Remedies for Delay in Construction Contracts

Introduction

Construction projects often run into delay, whether as a result of contractor default, acts of the employer, or circumstances outside of the control of either party, and claims relating to delay can be extremely complex. This article considers some of the potential remedies that may be available in these circumstances.

Time for Completion

The contractor's obligations in respect of the time for completion of works under a construction contract will depend upon the express provisions of the contract or, where such terms are not express, upon terms implied by law and, in certain circumstances, terms implied for the purposes of business efficacy.

It is usual for formal contracts to include an express provision requiring the contractor to complete the works either by a specified date or within a specified time period. Where the contract provides for the works to be completed within a set time period, the commencement date needs to be clearly defined in order for the completion date to be identified (this may be linked to the execution of the contract, or to the issue to the contractor of a "notice to proceed" with the works).

If the contract does not provide expressly for a completion date then time is said to be "at large" and, under English law, a term will be implied that the contractor is to complete the works within a reasonable time. In these circumstances, what constitutes "a reasonable time" will be a question of fact but, in considering this issue the courts will, based on the principles set out in Pantland Hick v Raymond & Reid¹, exclude any causes of delay which were under the Contractor's control.

The Role of Liquidated Damages

Construction contracts often provide for the payment of 'liquidated damages' (i.e. a pre-agreed fixed sum) in respect of certain types of breach. Construction contracts commonly provide that if the contractor fails to complete the works by the date, or within the time period, stipulated in the contract (as adjusted by any extensions of time properly granted under the contract), then the contractor must pay to the employer (or the employer will be entitled to deduct), liquidated damages at an agreed daily or weekly rate, from the contractual date for completion until the date that the works are actually completed.

The inclusion of liquidated damages clauses of this nature has advantages for both parties. From the contractor's point of view, such clauses are normally considered to be a limitation of the contractor's liability for delay, allowing the contractor to understand the extent of its risk for late completion and factor that risk into the tender price. From the employer's point of view, liquidated damages clauses give the employer a contractual right to compensation at an agreed rate, making it unnecessary for the employer to pursue a claim against the contractor for general damages for breach of contract (which would require the employer to provide evidence to prove the actual loss he has suffered).

The enforceability of any liquidated damages clause under English law is subject to a number of principles, including the rule in relation to "penalty clauses". According to this rule, in order for the clause to be enforceable the liquidated damages must be set at a level which reflects a genuine pre-estimate of the employer's likely losses arising from any delay. Our October 2010 construction newsletter explored in more detail the issues that parties should bear in mind when negotiating or seeking to enforce liquidated damages clauses.

¹ Pantland Hick v Raymond & Reid [1893] A.C. 22 HL
Extensions of Time

Construction projects often run into delays and standard form construction contracts usually make provision for the contractor to claim an extension of time to the contractual date for completion in certain circumstances. By way of example, clause 8.4 of the FIDIC Silver Book (1999 Edition) states that:

"The Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking Over of the Works and Sections] is or will be delayed by any of the following clauses:

(a) a Variation (unless an adjustment to the Time for Completion has been agreed under Sub-Clause 13.3 [Variation Procedure]),
(b) a cause of delay giving an entitlement to extension of time under a Sub-Clause of these Conditions, or
(c) any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site."

Under English law, if the employer causes delay to the completion of the works and the contract does not contain a mechanism for the contractual completion date to be extended as a result of such delay, then the employer will lose the right to claim liquidated damages. In these circumstances, time is considered to be "at large", meaning that the specified time for completion is no longer enforceable; instead, the contractor is obliged to complete the works within a reasonable time, and the employer will be entitled to claim general damages if he fails to do so.

A particular problem in relation to claims for extensions of time arises where two or more events contribute to the same delay – otherwise known as "concurrent delay". This situation can be particularly difficult if the delay is caused both by an "employer risk" event (in respect of which the contractor would be entitled to an extension of time) and a "contractor risk" event (for which the contractor could not claim an extension). The approach under English law to concurrent delay has attracted much debate recently following the decision in City Inn v Shepherd Construction: for a more detailed consideration of this issue, please see our July 2011 newsletter.

Delay and Disruption Claims

Where the work is delayed for reasons outside the contractor's control, the contractor may be able, in certain circumstances, to claim not only an extension of time, but also additional costs arising as a result of the delay. For example, clause 2.1 of the FIDIC Silver Book (1999 Edition) gives the contractor a contractual right to claim additional payment if the employer fails to grant the contractor possession and/or access to the site within the time stated in the contract, and the contractor suffers delay and/or incurs costs as a result. In circumstances such as these, the heads of loss commonly claimed by contractors include:

(i) head office overheads;
(ii) increased preliminaries;
(iii) finance charges;
(iv) loss of profits; and
(v) loss of productivity.

The extent to which a contractor will be able to recover such losses will depend upon the wording of the specific clause on which the contractor is seeking to rely, and is often also a matter for negotiation with the employer. Sometimes the contract states that the 'Contract Price' includes a fixed sum for head office overheads and profit which is not capable of adjustment, and that no claims on account of such costs will be made against the employer, in which case it may be difficult for the contractor to

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2 See Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd (1970) 1 B.L.R. 111; 69 L.G.R. 1, CA (Civ).
3 [2010] CSIH 68.
include such costs in any claim for losses. The contract may also prevent the contractor from recovering certain types of loss except in specific circumstances: for example, the definition of "Cost" in the FIDIC suite of contracts excludes profit, and specifically identifies the circumstances in which a Contractor may claim "reasonable profit" in addition to "Cost" (typically in circumstances where blame attaches to the employer).

Conclusion

Issues relating to delay remain some of the most frequent legal issues to arise in relation to construction projects. However, many of the potential problems can be avoided or minimised by clear drafting in the contract.

As noted above, an appropriate liquidated damages provision can be of benefit to both parties, providing certainty to the contractor while giving the employer an opportunity to assess and agree its potential delay-related losses up front, without the need to prove its losses in a general claim for damages. There is also scope for the parties to deal with the recoverability of certain types of loss, and an appropriately drafted contract can allow both parties to understand clearly who bears the risk in the unfortunate event of delay or disruption to the works.