Have we been blinded by science?

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An introduction to and the purpose of extensions of time

IT ought to be this simple. Construction contracts provide a start and end date for the works to be completed and for the contractor to forfeit liquidated damages if it fails to manage its risks such that completion of the works is delayed beyond the completion date. Conversely, if the employer fails to manage the risks that are allocated to it, with the result that the contractor has less time to complete the works or has more work to do than was originally allowed for, the contract contains a mechanism whereby the completion date is extended, thereby granting relief to the contractor from liquidated damages but otherwise preserving the completion date and the agreed risk profile, so the contractor remains at risk for managing its side of the bargain.

This is the classic risk allocation allowed for under most standard form construction contracts. This arrangement benefits the contractor because it knows what resources it needs to apply to efficiently manage its works so as to achieve completion by the completion date. It also benefits the employer because it preserves the fixed date for achieving completion along with the liquidated damages regime if the contractor fails to complete by the completion date.

The protection afforded to the employer is significant; it means that the period by which the works are to be complete can be extended to avoid the employer potentially falling foul of the prevention principle and thus being exposed to an uncertain temporal outcome whereby time is at large and it loses its right to payment of liquidated damages. Such an outcome removes the relative certainty of the outcome that is managed through operation of the contractual mechanisms for extensions of time (EOT) and would be unbankable. Certainty of a managed outcome has considerable benefits to the procurement of construction works and such practices (endorsed by the English common law) have a wider application beyond England and Wales to those jurisdictions globally that apply the common law (from Australia to Zimbabwe).

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Back to the future – Chestermount

The balance of risk is made clear within *Balfour Beatty v Chestermount* (1993) 62 BLR 1, a decision of Mr Justice Colman in the commercial court concerning issues of concurrent delay under a Joint Contracts Tribunal (JCT) Standard Form of Building Contract With Contractor's Design, 1980 edition. The EOT provisions in the 1980 edition are materially similar to those found in subsequent editions of the JCT form, including the most recent 2016 edition. Chestermount has been considered and applied in

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numerous judgments of the court without criticism or contradiction since 1993 and it remains a relevant decision to anyone considering the proper application of EOT (and concurrent delay) under JCT contracts.

The Chestermount judgment includes a summary of what the EOT mechanism seeks to achieve in terms of the agreed risk allocation as between the parties. Importantly, it also identifies the purpose of the EOT provision:

> *"The underlying objective is to arrive at the aggregate period of time within which the contract works as ultimately defined ought to have been completed, having regard to the incidence of non-contractor's risk events and to calculate the excess time, if any, over that period, which the contractor took to complete the works."*

This explanation is key to the approach required by EOT provisions, in determining what would constitute a 'fair and reasonable' period to complete the works, having regard for the additional time that would fairly and reasonably be required over and above the original contract period because of the impact of employer risk events. One further part of Colman J's judgment in Chestermount is apposite to this discussion:

> *"The completion date as adjusted retrospectively is thus not the date by which the contractor ought to have achieved, or ought in the future to achieve, practical completion but the date which marks the end of the total number of working days starting from the date of possession within which the contractor ought fairly and reasonably to have completed the works."*

This brings us to the question as to why it is that some English court decisions have had the effect of permitting employer's risks to eat into the contractor's time for completion of the works but still require the contractor to bear its own extended preliminary costs for the additional works and still suffer the imposition of liquidated damages? This has arisen in the context of delay caused by both contractor and employer risk events; concurrent delay.

The North Midland case

Of course, the parties are the masters of their own contractual fate; they can agree whatever terms they wish, provided those terms are not unlawful. This is neatly illustrated by the recent case of *North Midland Building Ltd v Cyden Homes Ltd* (2017) EWHC 2414 (TCC). In that case, the parties had entered into a contract to complete the design and build of a new home for Sir James Dyson's family. The contract was based on the JCT Design and Build 2005 edition standard form. However, the EOT provisions were amended to say:

> *"Any delay caused by a relevant event which is concurrent with another delay for which the contractor is responsible shall not be taken into account."*

Faced with such a clear expression of the parties' intentions, Mr Justice Fraser had no hesitation in finding that the words meant what they said. There was simply no room for the contractor to pray in its aid the prevention principle because it had agreed to sacrifice that principle by the express amendment in the contract. Accordingly, the contractor's claim for an EOT failed. Tough on the contractor, perhaps, but the court's function is to enforce contractual bargains not to re-write what might appear, in retrospect, to be a poor deal.

JCT standard form EOT provisions

However, what about contracts based on largely unamended JCT provisions? In the context of concurrent delay, there have been more cases decided by the court on the JCT terms than any other standard form contract. It is therefore illustrative to consider the approach adopted by the JCT form.

In essence, there is a mandatory requirement that an EOT should be awarded if three requirements are satisfied, with a fourth point as to the nature of that award (i) there must be a delay to the progress of the works; (ii) that delay to progress must have been caused by a relevant event; (iii) the delay to progress caused by the relevant event must likely delay completion of the works beyond the completion date; and (iv) the nature of the mandatory award is that it should be an estimate of the amount of time that would be 'fair and reasonable'.

JCT compared with NEC

It is important to note that the language of the EOT provision in the JCT form distinguishes between a delay to progress and a delay to completion of the works

beyond the completion date. Interestingly, the position is different under the New Engneering Contract (NEC) standard form. Clause 63.3 states:

> *"A delay to the completion date is assessed as the length of time that, due to the compensation event, planned completion is later than planned completion as shown on the accepted programme".*

Under the NEC terms, the completion date is adjusted but the amount of the adjustment is determined not by the impact of compensation events on the contractor's ability to complete by the completion date but rather by the amount of delay to the current planned date for achieving completion as set out on the accepted programme, a programme that is updated periodically to take account of actual progress amongst other factors. Any concurrent culpable delay by the contractor which is considered to drive progress on critical path activities is therefore wrapped up into the equation and at the contractor's risk.

Not so with the EOT mechanism under the JCT form; if a delay to progress has occurred and it was caused by a relevant event then once the extent of delay to progress is determined, it becomes necessary to consider the likely effect of that delay on the contractor's ability to complete by the completion date. The EOT provisions are not concerned with what may, or what ultimately does, cause completion of the works as a whole to be delayed to the time it was, i.e. practical completion. Rather, they are concerned with adjustments to something else, being the completion date.

Programming

Programming is an art, not a science but like science, it has the ability to blind. This is why the court has reminded us that delay is in essence about facts, not theory. In *Mirant v Ove Arup* (2007) EWHC 918 (TCC), the court observed that when seeking to determine the impact of activities at or near the critical path on the completion date, the use of computer programmes is merely a tool which must be considered with the other evidence and the question of whether or not an event caused delay, and if so what delay, is a question of fact. The evidence of programming experts may be of persuasive assistance.

However, controversy is introduced when programming experts seek to assess the impact of each event (whether employer risk or contractor risk) on the planned programme of activities to predict what is driving the anticipated date for achieving completion or what has caused completion to be delayed to the date it was (the critical path). The logical proposition is that if the contractor is already delayed beyond the completion date by its own culpable delay, it can only be entitled to an EOT to the extent a relevant event further delays the anticipated date for achieving completion. However, if that is right, why are JCT conditions routinely amended on behalf of employers to provide expressly that any concurrent delay will be assessed by awarding an EOT only to the extent delay is not caused by the contractor (or variants of this, as in the North Midland case)? Such amendments would be unnecessary unless the JCT conditions were intended to adjust the completion date only when there is a relevant event and to ignore the effect of contractor risk events?

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One answer may be that the approach adopted by programming experts has conspired to confuse the lawyers. There is a symmetry between, on the one hand, the requirement to give notice that the progress of the works is being or is likely to be delayed, and on the other, the contract programme that shows the contractor's ability to complete will be no further impacted because it has some issues of its own. However, the JCT conditions have specific rules entitled 'fixing completion date' which are to be applied once the notice is given. All they require is for there to be a delay to progress (a delay to any activity/operation) caused by a relevant event and that 'completion of the works is likely to be delayed thereby beyond the relevant completion date.' There is no reference to delay caused by contractor risk events in making this EOT assessment.

Judicial support

The jurisprudence on this issue is not consistent and we need a Court of Appeal decision to resolve it but amongst statements in support of the balanced risk approach is the judgment of Edwards-Stuart J in *De Beers v Atos* (2010) EWHC 3276 (TCC). In that case, the court adopted the Chestermount approach in finding that:

> *"It therefore does not matter if the contractor would have been unable to*

complete by the contractual completion date if there had been no breaches of contract by the employer (or other events which entitled the contractor to an extension of time), because he is entitled to have the time within which to complete which the contract allows or which the employer's conduct has made reasonably necessary."

This approach was endorsed by Akenhead in *Walter Lilly v Mackay* (2012) EWHC 1773 (TCC). In that case, the court found that:

"Where delay is caused by two or more effective causes, one of which entitles the contractor to an extension of time as being a relevant event, the contractor is entitled to a full extension of time."

Fair and reasonable

Having established that there has been a delay to progress, it was caused by a relevant event and it will likely delay completion of the works beyond the completion date, unless the contract has been amended in some way to require otherwise, the contractor is entitled to such EOT as the employer 'then estimates to be fair and reasonable'. The determination is an estimate which preserves the balanced risk allocation consistent with the objective of the EOT mechanism, as confirmed by Chestermount.

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As the court observed in that case, when assessing EOT the 'yardstick is what is fair and reasonable' having regard to whether, and if so to what extent, the relevant event delayed the progress of the works. Furthermore:

"He must then apply the result of his assessment of the amount of delay caused by the relevant event by extending the contract period for completion of the works by a like amount and this he does by means of postponing the completion date."

Nowhere in the above passage, nor in the JCT provisions, is it said that the first question to be asked is by what date will completion be achieved but for the occurrence of a relevant event. Nor is the question whether the relevant event causes an impact on completion by that date. Such an approach would be to adjust the date of practical completion, not the completion date.

Bearing in mind the earlier passage taken from Chestermount, once an assessment of a delay to the progress of work is made, then it is necessary to work out what the effect of that delay is on a sequence of activities. If the delayed sequence goes beyond the completion date, then an EOT should be awarded accordingly. This is fair and reasonable and works out the aggregate period of time that the works should have been completed in, having regard for the incidence of non-contractor risk events.

Summary

This short paper is intended to stimulate debate and to question the proposition that the prevention principle is not an appropriate means of relieving a contractor from liability where there is concurrent delay. That proposition is apparent from the obiter remarks of Fraser J in the North Midland case and his reference to the judgments in *Adyard Abu Dhabi v SD Marine Services* (2011) EWHC 848 (Comm) and *Jerram Falkus Construction Ltd v Fenice Investments (No. 4)* (2011) EWHC 1935 (TCC). This debate should be resolved by the Court of Appeal.

Is it fair and reasonable to allocate the risk of liquidated damages (and all the other costs of delay) to the contractor when employer risks would have delayed achievement of the completion date? Does such an EOT award represent the aggregate period of time within which the contract works as ultimately defined ought to have been completed, having regard to the incidence of non-contractor's risk events, as required by Chestermount?

Simple, really?

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With thanks to Jeff Edwards of Touchstone Consultants. Jonathan Hosie is an ICES advisory solicitor. A legal hotline is available free of charge to ICES members from the institution's advisory solicitors.