

## IN THIS ISSUE

- Reconciling the Irreconcilable? : Extensions of Time
- If you don't pay me more the job won't get done!
- Update on the new Construction Act – Get Ahead with Arbicon

## THE ARBICON TEAM

**Ian J Purser**  
Director

**Jon Nugent**  
Director

**Jack Kirk**  
Senior Consultant

**Mike Norrish**  
Senior Consultant

**Tim Dyson**  
Senior Consultant

## ARBICON ADR LIMITED

St George's House, George Street  
Huntingdon, Cambridgeshire, PE29 3GH

T: 01480 426560 advice@arbicon.co.uk  
F: 01480 426561 www.arbicon.co.uk



## Reconciling the Irreconcilable? : Extensions of Time

The matter of how extensions of time should be calculated where there exists both delays caused by matters for which the Contractor is entitled to an extension of time (often termed 'relevant events') and matters for which he is not, has again become a subject of debate after the Scottish equivalent<sup>1</sup> of the English Court of Appeal's Opinion in *City Inn v Shepherd*<sup>2</sup>.



The purpose of an extension of time provision in a contract is not just to facilitate the proper running of the project. It is there also to allow the Employer to recover from the Contractor a pre-agreed sum for damages for any inexcusable delay. We know these as liquidated and ascertained damages or 'LAD's'. If there is no facility in the contract to adjust the required completion date and the Employer himself delays completion then the LAD provision no longer bites<sup>3</sup>.

The problem with giving a catch-all formula for dealing with extensions of time is that not all contracts say the same. The Scottish case above was concerned with a contract based upon JCT'80. Other judgments often referred to and relied upon were based upon contracts using standard forms also long superseded

and in some cases, bespoke forms. However remember that the extension of time provisions to have the effect of preserving the Employer's right to deduct LAD's must allow the completion date to be adjusted in his default. Accordingly where rules are set, and often they are not, they tend to follow much the same practice, commonly that upon notice from the Contractor or independently the Employer's Architect/Project Manager/Engineer or in some cases the Employer himself must ascertain the effect of the matter in the notice upon the completion date and revise the date accordingly by giving an extension of time.

That sounds straightforward but delays to a project can be complex, caused by a combination of relevant events and the contractor's own problems all within a complex matrix. Rules have to be set but most standard forms shy away from any such attempt. So for the most part we have to revert to the common law to decide how to deal with it.

The first case to consider is *Fairweather v Wandsworth*<sup>4</sup>. This concerned a contract using JCT'63 standard form but the principle should be of general application. From this we derive authority that when considering extensions of time the first-in-time test (rather than the dominant test) is to be used.

*continued over...*

## Reconciling the Irreconcilable? : Extensions of Time... *continued*

To explain what that is, if I negligently damage your car causing the bumper to be replaced and subsequently, but before it is replaced, somebody else collides with it and causes damage that would have also on its own required its replacement, I am still liable for 100% of the cost of replacement and the second person none <sup>5</sup>.

If the damage I caused required re-spraying only but the second collision required replacement I am still liable for the now theoretical cost of re-spraying and the second person the cost of replacement less the cost of re-spraying <sup>6</sup>. This is the 'first-in-time' rule.

The second case to consider is *Balfour Beatty v Chestermount Properties* <sup>7</sup> (on a contract using JCT'80 but again probably of general application). This set two principles. The first was that the contractor was not entitled to an extension of time for matters such as variations when he was already in delay and the variation did not cause further delay – an end to the entitlement approach. Secondly, a variation issued during contractor culpable delay would not cause an extension by reference to the actual date of issue of the instruction, which would have the effect of giving an extension for the preceding period of contractor culpable delay, but by 'dotting on' an appropriate period of extension onto the original or previously extended completion date.

The third case to consider is *Henry Boot v Malmaison* <sup>8</sup> (again under JCT'80 but again probably of general application). There Dyson J decided firstly that the Architect when arriving at his determination of the extension of time arising from a relevant event can also take into account other matters including the Contractor's own delays. If that was otherwise then of course this article would lose its relevance.



Secondly, it decided that where there are two concurrent delays, one a Relevant Event and the other not, the Contractor should get his extension.

That was further developed in *Royal Brompton Hospital v Hammond* <sup>9</sup>, again a contract using the JCT'80 standard form. HHJ Thornton quite rightly observed that situations where two delays operate concurrently as hypothesised by Dyson J are rare. However, despite HHJ Thornton's judgment being described as exemplary in the Court of Appeal <sup>10</sup>, there is some conflict within parts of his judgment. He firstly stated in very simple terms what is required to evaluate whether a relevant event requires the completion date to be extended;

- i. that a Relevant Event has occurred; and*
- ii. that that Relevant Event is likely to cause the completion of the works as a whole to be delayed beyond the Completion Date then fixed under the contract, whether as a result of the original agreement between the contracting parties or as a result of the grant of a previous extension of time*

The particular point to note is that the assessment is to be made against the contractual completion date, not the anticipated actual completion. This goes against previous statements that a contractor's own delays are to be taken into account when assessing the effect of Relevant Events.

However later he seems to correct this;

*continued over...*

# RESOLUTION

## Reconciling the Irreconcilable? : Extensions of Time... *continued*

*'It does not mean, in my judgment, a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a Relevant Event and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation although there is a Relevant Event,*

*"the completion of the Works is [not] likely to be delayed thereby beyond the Completion Date."*

*The Relevant Event simply has no effect upon the completion date.'*

So what principles can be derived:

1. The first-in-time principle applies to extension of time considerations. Therefore when considering a number of delaying events their effect should be considered sequentially as they occurred. The approach of determining what is the dominant cause is not correct.
2. Matters other than Relevant Events can be taken into account when considering the effect of Relevant Events upon the completion date.
3. If the Relevant Event occurs on a contract already in delay, if the Relevant Event does not cause further delay then no extension of time is due.
4. When there is true concurrency between delaying events one of which is a Relevant Event, an extension of time is due.
5. A Relevant Event occurring during a period of Contractor culpable delay does not cause an extension up to the date of the Relevant Event but a relevant additional period added to the contractual completion date.

So what of the Scottish 1 decision in *City Inn v Shepherd*<sup>2</sup>. By a majority it was agreed that the position at 2 and 3 above was correct. But from the opinions expressed there does appear to a completely different approach to the matter of causation.

'Concurrent causes' apparently does not necessarily mean just those operating concurrently but those that cooperate in producing delays, i.e. all delaying events. If the dominant cause or causes cannot be determined then apportionment is the correct approach. This appears somewhat in conflict the English position at 1 and possibly 4 above.

So is the natural desire to harmonise the approach possible or even desirable or should we not just accept that different jurisdictions call for different analytical approaches?

As to what analytical methods are available that is for another time.

1. *Scottish civil law and Courts and English civil law and Courts are quite separate despite having a common legislature and final court of appeal since 1707. Scottish case law is therefore not a binding precedent on contracts under the Law of England and Wales and visa versa.*
2. *City Inn Ltd v Shepherd Construction Ltd Extra Division, Inner House, Court of Session [2010] CSIH 68 CA101/00*
3. *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 2 All ER 260, [1973] 1 WLR 601 at 606.*
4. *Fairweather (H) & Co Ltd v London Borough of Wandsworth (1987) 39BLR106*
5. *Performance Cars Ltd v Abraham [1961] 3AllER413, CA*
6. *The Haversham Grange [1905] P307*
7. *Balfour Beatty Construction Ltd v Chestermount Properties Ltd (1993) 62BLR1*
8. *Henry Boot Construction Ltd v Malmaison Hotel (Manchester) Ltd 18th October 1999 Technology and Construction Court Case No 99/000087*
9. *Royal Brompton Hospital NHS Trust v Frederick A Hammond & Ors [2000] EWHC Technology 39 (18th December 2000)*
10. *Royal Brompton Hospital NHS Trust v Frederick A Hammond & Ors [2001] EWCA Civ 206 (9th February 2001) para2*

# RESOLUTION

## “If you don’t pay me more the job won’t get done!”

Does this sound familiar? The current economic climate has seen many construction projects tendered and won on negative margins or by negotiating low rates. However this has inevitably lead to bad relations, claims and ransom demands for more cash to make up shortfalls. Typically, mid-contract the ransom demand appears in an attempt to change the prices.

So what happens if you are forced to agree to pay more money than originally agreed, can you dismiss this extra payment on the grounds of duress and being held to ransom?

The law generally does not interfere with what parties agree and there has to be good reason for the court to intervene with agreements. So for example where settlement agreements are expressed as full and final, it is normal for such to be just that, final. A good reason for an agreement to be unenforceable would be where duress and financial coercion exist in the making of an agreement. If an agreement is reached to reduce or increase payment by economic pressure it is accepted that such an agreement will be unenforceable. It is therefore important to recognise what is meant by financial coercion legally and how to deal with such a situation when it arises.

A good example of a situation where more money was demanded mid-contract is the case of *Carillion Construction Ltd v Felix (UK) (2000)*, Felix were cladding subcontractors who were in dispute over the value of the account and complaint was being made by Carillion regarding late delivery of the cladding. Carillion were concerned about the threat of Liquidated Damages being imposed by the Employer. Carillion who considered the account to be worth £2.756m, felt under great pressure to agree the final account and the parties settled

the account at £3.2m expressed as full and final. Carillion expressed their displeasure at being forced into the final agreement and reverted to the original figures after the work was completed. Felix sued for the balance. The court held that the pressure Felix applied was illegitimate, amounted to coercion and was without justification and thus refused their claim.

However, caution must be exercised as a court will not always hold financial pressure to be unenforceable. In the case of *Williams v Roffey Bros & Nicholls (Contractors) Ltd (1990)* a sub-contract carpenter, who had underpriced the works, demanded higher rates part way through the contract and threatened to stop work unless an agreement was reached. It was evident that to engage an alternative sub-contractor would have cost considerably more money, thus the increased payment was agreed. On completion of the work, the extra payment was not made and the sub-contractor sued. It was held by the court that the agreement to increase the rates was not duress or coercion as a benefit was obtained by retaining the sub-contractor as paying considerably more to complete the work was avoided.

So what is the difference? Are these cases a contradiction in precedent? What is the impact of all of this?

As happens often in case law there are opposite outcomes, which arise depending on the subtle circumstances of the

case in question. In Felix, Carillion were held to ransom as it would have been impossible in the time available to find an alternative specialist cladding firm. Design, manufacture, warranties, colour matching, etc would have been impossible to re-procure. Plus Carillion made clear protests that Felix’s demands were against their will, they had no choice. Whereas, in Williams, Roffey had a choice, with a less specialist trade that could have been replaced Roffey made the mistake of not insisting on their existing contractual rights and dealing with any subsequent abandonment by Williams as a breach of contract, by agreeing new terms, they waived their existing rights.

In conclusion, both cases involved economic pressure, but in Felix coercion was present and in Williams it was not. So when being held to ransom, coercion is the essential ingredient

needed to defeat the claim. It is thus important to make sure that such situations are carefully managed so that the liability and remedy after the event is secured with minimal risk. A “supplement the labour” clause in the contract is an example of how to deal with the type of instance experienced by Roffey. Where a situation arises as in Felix, this must be carefully managed contemporaneously. We would recommend that when such problems arise, whether it involves pressure to increase or decrease the contract price you consult Arbicon before it is too late. Don’t find out the hard way call us on **01480 426 560** or email us at [advice@arbicon.co.uk](mailto:advice@arbicon.co.uk)



## Update on the New Construction Act – Get Ahead with Arbicon

If you were wondering what has happened to the New Construction Act, it is now expected to come into force in either April or October 2011, dependent on the approval of the amended Scheme provisions. There are some very important changes to payment rights that affect anyone involved in a construction contract. There has been a lot of criticism and rightly so regarding the drafting of the new Act as it has not been accurately drafted and will cause inevitable problems in interpretation. The new payment provisions are complex and it is important that both parties do not fall foul of them. All contracts starting after the Act comes into force must comply with the provisions, payment provisions must be compliant or they will be void and overruled by the Act.



For example, if you are the Main Contractor or Employer, at present there is no equitable penalty for not certifying a due payment. Under the new Act if your sub-contractor or contractor makes and application for payment and you ignore it you will be forced to pay him what he asks for irrespective of any common sense behind that fact that he asked for say £1million more than he should have done! Do you see the importance of the necessary contractual awareness?

The new Act is complex and awareness and training is essential, we would strongly recommend that you book a consultation with Arbicon now for essential staff training. For more details call us on **01480 426560**.

## Arbicon is a leading provider of Professional Quantity Surveying, Cost Management Services and Alternative Dispute Resolution.

Services including the following:

### Pre-Contract Services

- Cost planning
- Estimating & tendering (including audits)
- Bills of quantities preparation and production
- Commercial audits and reports
- Budget and cash flow forecasts
- Quantity and procurement checks
- Material scheduling
- Contract procurement
- Drafting of Employer's Requirements

### Post-Contract Services

- Preparation of final accounts
- Contractual procedure advice
- Re-measurement
- Cost reconciliation reports
- Sub-contract account management
- Valuations for interim payments
- Variation and day work account valuation and control
- Extension of Time claims
- Loss and Expense claims
- Dispute Resolution, Mediation, Adjudication and Arbitration
- Support in Litigation
- Risk Management and Dispute Prevention
- Expert Witness

Arbicon ADR Ltd will under no circumstance be liable for indirect, special or consequential damages including any loss of business, revenue, profits, or data in relation to your use of the newsletter. All intellectual property of Arbicon ADR Ltd such as trademarks, trade names, patents, registered designs and any other automatic intellectual property rights remain the property of Arbicon ADR Ltd. The information is provided on the understanding that the newsletter is not engaged in rendering legal or professional advice and should not be relied upon when making any related decision or to evaluate any case problems. The information contained within the newsletter is provided on an "as is" basis with no warranties expressed or otherwise implied relating to the accuracy, fitness for purpose, compatibility or security of any components of the newsletter.