FEATURE ARTICLE

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Time: winning delay claims

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This paper is based on a presentation at an interactive session during the International Construction Projects Committee (ICP) Working Weekend in Athens in May 2019 during which the participants considered what should happen in different scenarios where a project falls into serious delay and parties disagree about whether or not an extension of time ought to be awarded. The presentation imitated life in that earlier activities (presentations and coffee breaks) had overrun so that, even after an extension of time granted by the ICP chairs and notwithstanding accelerative measures, not all the work was completed within the time available. Accordingly, in places, this paper trespasses beyond the discussion in Athens.

Why lawyers benefit from delay claims

The financial costs that are associated with delays are often considerable. Whoever 'funds' the delays in terms of paying the costs as they are incurred, responsibility will ultimately turn on what the contract says and the extent to which interim milestones or the completion date are extended.

However, deciding where that responsibility lies is far from straightforward. Although most contracts proactively seek to allocate delay risk, it is difficult (and perhaps dangerous) to devise a regime that prescribes how to go about actually proving and assessing extensions of time but that will also be sufficiently flexible to accommodate what might actually happen at any given time during a major project and come up with a fair outcome in every scenario. Extensions of time provisions have become longer as

draftsmen try to grapple with new scenarios or decisions and remarks from tribunals, but when the parties' dispute lawyers look to the contract for answers to the issues surrounding entitlement in any given case, they still find much has been left ambiguous, unsaid or is unworkable in practice.

When the scope for legal debate over the interpretation of a clause is combined with multiple and competing causes of delay requiring detailed analysis of the facts and expert evidence, the only certainty is that it is going to be expensive to resolve.

The commercial reality is that each party gambles.

Gambling with time

Rarely will the wheels of justice move as quickly as the project; indeed, a claim that is first presented as forecast delays substantiated by a prospective analysis may not be finally resolved until after the project is completed, by which time the actual delay has crystallised and delays are being assessed by reference to competing retrospective delay analyses. There can be legitimate opposing views in respect of multiple and interrelated causes of delay, so that the task of unravelling what happened in order to assess entitlement becomes complicated and time consuming. Whatever the contract says, in practice: the process of substantiating the impact of events is ongoing; the programmes may not have been updated let alone agreed; the contemporary record is seldom complete, accurate or impartial; and delay analysts have a propensity to argue as to which events were concurrent and sequential, critical and non-critical.

In such circumstances, the commercial reality is that each party gambles. For the contractor's part, the gamble is whether it should proceed on the basis that its entitlement to an extension of time will ultimately be successful such that it will be relieved of liability for liquidated damages (in whole or in part) and can recover prolongation costs, or if it should take steps to fund such measures as are necessary to recover the programme absent an instruction to do so.

For the employer's part, once an extension has been granted it cannot be withdrawn, so if the contractor has not yet substantiated its claim, it takes the risk of awarding an extension of time that may later prove to have been overly generous or may remove the incentive for the contractor to recover the delays. Instead, the employer might be tempted to withhold an extension of time on the grounds that it has yet to be substantiated properly in the hope that the liquidated damages sword of Damocles will lead the contractor to accelerate 'voluntarily' at no cost to the employer.

Each of these 'gambles' has the potential to derail the project. Of course, on both sides there is a duty to mitigate and the Society of Construction Law (SCL) Protocol[1] discourages adopting a 'wait and see' approach. However, in practice each is likely to be driven by a sober assessment of its own commercial interest.

Whatever the attitude of the employer, a contractor is well advised to fight actively for an extension because even a partial extension of time (EOT) or the existence of a genuine claim will diminish its risk. To that end, a contractor needs to operate the contractual machinery and devote sufficient resources to collating its substantiation in order to apply pressure on the employer to grant an extension of time.

In the meantime, a contractor will assess its competing exposures, namely its liability for damages for late completion (ie, the rate for liquidated damages, whether there is a cap, the likely costs to accelerate and the level of prolongation costs it will incur). Very often this assessment suggests that its maximum exposure if it is wrong (about its entitlement to an extension of time and its prolongation costs) is less than the potentially irrecoverable costs it is likely to incur in accelerating, so the contractor will 'dig in' and hold out for an extension. It does so in the knowledge that an employer is unlikely to terminate for delay, particularly if there is an outstanding or genuinely disputed claim for an extension of time.

In parallel, the employer will consider the consequences of delay such as lost revenue from the asset and any exposure to delay damages of its own (eg, because of the terms of financing or from other contractors on site). The assessment the employer makes is to work out what is likely to get the project completed as quickly, efficiently and with as little acrimony as possible: holding back the extension or granting it.

Quite often it is in the employer's interests to give at least *some* extension, for example, by awarding a partial or interim extension of time pending further substantiation. Where there is a legitimate concern about whether the extension is justified or will ever be substantiated, the employer might express the relief as a liquidated damages 'holiday' in order to maintain the existing milestone or completion dates or state that the extension is granted *ex gratia* or with no entitlement to prolongation costs (particularly if there is evidence of concurrent delay). Certainly, by resisting granting a contractor any relief in a situation where there is likely to be some entitlement, an employer may not only expose the employer to a claim for breach of contract (especially if there are obligations of good faith), but may also lead to a tribunal having sympathy with the contractor and so giving more credence to what was in fact an exaggerated claim.

Delay versus disruption

The concepts of delay and disruption should not be conflated. Although both are the effects of events, the impacts on the works are different: what should happen upon their occurrence might be governed by different provisions; they tend to require different substantiation; and they will lead to different remedies. Delay is about time, work taking longer than planned. As such, delay analysis looks at what activities are on the critical path and the extent to which the milestone or end date is pushed out. By contrast, disruption is about how the working methods and sequence of activities have been disturbed, hindered, interrupted or otherwise interfered with; so that disruption analysis focuses on assessing productivity, regardless of whether or not the relevant activity sits on the critical path.

That said, delay and disruption are inherently related. If there is a loss of productivity in completing an impacted activity that is also on the critical path, disruption may cause critical delay. However, it is also possible for work to be disrupted but the project still competed on time if the disrupted work was not actually on the critical path. Similarly, acceleration measures aimed at overcoming delays may lead to less efficient working; for example, parallel working can lead to increased congestion and lower productivity on site. In such a situation, the project needs to check that the lost productivity will be offset by the potential programme recovery.

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Where the delay and disruption claims overlap, in order to prove its entitlement a contractor may find itself having to put forward different evidence in support of each or even pursue the claims at different times. For example, while it is increasingly common for contracts to provide for prospective forecasting of delay and assessment of extensions of time, most contracts only entitle a contractor to additional costs that have in fact been incurred so it is more natural to assess disruptive claims retrospectively.

Losing the right to liquidated damages

Most jurisdictions have a mechanism for precluding a party from insisting on performance of an obligation that it has prevented the other party from performing. Thus, an employer cannot hold a contractor to a milestone or completion date and exact liquidated damages where the employer itself has prevented the contractor from achieving those dates. The contractor does not need to prove that the employer has committed a breach of contract; such concepts apply equally where an employer legitimately invokes its contractual rights such as issuing variations and directions. In England and Wales, this is called the 'prevention principle' and it operates to set 'time at large': the completion date falls away and the contractor has a reasonable time within which it must complete its work. In other jurisdictions, it presents itself in concepts of waiver, estoppel and good faith.

However, what happens when a contractor, through its own fault, is not only late but, in the event, *never* delivers the work having contracted to do so by a specified date? In *Triple Point Technology Inc v PTT Public Company Ltd* ('*Triple Point*'),[2] the English Court of Appeal considered three possible scenarios in such a situation. In that case, the employer (PTT) withheld payment because relevant milestones were not met. The contractor suspended performance. The employer then terminated the contract and engaged a replacement contractor to complete the work instead. The

contract included a liquidated damages provision requiring the contractor to pay 'the penalty at the rate of 0.1% of undelivered work per day of delay from the due date for delivery up to the date [employer] accepts such work'.

The Court of Appeal reviewed the authorities and discovered an inconsistent approach had been adopted in that, in such circumstances, the courts had decided variously:

- the liquidated damages clause did not apply;
- the liquidated damages clause did apply but only up to the point of termination; and
- the liquidated damages clause continued to apply until the replacement contractor achieves completion.

In the event, relying on a 100-year-old Supreme Court (then House of Lords) authority[3] 'which had never been disapproved' but also had rarely been cited in modern cases, the Court of Appeal preferred the first approach: the liquidated damages clause did not apply where the contractor never handed over completed work to the employer so that, while the employer could recover liquidated damages in respect of the contractor's delay in delivering two completed milestones prior to termination, no liquidated damages accrued for incomplete milestones. Instead, the employer was entitled to recover general damages based on ordinary principles and subject to the employer proving its loss. Further, the employer's recovery was capped by a standalone limitation of liability clause.

During the debate at the ICP Working Weekend, it became clear that the majority of the audience disagreed with the outcome of this case. Common and civil lawyers alike favoured a more orthodox analysis whereby liquidated damages would be applied up to the date of termination and, thus, rights that have already accrued would be preserved. The English Court of Appeal had difficulty with that analysis because it considered it artificial to divide employers' rights into a period before termination (when liquidated damages applied) and after termination (only general damages). The court had also disliked the third option because it would mean that the employer and replacement contractor controlled the period for which liquidated damages might run.

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The court was at pains to stress that its decision was based on the wording of the clause and the circumstances in any particular case. At least one participant at the Working Weekend predicted that the *Triple Point* matter would come back before the English courts within a year and revert to a more traditional approach. However, a party considering terminating a construction contract where the contractual date for completion has overrun should bear in mind that termination might mean that any entitlement to liquidated damages for delay no longer applies, requiring it instead to assume the more onerous burden of proving its actual delay losses.

In the meantime, it will be interesting to see whether those who negotiate construction contracts will now include or strengthen the express wording to ensure that accrued rights are preserved on termination, particularly where works remain incomplete, for example, because a contractor suspends for non-payment or abandons the project. They may also wish to make it clear whether any cap on liability applies to liquidated and other damages, and whether the employer is entitled to claim general damages over and above the liquidated damages specified if the relevant clause falls away.

Holding on to liquidated damages

The Working Weekend considered two scenarios in which an employer may not lose its entitlement to liquidated damages even though it may have caused delay: (1) where there is concurrent delay; and (2) where a contractor fails to comply with a condition precedent notice provision.

The decision from the Supreme Court of the Northern Territory of Australia in *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* ('*Gaymark*')[4] – which refused to allow the employer to recover what was described as 'an entirely unmeritorious award of liquidated damages for delays of its own making' – led to an uptick in contractors seeking to invoke the prevention principle as a defence where they had failed to comply strictly with notice provisions. However, this was dealt a blow in *Multiplex Construction (UK) Ltd v Honeywell Control Systems* ('*Multiplex*'),[5] which cast doubt on the its applicability. In *Multiplex*, the English Court of Appeal was concerned that a

term requiring a contractor to give notice served a valuable purpose and warned against the potential danger of absolving non-compliance since it would enable a contractor to disregard any provision making notice a condition precedent with impunity and manufacture a situation where time could be placed at large at its option. That decision was endorsed in subsequent authorities in England, albeit only in *obiter dicta*. And notwithstanding *Gaymark*, the application of the prevention principle in such scenarios even remains unsettled in Australia.[6]

In fact, the prevailing wind tends to favour holding parties to the bargain they agreed not only in respect of condition precedent notices, but also in respect of allocating the risk of concurrent delay. In *North Midland Building Ltd v Cyden Homes Ltd* ('*Cyden*'),[7] a standard form of contract had been amended to allocate the risk of concurrent delay to the contractor by expressly providing that 'any delay caused by a Relevant Event[8] which is concurrent with another delay for which the Contractor is responsible shall not be taken into account'.[9]

In the event, two employer-caused delays were concurrent with delays for which the contractor was responsible. Relying on the amended clause, the employer reduced the contractor's entitlement to an extension of time accordingly. The contractor challenged this and the matter eventually came before the English Court of Appeal, which was asked to consider whether this clause contradicted the prevention principle and so was unenforceable.

The contractor lost at both first instance and on appeal. At each instance, the court described the clause as being 'crystal clear' about the parties' intention to allocate concurrent delay risk to the contractor. The Court of Appeal rejected the contractor's argument that the prevention principle was an overriding rule of law or policy, but concluded that, in any event, the principle was not engaged in this case because the contract had included 'any impediment, prevention or default, whether by act or omission, by the Employer' as one of the relevant events that would entitle the contractor to an extension, so that time was not to be set at large on the occurrence of an act of prevention. Instead, the courts upheld the clause as having effectively reversed the way the court had dealt with concurrent delay in *Walter Lilly & Co v Mackay*.[10] In this context, the court's *obiter* comments are also significant as potentially opening the door for employers to argue in future that, even where a contract is silent on concurrency, a contractor should not automatically be granted an extension of time for periods of concurrent delay.

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Although this was an English case, members of the global construction and engineering team at Hogan Lovells have considered how the *Cyden* approach would fare in their jurisdictions and suggest it would broadly:

- succeed in common law countries (such as Australia, Hong Kong, Singapore and the United States);
- be followed in continental European and Latin American civil law countries where clear drafting overrides general rules of fairly apportioning concurrent delays, allowing the parties' will and contractual terms entered into at arms' length to prevail (such as Germany, France, Italy, Mexico and Spain); but
- be rejected in civil law countries influenced by Sharia law because of underlying principles that focus more on outcomes – such as good faith and abuse of rights – where the courts tend to intervene so as not to allow a party that has contributed to non-performance to seek redress for such non-performance. Instead, tribunals in jurisdictions such as the United Arab Emirates and Saudi Arabia are more likely to try to reflect what the parties have agreed while apportioning delay between them.

Against that background, parties may now be encouraged to agree provisions that clearly and unambiguously allocate concurrent delay risk to one party alone or provide first to be apportioned reasonably between the parties, or to define acts of prevention and default by the employer more narrowly so as to leave open a possible route of engaging the prevention principle.

The author notes that, in fact, the clause in *Cyden* included a second precondition to the contractor's entitlement to an extension of time, namely that 'the Contractor has made reasonable and proper efforts to mitigate such delay'. On its face, the amendment looks innocuous – merely a restatement of the duty to mitigate. However, by translating

it into an obligation to demonstrate that mitigation efforts were both 'reasonable' and 'proper' (whatever that means), the contractor – perhaps inadvertently – accepted the introduction of a second gate, and arguably one that could only be unlocked with a more elusive key.

So how do you win?

In order to best manage the risks and improve the prospects of a 'win' in delay cases, those responsible for collating the substantiation for a claim or evidence to pursue its case in proceedings should pay heed to the ancient Egyptians: build a pyramid, not a funnel.

The absolute foundation for a successful case is the documents – and it should be a broad foundation. The evidence of fact witnesses needs to be consistent with the documents or to explain why those documents are not the full story or accurate. An expert may help to identify which documents require further explanation and which documents can be relied on to support an analysis.

The expert's role is a narrow peak (and the advocate's is even an even narrower zenith). Too often the role of the expert is misunderstood: it is to provide an analysis based on the story as reflected in the documents and witness statements, not to invent one. Otherwise, the pyramid is inverted and becomes an unstable funnel: an expert dependent on a precariously narrow base of factual evidence, which is easily undermined by the introduction of contravening facts.

Conclusion

The handful of scenarios considered in this paper, like the ICP panel session on which it is based, only scratches the surface of the practical and commercial difficulties project teams face when a major project falls into serious delay and management asks them (or their legal teams) to predict the likely outcome of a dispute over a contractor's entitlement to an extension of time and its assessment.

The characteristics of each project and, perhaps more importantly, the individual and combined behaviour, skills and experience of the teams that execute them, are unique, so it is not surprising there is no universal solution. Given the pervasive uncertainty that surrounds such projects, it is unrealistic to believe a contract can not only provide a mechanism for every eventuality, but also ensure a 'fair' outcome in every case. In truth, good contract drafting will not save a party from its poor execution of the project, just as a poorly drafted contract will not prevent a project from being executed well.

Notes

1 Society of Construction Law Delay and Disruption Protocol (2nd ed, February 2017).
2 [2019] EWCA Civ 230, 5 March 2019.
3 *British Glanzstoft Manufacturing Co Ltd v General Accident, file and life Assurance Co Ltd* (1913) SC (HL).
4 [1999] NTSC 143.
5 [2007] EWHC 447 (TCC).
6 As recently discussed by the New South Wales Court of Appeal in *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151. In that case, the court noted there were conflicting decisions contrasting the *Gaymark* decision with the decision in *Turner (No 1)* where the court held that a failure to comply with contractual notice provisions prohibited the contractor from relying on the prevention principle. Rather than dealing with the apparent conflict between the *Turner* and *Gaymark* decisions, the court in *Probuild* took a different approach focusing upon Probuild's unilateral power to extend time under Clause 41.9. A similar clause had been considered in *Peninsula Balmain v Abigroup Contractors Pty Ltd* [2002] NSWCA 211 in that there was a discretionary power to the superintendent to extend time even if the contractor had failed to make a claim for an extension. In *Peninsula Balmain*, Hodgson JA held that the superintendent was required to exercise that power honestly and impartially and should have done so to extend time, despite no claim being made.
7 [2018] EWCA Civ 1744.
8 'Relevant Events' (those pushing actual completion beyond the contractual completion date and triggering an entitlement to an extension of time) included wide-ranging employer acts of prevention and default.
9 Clause 2.25.1.3(b).
10 [2012] EWHC 1773 (TCC). At para 47, Coulson LJ said: 'A period of concurrent delay, properly so called, arises because a delay has occurred for two separate reasons, one being the responsibility of the contractor and one being the responsibility of the employer. Each can argue it would be wrong for the other to benefit from a period of delay for which the other is equally responsible. In *Walter Lilly* and the cases cited there, under standard JCT extension of time clauses, it has been found that the contractor can benefit despite his default. By clause 2.25.1.3(b), the parties sought to reverse that outcome and provide that, under this contract, the employer should benefit, despite the act of prevention. Either result may be regarded as harsh on the other party; neither could be said to be uncommercial or unworkable.'

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