amounts due to the Contractor (including Retention).




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### Liquidated damages

Condition precedent to the Employer's right of deduction

Refer to SFBC Clause 40(2)  
Under clause 40.1(1)

- Yes, if he gives a notice to the Contractor by special delivery\*\* stating the amount of the deduction and the reason for it at least 7 days before making the deduction.

\*\*Special delivery = the communication which is either delivered by courier or sent by registered post or recorded delivery.




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### Liquidated damages

Can unliquidated damages > liquidated damages?

Will v. Rederiaktiebolaget Luggude (1915)

- Yes, the unliquidated damages which were proved to have been incurred could be levied in full even though they exceeded the amount of LAD

Elsley v. J.G. Collins Insurance Agency (1978)

- provided an opposite view

Alghussein Establishment v. Eton College (1988).

- No, it would seem that an employer who caused a delay for which there was no provision for an EOT and so rendered time at large should not be able to recover in respect of the contractor's delays general damages which exceed the LAD stated in the contract.




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### Liquidated damages

Refund if Completion Date revised

Refer to SFBC Clause 24.3

- If the Architect fixes a later Completion Date, the Employer shall refund to the Contractor the amount of liquidated damages paid or allowed to the Employer for the period from the original Completion Date up to the later Completion Date plus interest at 1% below the judgment debt rate within 28 days of the Architect fixing the later Completion Date.




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### Challenges to LAD

- Agreed sum is a penalty
- No date from which to run
- Waiver
- Act of Prevention, and time at large
- Breach of conditions precedent by employer
- Extension of time
- Interference with the Certifying Process




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## Challenges to LAD

**Agreed sum is a Penalty - Burden of Proof**

*Robophone Facilities Ltd v Blank (1966)*

- A stipulated sum is a penalty and not LD rests on the party making the challenge.
- A simple assertion that LD are a penalty will not suffice and a demand that loss be proved to show that the stipulated sum is not a penalty will fail.
- The stipulated sum is not a genuine pre-estimate of loss.

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## Challenges to LAD

*Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915]*

4 principles enunciated by Lord Dunedin:

1. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages.
2. The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.
3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon terms and inherent circumstances of each particular contract, judged at the time of the making of the contract, not as at the time of breach.

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## Challenges to LAD

4. To assist this task of construction, various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
  - 4.1 It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.
  - 4.2 It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid.
  - 4.3 There is a presumption (but not more) that it is a penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and other but trifling damage.
  - 4.4 It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.

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### Challenges to LAD

- **There must be a date** from which to run in the Contract
- i.e. a completion date or a date for completion stipulated(used to calculate when the LAD should start)
- If such date is omitted / cannot be deduced from the Contract / no new date was set within the contractual time frame when there was a delay
  - >>> the Employer may not claim LAD
  - >>> the courts will not fix such a date for the parties. (*Kemp v Rose* (1858)).




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### Challenges to LAD

#### *Miller v London County Council* (1934)

- 'prospectively or retrospectively'
- the Court held that the engineer cannot grant EOT after completion of the Works, notwithstanding the word 'retrospectively'.
- This is distinguished in the *Amalgamated Building Contractors Limited v Waltham Holy Cross UDC* (1952).




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### Challenges to LAD

#### **Waiver**

- The Employer may expressly or imply waive the right to deduct LAD for delay.
- An express undertaking not to enforce LAD clause, even if not supported by consideration, can be a waiver.

#### The essence of waiver

- there must be a conduct which leads the other party reasonably to believe that the strict legal rights of the party will not be insisted upon.

\*\*Note: mere payment in full in interim payments without deducting LAD when the right of the Employer had arisen rarely suffice.




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### Challenges to LAD

#### Act of Prevention, Time at large

- The Employer loses his right to LAD
- Time is put "at large"
- Employer can still claim "general damages" (if proved that he has suffered loss)



**\*\*Note:** With LAD, the Employer needs not prove he has suffered loss, provided that it is not challenged as being a penalty

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### Challenges to LAD

#### Extension of Time

- Special circumstances  
 >>> insufficient to cover acts of prevention by the Employer.
- In the absence of express power, the Employer cannot extend the time for its own benefit. (*Dodd v Churton* [1897])
- EOT clauses are construed against the party for whose benefits it is argued.

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### Challenges to LAD

#### Interference with the Certifying Process

- If the Employer interfere with the certifier's assessment / certification of EOT  
 >>> The Employer may not be able to insist on the LAD clause.
- Roberts v Bury Improvement Commissioners* (1870) LR4CP 755
- A party to a contract cannot complain of a breach by the other party
  - If the complainant has, by its own actions prevented the other from complying is a longstanding principle of construction in contract law

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### Conditions Precedent

Conditions Precedent to the Employer's right to deduct LAD

Architect to certify Contractor's failure to complete on time  
 Refer to SFBC Clause 24.1(1)

- If the Contractor fails to complete the Works by the Completion Date, the Architect shall issue a certificate (i.e. certificate of non-completion) to that effect
  - confirming that all claims for extensions of time have been addressed and
  - stating the date by which the Works ought to have been complete.

Refer to SFBC Clause 24.1(2)

- If a new Completion Date is fixed after the issue of the certificate of non-completion, the fixing of the new Completion Date shall cancel that certificate and the Architect shall, if appropriate, issue another certificate to correspond to the new Completion Date.

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### Conditions Precedent

Liquidated and ascertained damages

Refer to SFBC Clause 24.2(1)

- If the Architect issues a certificate of non-completion, the Contractor shall, if required to do so by a notice from the Employer, pay or allow to the Employer liquidated and ascertained damages for the period between the Completion Date and the Date of Substantial Completion.

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### Conditions Precedent

No effective non-completion certificate issued

*A Bell & Son (Paddington) Ltd v. CBF Residential Care & Housing Association (1989)*

- the issue of an architect's non-completion certificate had not been fulfilled and the employer
- Thus, lost the right to deduct LD

Under SFBC clause 24.1(1)  
 The employer will lose the right to deduct LD,  
 if the architect fails to issue a proper non-completion certificate.

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### Notice of claim for LAD

Refer to SFBC Clause 24.2(2)

- The Employer's notice under clause 24.2(1) shall not be given either
- before the certificate of non-completion is issued or
  - after the Final Certificate is issued.



- The Employer must give notice of his intention to claim or deduct LD.
- after the issue of certificate of non-completion
  - before the issue of the Final Certificate

*J.F. Finnegan v. Community Housing (1993)*

- A written notice from the employer under JCT80  
 >>> a condition precedent to the right to deduct LAD.




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### Amount of LAD

Can this be \$NIL

*Temloc Ltd v Errill Properties Ltd (1987)*

- If the amount of LAD inserted in the Contract is NIL,
- The Employer lost his right to claim any relief as a result of the Contractor's delay.




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### Notice provision, condition(s) precedent and the prevention principle

*Hsin Chong Construction (Asia) Limited v Henble Limited (2006)*

- Approved that contractor's failure to give notice will not resurrect the prevention principle, and the contractor is liable to pay full LD for the delay caused by the employer, which but for the lack of timeous notice, would have entitled the contractor to EOT. (See ss. 6-031 *et. al.* Hudson 12<sup>th</sup> edition)




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## Notices and requirements

**Contractor's first notice of delay**  
 Refer to Standard Form of Building Contract (2005)(SFBC) Clause 25.1(1)

- As soon as practicable but in any case within 28 days of the commencement of an event likely to cause delay to the completion of the Works beyond the Completion Date becoming apparent, the Contractor shall give notice (i.e. first notice) to the Architect.
- What is meant by "becoming apparent"?

**Details required in first notice**  
 Refer to (SFBC) Clause 25.1(2).

- The first notice shall:
  - state the likelihood and estimated length of the delay beyond the Completion Date;
  - set out the material circumstances including the cause of the delay; and
  - identify which of the listed events to be the cause of the delay.




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## Notices and requirements

- Clause 25.3(1) - The Architect shall give EOT by fixing a later Completion Date (prospective EOT)
- If his is satisfied that the completion of the Works ... is being or is likely to be delayed (prospective EOT)
- Beyond the Completion Date (no EOT if no delay beyond)
- By the listed event stated by the Contractor ... to be the cause of the delay
- Clause 25.3(2) – within 60 days of receipt of particulars in the second notice

**Does a contractor lose entitlements to extensions of time if he fails to submit the appropriate notices and details required by the contract?**  
 The situation of lack of notice was examined in the decision in *Stanley Hugh Leach v. London Borough of Merton* (1985) in relation to JCT 63 where *Mr Justice Vinelott* summarized the position as follows:




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## Notices and requirements

- "If the architect is of the opinion that because of an event falling within sub-paragraphs (a) to (k) progress of the work is likely to be delayed beyond the original or any substituted completion date, he must estimate the delay and make an appropriate extension to the date for completion. He owes that duty not only to the contractor but also to the building owner.*

*If the architect wrongly assumes that a notice by the contractor is a condition precedent to the performance of the duty of the architect to form an opinion and in consequence refuses to perform such duties, the Employer loses his right to liquidated damages. It may therefore be against the Employer's interests for an architect not to consider a cause of delay of which late notice is given or of which he has knowledge despite lack of notice."*




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## Notices and requirements

Are minutes of site meetings considered to be adequate notices of delay required by extension of time clauses?

- Scottish decision of *John L. Haley Ltd v. Dumfries & Galloway Regional Council* (1988)
- Under the JCT 63 contract (HKIS/RICS form 1986/1999 similar)
  - Not really

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## Notices and requirements

Contractor's second notice and its required particulars  
 Refer to SFBC Clause 25.2(1) The Contractor shall, as soon as practicable but in any case within 28 days of giving the first notice, submit a second notice to the Architect giving:

- (a) Substantiation that the listed event is the cause of the delay; and
- (b) Particulars of the cause, effect and length of the delay to the completion of the Works beyond the Completion Date in sufficient detail to enable the Architect to make a decision.

Contractor's second notice – delay later than 28 days  
 Refer to SFBC Clause 25.2(2)

- Where the delay envisaged by the Contractors' first notice of delay commences later than 28 days after the Contractor has given the first notice to the Architect, the Contractor shall give the Architect a statement to this effect and shall submit the second notice within 28 days of the commencement of the delay.

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## Notices and requirements

Contractor's second notice – continuing effect  
 Refer to SFBC Clause 25.2(3) Where the listed event has continuing effect, the Contractor shall:

- (a) give the Architect a statement to that effect together with:
  - (i) Substantiation that the listed event is the cause of the delay; and
  - (ii) Interim particulars including details of the cause and effect and an estimate of the length of the delay to the completion of the Works beyond the Completion Date;
- (b) make further submissions to the Architect at intervals not exceeding 28 days giving further interim particulars and estimates of the length of the delay until the delay ceases;
- (c) within 14 days after the delay ceasing, submit to the Architect final particulars of the cause, effect and length of the delay to the Works beyond the Completion Date in sufficient detail to enable the Architect to make a decision.

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### Notices and requirements

Deciding an extension of time within 60 days – Prospective EOT

Refer to SFBC Clause 25.3(1)

- The Architect shall give an extension of time by fixing a later Completion Date if he is satisfied that completion is or is likely to be delayed...

Refer to SFBC Clause 25.3(2)

- The Architect shall give the extension of time, and the reasons for his decision as soon as practicable but in any case within 60 days after the receipt of the particulars submitted with the second notice.

Not granting an extension of time

Refer to SFBC Clause 25.3(3)

If Architect decides no EOT:

- (a) Give reasons, asap and within 60 days of receipt of the particulars submitted with the second notice; and
- (b) The Architect may revise his decision if further and better particulars are provided within 28 days of the Architect's notification under SFBC clause 25.3(3)(a).



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### Notices and requirements

Fixing a new Completion Date based on available information

- Refer to SFBC Clause 25.3(4) If the Contractor fails to submit the notices within the prescribed time frame but a first notice is nevertheless submitted, the Architect shall, if he is satisfied that the completion of the Works has been delayed by the listed event, give an extension of time to the Contractor to the extent that he is able to on the information available.

Can an architect fix an earlier Completion Date due to the omissions?

- In the case of *Balfour Beatty Building Ltd v. Chestermount Properties Ltd* (1993), Mr Justice Colman said that when the architect reviews extensions of time under clause 25.3.3.2 of JCT80 following practical completion, he is entitled to reduce the extended contract period to take account of omissions. These may have been issued during a period of culpable delay. It would, therefore, be illogical for the architect to have to deal with additions differently to the way he deals with omissions.



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### Notices and requirements

Fixing an earlier Completion Date

Refer to SFBC Clause 25.3(5)

If after fixing a new Completion, the Architect issues an instruction under:

- (a) Clauses 13.1 for the omission of work or the omission or diminution of an obligation; or
- (b) Clause 13.2 resulting in a substantial reduction of the work to be carried out, provided that the variance was not apparent from the Contract Drawings, the Architect may fix an earlier Completion Date, though not earlier than the Completion, if it is fair and reasonable to do so.

If the architect issues a variation after the extended completion date but before practical completion, can an extension of time be granted or will liquidated damages become unenforceable?

- Where an architect issues a variation after the contract completion date but before practical completion, it is appropriate where resultant delays occur for an extension of time to be granted. Such extension of time will be calculated by extending the completion date by the net period of delay. (See the *Balfour Beatty* case)



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### Notices and requirements

Granting an extension of time after Completion Date

Refer to SFBC Clause 25.3(6)

- If the Architect gives an extension of time to the Contractor because of a listed event that occurs in the period of delay after the Completion Date but before the Date of Substantial Completion, he shall add this extension of time to the total of any extensions of time previously granted.

Fixing an earlier or later Completion Date

Refer SFBC Clause 25.3(7)

- The Architect may fix a new Completion Date earlier or later than that previously fixed, during the period of delay between the Completion Date and the Date of Substantial Completion, taking into account any further and better particulars submitted by the Contractor, or any extension of time granted under clause 25.3(6).




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### Notices and requirements

Deciding the final extension of time within 90 days – Retrospective EOT

Refer to SFBC Clause 25.3(8)

- The Architect shall finally decide the overall extension of time, whether by reviewing any extension of time previously granted or otherwise, and shall fix the Completion Date, which may be the same as but not earlier than the Completion Date previously fixed, within 90 days after Substantial Completion or such later date as may be agreed by the parties.
- Absent such a clause, the Architect may not be entitled to fix a new completion date and the time for completion may arguably be set at large if the delay is due to a cause for which the Employer is responsible

If the architect fails to grant an extension of time within a timescale laid down in the contract, will this prevent the employer from levying liquidated damages?

- The effect on the employer's entitlements to LD should the architect fail to give his decision within the timescale, Lord Justice Croom-Johnson said in *Temloc v. Errill* (1988) that:
  - The timeframe is purely directive
  - Not affecting the employer's right to deduct LD




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### Notices and requirements

Contractor's default involved in the delay (Concurrent delay)

Refer to SFBC Clause 25.4

- Where and to the extent that a listed event resulting in delay was, in the Architect's opinion, contributed to, or aggravated by a breach of contract or other default by the Contractor, the Architect shall take the effects of that contribution or aggravation into account in fixing the new Completion Date.




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### Best endeavours to prevent the delay

**What is meant by a contractor having to use constantly his best endeavours to prevent delay?**

- With regard to the JCT forms of contract, Keating on Building Contracts says that
- *“This provision is an important qualification of the right to an extension of time. Thus, for example, in some cases it might be the contractor’s duty to re-programme the works either to prevent or to reduce delays. How far the contractor must take the other steps depends upon the circumstances of each case, but it is thought that the proviso does not contemplate the expenditure of substantial sums of money.”*

*Terrell v. Mabie Todd & Co (1952)*

- a best endeavours obligation only required a party to do what was commercially practicable and what it could reasonably do in the circumstances.




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### Best endeavours to prevent the delay

Best endeavours to prevent delay

Refer to SFBC Clause 25.1(4) The Contractor shall:

- (a) continuously use his best endeavours to prevent or mitigate delay to the progress of the Works, however caused, and to prevent the completion of the Works being delayed or further delayed beyond the Completion Date, provided that the words ‘best endeavours’ shall not be construed to mean that the Contractor is obliged to spend additional money, without reimbursement under clause 26, to accelerate the carrying out of the Works to recover delay that the Contractor did not cause; and
- (b) do all that may reasonably be required to the Architect’s satisfaction to proceed with the Works




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### Extension of Time under Hong Kong Government General Conditions of Contract for Civil Engineering Works (Cont’d)

1) Time for completion of a Contract

Clause 49

- “The Works and any Section thereof shall be completed within the time or times specified in the Appendix to the Form of Tender... or such extended time as may be determined in accordance with Clause 50.”

Clause 52(1)

- Failure to complete by the time specified will attract liquidated damages (LD)
- Employer may but not bound to deduct LD.
- Payment of LD does not relieve the Contractor from his obligations to complete the Works.




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### Extension of Time under Hong Kong Government General Conditions of Contract for Civil Engineering Works (Cont'd)

2) Contractual rights to extension of time

- Basically, the Contractor is entitled to have the time for completion of the Works extended in accordance with GCC Clause 50.
- Notice requirements – the Contractor has to notify the Engineer if he considers that any event has caused delay to the progress of the Works
- The notice need not specify the clause or sub-clause no. of the GCC – it is the duty of the Engineer in his assessment and grant of extension of time (EOT) that he specifies the cause of the delaying event.




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### Extension of Time under Hong Kong Government General Conditions of Contract for Civil Engineering Works (Cont'd)

3) Reasonable time

- Contractor to complete within a reasonable time, where no time is specified in a contract
- What is reasonable time will always be a matter of fact rather than law and shall take into account the actual time required and the delays, if any, which may be attributable to the Contractor

4) Minimum requirement of a notice for EOT

- The notice must be in writing.
- The notice must give details of the cause and the probable extent of the delay.




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### Extension of Time under Hong Kong Government General Conditions of Contract for Civil Engineering Works (Cont'd)

5) Time of the Notice

- The notice must be made as soon as practicable but in any event within 28 days after the cause of any delay
- If the delay is one caused by an order or instruction issued by the Engineer, the Contractor shall forthwith and in any event within 28 days of the issuance of such order or instruction give a written notice of delay




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### Extension of Time under Hong Kong Government General Conditions of Contract for Civil Engineering Works (Cont'd)

6) Notice not a condition precedent

- The notice requirement for EOT under the GCC is not a condition precedent to the Contractor's right to claim EOT

7) Causes of delay which entitle the Contractor to EOT

There are altogether 11 circumstances the happening of which **may** entitle the Contractor to EOT

Emphasis is made to the word "may":

- The event must be one causing delay to the progress and completion of the Works
- The event must be critical to the completion of the Works in order to be qualified




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### Extension of Time under Hong Kong Government General Conditions of Contract for Civil Engineering Works (Cont'd)

8) Details and Particulars of an EOT Notice

- The causes of the delay, e.g. the instruction received giving details such as the date of the instruction, and the general scope of works involved,
- Details of the activities that may be affected by the event in question,
- The probable (or approximate) extent of delay to the progress of the Works that may be suffered (note that it is not necessarily that there be a 'delay' to the completion of the Works, even if there is no apparent delay to completion (which in turn depends on many other factors), a notice of delay can still be served if it is considered that there is a delay to the 'progress' of the Works – refer to Clause 50(1)(a))
- A critical path programme showing that the alleged event causing delay lies on the critical path to completion of the Works (or the relevant Section)
- Shows prospectively the effect of an event on the completion of the Works




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### Extension of Time under Hong Kong Government General Conditions of Contract for Civil Engineering Works (Cont'd)

8) Details and Particulars of an EOT Notice (Cont'd)

- Records are preferably agreed between the parties, but even if not agreed by the Engineer or ER, there is nothing preventing the Contractor from submitting the records without agreement.
- Need to ensure that the delay event lies on the longest critical path for the purpose of delay cost claim, if the Contractor has concurrent activities at the same time, that may dissipate or even annul the Contractor's entire claim for prolongation costs




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### Extension of Time under Hong Kong Government General Conditions of Contract for Civil Engineering Works (Cont'd)

10) "Special Circumstances" or "Causes beyond Contractor's control"

- These words cannot be used to cover causes of delay which are solely the Employer or the Engineer's default, which are not listed in GCC Clause 50(1)(b).
- "GCC Clause 50(1)(b)(vii) – a disturbance to the progress of the Works for which the Employer ... is responsible including but not restricted to any matter referred to in Clause 63
- This is a catchall phrase intended to cover all other matters which are not covered in the various other events in GCC Clause 50(1)(b).

11) Notice provision, condition(s) precedent and the prevention principle

12) It is important that the contractual notices, if required, are served in the format, details and within the time specified.

- Failure to do so will risk forfeiture of the right to claim under Contract, which will normally also be a forfeiture of the right to claim under common law.

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### Extension of Time under Hong Kong Government General Conditions of Contract for Civil Engineering Works (Cont'd)

11) Notice provision, condition(s) precedent and the prevention principle (Cont'd)

Time bar clauses or conditions precedent –

- In *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem (1978) 2 LLR 109*, Lord Salmon:
  - "had it been a condition precedent, I should have expected the clause to state the precise time within which the notice was to be served and to have made plain by express language that unless the notice was served within the time, the sellers would lose their rights under the clause".
- To qualify as a condition precedent to the right to claim, the clause must:
  - State the time within which the notice or claim must be made, and
  - State clearly the consequence of non-compliance, which usually is waiver or deemed waiver or forfeiture of the right to claim (*Steria Ltd v Sigma Wireless Communications Ltd [2009] BLR 79*, where the judge has rejected this as being a necessity), or
  - State clearly that the notice provision is a condition precedent to the right to claim

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### Extension of Time under Hong Kong Government General Conditions of Contract for Civil Engineering Works (Cont'd)

11) Notice provision, condition(s) precedent and the prevention principle (Cont'd)

- It has been argued that notice provisions conflicts with the prevention principle.
- The recent judicial trend is to uphold the notice provisions where it is clear and satisfies the requirements of condition(s) precedent

*Multiplex Construction (UK) Ltd v Honeywell Control Systems Ltd (No.2) (2007)*

- Notice enables matters to be investigated while they are still current
- Such notice gives the employer (or contractor, in case of sub-contract) an opportunity to withdraw the instruction when the financial consequence becomes apparent.

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### Presentation of notices of claim and EOT claim

Notice of claim for liquidated damages

Refer to SFBC Clause 24.2(2)

- The Employer's notice under clause 24.2(1) shall not be given either
  - before the certificate of non-completion is issued or
  - after the Final Certificate is issued.
- The Employer must give notice after the issue of certificate of non-completion and before the issue of the Final Certificate of his intention to claim or deduct liquidated damages.
- In *J.F. Finnegan v. Community Housing* (1993), it was held that a written notice from the employer under JCT80 is a condition precedent to the right to deduct liquidated damages.

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### Presentation of notices of claim and EOT claim

Notice of claim for EOT

Notice provisions vary.

- JCT Standard Building Contract 2011 – *'Whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed the Contractor shall forthwith give notice...'* (Clause 2.27.1)
- GC/Works/1 (1998) – *Notice may be given at any time, but not '...after completion of the Works'* (clause 36(4))
- ICE seventh edition – the Contractor shall *'...within 28 days after the cause of any delay has arisen or soon thereafter as is reasonable deliver to the Engineer full and detailed particulars ...'* (clause 44(1))

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### Presentation of notices of claim and EOT claim

Notice of claim for EOT

- Contractors are responsible for giving details of all events, dates, what work is likely to be affected, or was affected and an estimate of the delay period.
- Provisions usually do not require contractor to show how it arrives at its estimate of the period of delay.
- However, by presenting how estimations are derived, contractors can lower the chance of receiving an insufficient extension made by the architect.
- With the help of critical path programme

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### Walter Lily v Mackay [2012]

Plaintiff: Giles Patrick Mackay (the employer)  
Defendant: Walter Lilly & Co Ltd (the contractor)

**Background:**

The project was a luxury town house development in London. By the date of Contract, little design work had been finalized. Many of the individual work packages were only briefly described and were subjected to provisional sums. As the project progressed, the list of design decisions awaiting employer approval and the lists of alleged defects grew longer. Eventually, delays occurred and the relations between the two parties became very strained. The contractor sought for extension of time and loss and expense.

**Court decision:**

It is found that most causes of delays occurred were related to elements of the works for which the Contractor had no design responsibility. An extension of time until the date of practical completion and a substantial sum for loss and expense were awarded.



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### Walter Lily v Mackay [2012]

**Main issue: Notification of claims**

- The relevant clause of the Contract required the Contractor to submit to the Architect such details as
  - (1) should reasonably enable him to form an opinion the regular progress of the Works or of any part thereof has been or is likely to be so materially affected and/or
  - (2) reasonably necessary to ascertain the extent of loss and expense.
- In determining the Contractor's obligation to provide information, the following matters should be considered:
  - The extent of information already available to the Architect,
  - What is "reasonably necessary" may be met by an offer to the Architect to inspect the records at the Contractor's office for the ascertainment of loss and expense.
  - The Architect must be satisfied that the loss and expense claimed is likely to be or has been incurred but he does not have to be "certain"; he only needs to review all the detail that is reasonably required by the wording of the clause.



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