

Extending the Time for Completion

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The time for completion of a construction project is a matter close to the hearts of all parties. If a contractor goes beyond it he becomes liable to pay liquidated damages for late completion, whereas if he finishes early he may well find that he has spent more resources on completing the works than he had originally allowed for in his tender.

It is for this reason that arguments concerning extensions of time are so prevalent in the industry and so often the cause of arbitration and litigation.

Disputes concerning extensions of time are usually concerned with the facts of the case rather than of points of principle or interpretation of the clauses providing for extensions to be given.

However in the recent case of Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Limited (18 October 1999) the contractor raised an interesting and clever argument on the wording of the JCT 1980 form of contract regarding the powers of the Architect (and subsequently) an arbitrator when it comes to considering the extension of time due to a contractor.

All forms of construction contract provide for the contract administrator to grant extensions of the time for completion in the event that a delay occurs which falls into one of the specified reasons that the employer has accepted entitle the contractor to an extension of time.

Very few forms of contract however provide for the contract administrator to reduce the time for completion in the event, for example that a part of the works is omitted from the contract by way of a variation order. The difficulties in determining the extent of time saved by an omission of

works coupled with the inevitable disputes are probably reason for this position.

However some forms of contract, and the Hong Kong Government and West Rail conditions are a good example of this provide that the contract administrator, when assessing the duration of an extension of time due, can take account of all matters known to him including for example works that have been omitted. The proviso to GCC Clause 50(2) is a good example of this:

"Provided that the Engineer in determining any such extension shall take into account all the circumstances known to him at that time, including the effect of any omission of work or substantial decrease in the quantity of any item of work."

Therefore under such forms of contract when a delay occurs that entitles the contractor to an extension of time the contract administrator will grant a net extension of time that will assess the delay caused by the event and set off against that delay other matters that may be relevant.

It was this point that was challenged in the Henry Boot v Malmaison Hotel case.

The claimant contract entered into a contract for the design and construction of a portion of the works on the Malmaison Hotel in Manchester under a JCT 80 form of contract. The date for completion was 21 November 1997, subsequently extended to 6 January 1998, but completion was not achieved until 13 March 1998 and the employer deducted liquidated damages of £250,000.00.

The contractor claimed an extension of time for the period between 6 January 1998 and 13 March 1998 principally on the basis of failure by the Architect to give adequate information on time and variations.

No agreement could be reached and the matter went to arbitration. In the arbitration the employer pleaded in detail that the works were delayed by a number of causes (but not failure by the Architect to give adequate information on time or variations) which basically amounted to a long list of complaints about the poor performance of the contractor.

The contractor argued that the arbitrator, like the Architect before him, had to consider in isolation whether the Relevant Event complained of had caused a delay to the completion of the works, and if it had done so to grant an extension of time on such a basis. It was not open to the arbitrator or the Architect to take into account other matters, such as the contractors own delays and poor performance when assessing the extension of time due.

The contractor's ingenious argument was based upon the wording of Clause 25 of the JCT 1980 form of contract. Under this clause the mechanism for granting an extension of time is:

- Firstly, pursuant to Clause 25.2 if the contractor considers that there is an actual or anticipated delay to the completion of the works then he shall serve notice identifying which of the Relevant Events (a Relevant Event is an event entitling the contractor to an extension of time) has caused the delay and give details of the probable extend of the delay.
- Secondly, pursuant to Clause 25.3 if in the opinion of the Architect the delay is caused by a Relevant Event and the completion of the works is delayed beyond the Completion Date the Architect shall grant an extension of time.

On the basis of the wording of Clause 25.3 the contractor thus said that the Architect had to grant an extension of time if a

Relevant Event caused delay and could not take account of anything that was not a Relevant Event in setting a revised Date for Completion.

The contractor further said that if this was not the case the employer would in effect be raising counter claims in respect of each of the issues that it had complained of regarding the contractor's performance.

The employer disagreed with the contractor's argument. It said that an employer could have both a negative and a positive defence to an extension of time claim. The negative defence being that the Relevant Event did not cause a delay to the critical activities of the project, and the positive defence being that the true cause of the delay was other matters which were not Relevant Events but were matters for which the contractor was responsible.

The judge, His Honour Mr Justice Dyson QC accepted that the employer was correct in his assertion and that an Architect when assessing an application for an extension of time was entitled to consider other factors that may be impeding progress or indeed be the true cause of the delay such as the contractors own inefficiency and delays.

The judge's interpretation thus confirmed that the express power included in the Hong Kong Government and the West Rail Conditions applied equally the JCT1980 Editions.

The judge was careful however to set limits to the position and ensure that the defence to a claim was specific and not a general claim that the contractor had performed badly throughout. He gave the example of a delay at the beginning of the project caused by a late handover of the site. He said that in such circumstances it was open to the Architect to contend that the contractor could have been getting on with work off-site in such a period and that his failure to do so was the true cause of the delay, but he

made it clear that the Architect could not deny the claim on the basis of allegedly poor performance of the contractor throughout the entire project.

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