

EXTENSION OF TIME AND LIQUIDATED DAMAGES IN CONSTRUCTION CONTRACTS

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1.0 INTRODUCTION

It is often said that for a building or construction project, there are three objectives which the owner¹ of the project is aiming. These are, in no order of priority or importance, money, quality and time. This paper seeks to discuss certain aspects of the last named objective.

The question of time is an important one in construction contracts.² There are provisions in construction contracts, for example, that the Contractor must complete the project, that the Engineer or the Architect or the S.O. must furnish the necessary drawings and information to the Contractor, and that the Employer must pay the Contractor, all before a certain date. All these carry with them their respective legal implications and consequences. This paper will focus only on the obligations of the Contractor to complete³ the project by a certain date and the contractual consequences which may follow if he does not.⁴ It is therefore

¹ Often called the “Employer” which is strictly inaccurate for the legal relationship between the owner of a project and the “Contractor” who implements the construction is not one of employer-employee relationship; the contract between the Employer and the Contractor is a contract *for* service, not a contract *of* service. The Employer is often also the promoter of the project.

² The term “construction contracts” is used generally herein to include contracts for the construction of buildings or civil engineering works.

³ It is one of the primary obligations of the Contractor that he must *complete* the “Works” (as so defined in most standard contract forms) save for the occurrence of any physical or legal impossibility, e.g. Clause 4 IEM Conditions of Contract for Works of Civil Engineering Construction. When the execution of the Works is physically or legally impossible, the contract can be said to have been frustrated: section 57 Contracts Act 1950. For a discussion of what constitute completion, see below.

⁴ For further and more detailed discussions, see Brian Eggleston, *Liquidated Damages and Extension of Time in Construction Contracts*, 2nd Edition (1997) and Keith Pickavance, *Delay and Disruption in Construction Contracts*, 2nd Edition (2000).

important that some basic legal principles and concept of time *vis-à-vis* completion be understood.

2.0 SOME BASIC PRINCIPLES AND CONCEPTS

2.1 Time of the Essence

The possible legal consequences that can flow from the Contractor's failure to complete the Works within the contractual time⁵ can be inferred from the provisions of section 56 Contracts Act 1950. The material part of section 56 Contracts Act 1950 is reproduced below:

“56(1) When a party to a contract promises to do a certain thing at or before a specified time, ..., and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

56(2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.

56(3) If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so.”

An understanding of the above provision demands an understanding of what is the meaning of time being “of the essence”. Though it has often been said, and routinely reproduced as a boilerplate clause in most commercial contracts, it is strictly not accurate to state merely that “time shall be of the essence of the contract”: it would be more accurate and reflective of the intention of the parties to state that time would be of the essence with respect to which provision or provisions of the contract.

“Time being of the essence means that one or more stipulations as to time are conditions breach of which discharges the other party from the obligation to

⁵ That is, the original contract completion date or any extended date for completion as certified by the Engineer/Architect/S.O.

continue to perform any of his own promises.”⁶ This passage, taken from one of the leading textbooks on building contracts⁷ strictly provides a circular definition of time being of the essence and links the meaning of the phrase to the specified consequences if its compliance is breached. The problem with this is that the above definition, like the provisions of the section 56 Contracts Act 1950, only deal with the consequences of time being of the essence and time not being of the essence but they do not provide as to when and in what circumstances that time would be of the essence.

In *Tan Ah Kian v. Haji Hasnan*,⁸ Gill CJ identifies the following three situations when time would be of the essence:

- (a) the parties expressly state in the contract that it shall be so;
- (b) where it was not originally stated to be of the essence but it was subsequently made so by one party giving reasonable notice to the other who has failed to perform the contract with sufficient promptitude; or
- (c) where from the nature of the contract or of its subject matter time must be taken to be of the essence.

There is a fourth situation, that is to ascertain from the real intention of the contracting parties.⁹

It can be said that in construction contracts, with the presence of extension of time and liquidated damages clauses, time is, more often than not, NOT of the essence with respect to completion date.¹⁰ That is to say, for the legal consequences flowing from a delay to the completion date or extended completion date in most construction contracts, the applicable provision in Contracts Act 1950 would be section 56(2).

2.2 Time at Large

Time for completion of the Works is said to be “at large” when the Contractor’s obligation to complete the Works within the specified time or certified extended time is lost. That is to say, the Contractor is no longer bound by the contract provision that he has to complete the Works by a certain date or extended date. The obligation of the Contractor is then to complete the Works within what is called “reasonable time”.¹¹

⁶ Stephen Furst and Vivian Ramsey, *Keating on Building Contracts*, 7th Edition (2001) at p. 276, para 9-04.

⁷ The other two must be I. N. Duncan Wallace, *Hudson’s Building and Engineering Contracts*, 11th Edition (1994) and A. J. Anderson, S. Bickford-Smith *et al*, *Emden’s Construction Law*, 8th Edition (1992) with continuous updating supplements.

⁸ [1962] MLJ 400.

⁹ *Yeoh Kim Pong Realty Ltd v. Ng Kim Pong* [1962] MLJ 118.

¹⁰ The only exception to this in a standard construction contract would be Clause 41.3 of JKR Standard Form of Design & Build/Turnkey Contract (PWD Form DB/T), 2002 Edition.

¹¹ See discussion below.

Time for completion of the Works can be said to be, or made, “at large” in the following five situations:

- (a) no time for completion is fixed in the contract;¹²
- (b) improper administration or misapplication of the extension of time provision in the contract;
- (c) waiver of time requirements;¹³
- (d) the Employer’s interference in the certification process;¹⁴
- (e) when the extension of time provision does not confer power on the Engineer/Architect/S.O. to extend the time for completion of the Works on the occurrence of event or events which fall(s) within the obligation of the Employer.¹⁵

The significant consequence of time for completion being at large is that the liquidated damages clause in the contract becomes inoperative and the Employer cannot rely on this liquidated damages clause to impose liquidated damages onto the Contractor.¹⁶ The other significance when time for completion is at large is that the original completion date or the contractually certified extended completion date no longer binds the Contractor. The Contractor’s remaining obligation is to complete the Works within what is called “reasonable time” the meaning of which we now turn.

2.3 Reasonable Time

The question of what duration of time is reasonable is one of fact, not law. It is a question of fact taking into consideration all relevant factors and circumstances, objectively assessed. Regrettably as it is, this is one of the elastic concepts for which there will be no fixed answer. What constitute reasonable time has to be considered in relation to circumstances which existed at the time the contract obligations are performed but excluding circumstances which are under the control of the party performing those obligations, normally the Contractor in our case.¹⁷

¹² See *J and J Fee Ltd v. The Express Lift Company Ltd* 34 ConLR 147.

¹³ See *Charles Rickards Ltd v. Oppenheim* [1950] 1 All ER 420.

¹⁴ See *Roberts v. Bury Improvement Commissioners* (1870) LR 5 CP 310.

¹⁵ This will be the most common situation that time for completion becomes at large. A common example would be the Employer’s failure to give site possession (which undoubtedly would be the Employer’s obligation) for the Contractor to commence and proceed with the Works in a contract based on PAM/ISM 1969 Standard Form for which failure of the Employer to give site possession is not one the grounds on which the Architect can exercise his power to grant extension of time. This has been apparently rectified in PAM 1998 Standard Form for Building Contract in the form of Clause 21.1. See *Thamesa Designs Sdn Bhd v. Kuching Hotels Sdn Bhd* [1993] 3 MLJ 25.

¹⁶ See *Sim Chio Huat v. Wong Ted Fui* [1983] 1 MLJ 151.

¹⁷ *British Steel Corporation v. Cleveland Bridge & Engineering Co* (1981) 24 BLR 94 per Robert Goff J (as Lord Goff then was) at p. 123.

2.4 The Meaning of Completion

There have been many shades of opinion as to what constitute “completion” and the use of some phrases in certain standard forms of building and construction contracts such as “practical completion”, “substantial completion” and others certain do not help. Further, the standard forms of building and construction contracts also do not define the meanings of such phrases.¹⁸ The completion of the Works comprised within a contract is important as not only it has a direct bearing on the question of whether the Employer can levy liquidated damages on the Contractor, but it also usually marks the transfer of certain risks or the crystallization of certain rights between the Contractor and the Employer *inter-se*. Further, and as an additional example to illustrate the importance of the meaning of “completion”, it may also be used to determine the extent of the right to payment in those contracts which provide for stage payments. In most standard contract forms, “completion” also marks the commencement of defects liability period and also the release of half of the retention monies.

There have been a number of judicial decisions attempting a legal definition of the terms “practical completion”¹⁹ and “substantial completion”.²⁰

In *J. Jarvis and Sons v. Westminster Corporation*²¹ in the Court of Appeal, Salmon LJ defined practical completion as completion for the purpose of allowing Employer to take possession of the Works and used them as intended. He therefore held that practical completion did not mean completion down to the last minute details. On appeal to the House of Lords²², Viscount Dilhorne’s definition was that practical completion meant the completion of all the Works that had to be done.

In *H. W. Neville (Sunblest) Ltd v. William Press and Son Ltd*²³, it was held by HHJ John Newey that practical completion was achieved when the Works

¹⁸ This is the complaint of I. N. Duncan Wallace QC: see his *Construction Contracts: Principles and Policies in Tort and Contract* (1986) at p. 519. However as the draftsman of the Singapore Institute of Architects Standard Building Form SIA 1980, he had therein provided a circular definition and defined completion as that which the Architect had certified: see Clause 3(4) of SIA 80!

¹⁹ The term “practical completion” is the term used in PAM/ISM 1969 Standard Building Form and 1998 PAM Standard Building Form. This is also the term used in all JCT family of forms from whose stable JCT 1963 form is a member and on which PAM/ISM 1969 was based. This term is also the term used in IEM Conditions of Contract for Works of Civil Engineering Construction (IEM. CE 1/89) Clause 39(b).

²⁰ The term “substantial completion” is the term used in ICE Conditions of Contract for Works of Civil Engineering Construction 7th Edition, Clause 48.

²¹ [1969] 1 WLR 1448 CA.

²² *Westminster City v. Jarvis & Sons Ltd* (1970) 7 BLR 64 HL; also reported in [1970] 1 WLR 657 HL.

²³ (1981) 20 BLR 78. This case and the meaning of “practical completion” therein held seem to have guided the drafting of PAM 1998 Standard Building Form; see Sundra Rajoo, *The Malaysian Standard Form of Building Contract*, 2nd Edition (1999), pp. 140-144 and also Clause 15.1 of PAM 1998 Standard Form of Building Contract. The reference in Clause 15.1 of PAM 1998 Standard Form of Building Contract to “the patent defects existing in such Works are ‘*de minimis*’” is perhaps un-intended and unfortunate for the *de minimis* principle should relate to the Works and not “patent defects existing in such Works” according to the judgment of HHJ John Newey QC.

comprised in the contract had been carried out save for *de minimis* works. It was also held that if there were any patent defects, the Architect should not certify practical completion. This definition is definitely a stricter test compared to that held in *Jarvis* in the House of Lords (*per* Viscount Dilhorne) but less strict compared to that held in *Jarvis* in the Court of Appeal (*per* Salmon LJ).

Another case which is more illustrative is another decision of HHJ John Newey QC in *Emson Eastern Ltd v. E.M.E. Development Ltd.*²⁴ Judge Newey confessed in *Emson* that he took the position somewhere between Salmon LJ and Viscount Dilhorne in *Jarvis* (in the Court of Appeal and in the House of Lords respectively) and concluded that there was no difference in meaning between completion and practical completion. Completion could take place before defects and other defaults had to be remedied. In arriving at this conclusion, Judge Newey took accounts of the realities of building sites and that a building could seldom be built precisely as required by drawings and specifications as could a manufacturer with every screw and every brush of paint correct. This writer inclines to support this position and takes the view that *Emson* lays down the correct test.²⁵

The term “substantial completion” was the term used in FIDIC 4 and also the ICE standard forms. It is suggested that there is no difference between the terms “completion” and “substantial completion”.²⁶ The Works must be completed in their entirety: the *de minimis* principle will still apply.

3.0 EXTENSION OF TIME CLAUSES IN CONSTRUCTION CONTRACTS

This writer has seen quite a number of in-house drafted contracts which do not provide for an extension of time (hereinafter referred to as “EoT”) clause for the declared reason that, in the absence of such a provision, the Contractor would not be able to claim for extension of time and hence, on that pretext, no claim for “loss and expense” can be entertained. Almost always, those contracts also contain a provision for the imposition of liquidated damages (hereinafter referred to as “LD”) for delay to completion. Further, there are also a considerable contracts which this writer has seen which attempt to limit as much as possible the grounds on which the Engineer/Architect/S.O. can grant EoT. With respect, such over-zealousness in protecting one party may be counter-productive and glaringly displays an ignorance of the purpose, and legal implications, of EoT clause in construction contracts. To properly understand this, an understanding of the concept of what is called the “prevention principle” is necessary.

²⁴ (1991) 55 BLR 114.

²⁵ HHJ John Newey QC seemed to have approved his own earlier judgment in *William Press* but this writer opines that there were differences between his two judgments in *William Press* and *Emson*; the learned judge had also further, and in the opinion of this writer correctly, concluded that there was no difference in meaning between “completion” and “practical completion”.

²⁶ *Sapiatoon v. Lim Siew Hui* (1963) 29 MLJ 305; *Building and Estates Ltd v. AM Connor* (1958) 24 MLJ 174. The two cases cited here had considered the judgment of Denning LJ (as the Master of the Rolls then was) in *Hoenig v. Issacs* [1952] 2 All ER 176.

3.1 The Prevention Principle

Despite vehement academic criticisms, it is now settled law that if the Employer is wholly or partly responsible for the failure of the Contractor to complete on time, he cannot recover LD; the LD clause can be said to have been invalidated.²⁷ This prevention principle as it has come to be called, was explained and enunciated in the English Court of Appeal decision of *Peak Construction (Liverpool) Pty Ltd v. McKinney Foundation Ltd*,²⁸ arguably the leading case on this subject. An earlier authority can be found in the decision of Denning LJ (as the Master of the Rolls then was) in the case of *Amalgamated Building Contractors Ltd v. Waltham Holy Cross UDC*²⁹ where he said,

“I would also observe that on principle there is a distinction between cases where the cause of delay is due to some act or default of the building owner, such as not giving possession of the site in due time, or ordering extras, or something of that kind. When such things happen the contract time may well cease to bind the contractors, because the building owner cannot insist on a condition if it is his own fault that the condition has not been fulfilled.”³⁰

The fact that Denning LJ had cited *Roberts v. Bury Improvement Commissioners*³¹ in support suggests that the prevention principle is of some vintage.

The following passage of Salmon LJ in *Peak Construction* is instructive:

“A clause giving the employer liquidated damages at so much a week or month which elapses between the date fixed for completion and the actual date of completion is usually coupled, as in the present case, with an extension of time clause. The liquidated damages clause contemplates a failure to complete on time due to the fault of the contractor. *It is inserted by the employer for his own protection*; for it enables him to recover a fixed sum as compensation for delay ... *If the failure to complete on time is due to the fault of both the employer and the contractor, in my view, the clause does not bite.* ... I consider that unless the contract expresses a contrary intention, the employer ... is left to his ordinary remedy ... *No doubt if the extension of time clause*

²⁷ For a criticism of the prevention principle, see I. N. Duncan Wallace, *Prevention and Liquidated Damages: A Theory Too Far?* (2002) 18 BCL 82. See also Hamish Lal, *Extension of Time: the Conflict between the Prevention Principle and Notice Requirement as a Condition Precedent*, being a Hudson prize winning paper (2001) presented to the Society of Construction Law in London on 9 April 2002.

²⁸ (1970) 1 BLR 111.

²⁹ [1952] 2 All ER 452.

³⁰ *Ibid.*, at p. 455 C – D.

³¹ (1870) LR 5 CP 310.

provided for a postponement of the completion date on account of delay caused by some breach or fault of on the part of the employer, the position would be different. This would mean that the parties had intended that the employer could recover liquidated damages notwithstanding that he was partly to blame for the failure to achieve the completion date, and the contractor would be liable to pay liquidated damages for delay as from the extended date. ...”³² (emphasis supplied)

Edmund Davies LJ (as His Lordship then was) explained further:

“Proceeding upon the basis that the employers contributed to the delay, it seems clear that the architect could not, pursuant to the extension of time clause, have on this account extended the time for completion, ... The stipulated time for completion having ceased to be applicable by reason of the employer’s own default and the extension clause having no application to that, it seems to follow that there is in such a case no date from which liquidated damages could run and the right to recover them has gone.”³³ (emphasis supplied)

The law can thus be simply put. If the reason for the Contractor’s failure to complete on time is wholly or partly the fault of the Employer, time may become “at large” and the Contractor’s obligation is then to complete within “reasonable time”. Similarly, the LD clause is inoperative as there is no date from which LD could run.³⁴ However, if there is EoT clause which extends the time for completion due to delay occasioned by the Employer, and such delay is among the grounds on which the Engineer/Architect/S.O. can exercise his power to grant EoT, and the Engineer/Architect/S.O. validly exercises that power, then the LD clause survives.

3.2 Construction of EoT Clauses

It can thus be seen that contrary to popular belief and perception, the LD clause is very much for the benefit of the Employer. Lest that the Employer can lose control of completion date when time for completion is at large, with its consequence that LD clause becomes inoperative, the LD clause should be drafted which covers as many grounds as can be envisaged which allow the Engineer/Architect/S.O. to extend completion time for which the Employer may be liable.

³² *Peak Construction (Liverpool) Ltd v. McKinney Foundation Ltd* (1970) 1 BLR 111 at p.121.

³³ *Ibid.*, p. 126.

³⁴ See also *Miller v. London County Council* (1934) 151 LT 425.

Since the LD clause is provided for the benefit of the Employer, it follows that it must be construed strictly *contra proferentem*. As Salmon LJ opined in *Peak Construction*:

“The liquidated damages and extension of time clauses in printed forms of contract must be construed strictly *contra proferentem*.”³⁵

The following observations of Salmon LJ in *Peak Construction* must also be noted:

“If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employer’s own default or breach of contract, *then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer.*”³⁶ (emphasis supplied)

In construing EoT clause, it must be borne in mind of the allocation of risks between the Employer and the Contractor inherent in the contract itself: if an event causing the delay is within the obligations of the Contractor, then the Contractor will be responsible for that delay; EoT clause does not apply or the EoT clause should not include this ground as a ground for which EoT can be granted. In this regard, the following passage from the judgement of HHJ Edgar Fay QC in *Henry Boot Construction Ltd v. Central Lancashire New Town Development Corporation*³⁷ is illustrative:

“There are cases where the loss should be shared, and there are cases where it should be wholly borne by the employer. There are also those cases which do not fall within either of these conditions and which are the fault of the contractor, where the loss of both parties is wholly borne by the contractor.”³⁸

4.0 THE CERTIFIER

It is clear that the certifier for EoT (and for that matter for certificate of non-completion if the contract provides for its issuance) in IEM, ICE and FIDIC Conditions of Contract is the “Engineer”; that for the PAM and the JCT family of standard building forms is the “Architect” and that for the JKR family of forms and CIDB Building Contract Form (2000 Edition) is the “S.O.”

³⁵ *Peak Construction (Liverpool) Ltd v. McKinney Foundations Ltd* (1970) 1 BLR 111 at p. 121. In SIA Contract drafted by I. N. Duncan Wallace QC, the *contra proferentem* rule is expressly excluded and stated to be not applicable: see SIA 1980 Articles of Agreement (and subsequent editions) Article 7.

³⁶ *Ibid.*, p. 121.

³⁷ *Henry Boot Construction Ltd v. Central Lancashire New Town Development Corporation* (1980) 15 BLR 1.

³⁸ *Ibid.*, p. 12.

Since the celebrated case of *Hedley Byrne and Co Ltd v. Heller and Partners Ltd*,³⁹ professional men (for which an engineer or an architect is certainly one) is potentially liable in tort for negligent misstatements. This principle is extended to an architect's duty of care to contractors when issuing certificates.⁴⁰ In *Michael Salliss and Co Ltd v. Calil*,⁴¹ the Architect was held to have been negligent in failing to properly extend the completion date and failure to certify the loss and expense.

Though there has been English cases to the effect that recover for pure economic loss in tort should not be allowed⁴², the law in Malaysia is however such a recovery may be possible⁴³. The law in this area can thus be said to be in a state of uncertainty.

5.0 TIME FOR GRANTING EXTENSION

In *Miller v. London County Council*,⁴⁴ it was held that the Engineer had no power to fix a new date for completion of the Works after the Works had been completed. It is submitted, however, that this is a case based on the interpretation of particular wordings of the EoT clause therein.⁴⁵ Denning LJ (as the Master of the Rolls then was) in *Amalgamated Building Contractors Ltd v. Waltham Holy Cross UDC*⁴⁶ declined to follow and distinguished *Miller* and held the grant of EoT after the Works had been completed was not invalid.

These are two contradicting authorities on the same point. This writer inclines to the position that save for any express provision in the EoT clause, the EoT must be granted and the new completion date informed to the Contractor "as soon as reasonably practicable".⁴⁷ The concept of reasonableness is thus invoked here. Further, it has also been held in the New Zealand case of *New Zealand Structures and Investments Ltd v. McKenzie*⁴⁸ that the Engineer/Architect had the power to

³⁹ [1964] AC 465.

⁴⁰ *Sutcliffe v. Thackrah* [1974] AC 727.

⁴¹ (1989) 13 ConLR 68.

⁴² See for example *Murphy v. Brentwood DC* [1990] 2 All ER 908 and *Pacific Associates Inc v. Baxter* [1989] 2 All ER 159.

⁴³ See for example *Dr Abdul Hamid Abdul Rashid & Anor v. Jurusan Malaysia Consultants & Ors* [1997] 3 MLJ 546 and *Steven Phoa Cheng Loon & 72 Ors v. Highland Properties Sdn Bhd & 9 Ors* [2000] 3 AMR 3567 ("the Highland Tower case"). For latest development to the contrary, see *Pilba Trading & Agency v. South East Asia Insurance Bhd & Anor* [1998] 2 MLJ 53 and the Highland Tower case in the Court of Appeal, *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 2 AMR 6.

⁴⁴ (1934) 151 LT 425

⁴⁵ The relevant EoT clause provides that the Engineer could "assign such other time for completion" (emphasis supplied) and a retrospective grant of EoT would be too late for it to be effective.

⁴⁶ [1952] 2 All ER 452.

⁴⁷ See the New Zealand case of *Fernbrook Trading Estate Co Ltd v. Taggart* [1979] 1 NZLR 556 and also the Australian case of *Perini Corporation v. Commonwealth of Australia* (1969) 12 BLR 82.

⁴⁸ [1979] 1 NZLR 515.

determine EoT before he becomes *functus officio*; and he only becomes *functus officio* after he has issued the final certificate.

While on this issue, it may be pertinent to ask if there is a delaying event which occurs after the contractual or extended completion date, can the Engineer/Architect/S.O. grant EoT based on that delaying event? The answer seems to be that this will depend on the wordings of the particular contract and most standard forms of contract in Malaysia do not have this provision.⁴⁹

6.0 NOTICE REQUIREMENTS

A reading of almost all EoT clauses will reveal that before the Engineer/Architect/S.O. can grant EoT, the Contractor will have to serve a notice to that effect. This will lead to the following questions:

- (a) What if the Contractor has not served a notice?
- (b) If so, when should the notice be served?
- (c) In what form should the notice be?
- (d) Must full information be given to the Engineer/Architect/S.O. at the time of the service of the notice?

It is the opinion of this writer that even though most EoT clauses provide for the requirement of a notice to be served, a failure to serve notice would not be fatal to the Contractor's claim.⁵⁰ Minutes of the meetings that record the delay to the Works do not per se constitute notice: a notice has to be "served". There is still debate as to whether there is such a thing as "constructive notice" in construction contracts. For the notice requirement to be mandatory, the EoT clause must state precisely the time within which notice ought to be served. It should also be that there should not be a mandatory requirement to serve notice if the delay is caused by the Employer.

7.0 QUANTUM OF TIME EXTENSION⁵¹

It has sometime been said that the complex of determining the quantum of time extension is an art, rather than a precise science. This is also reflected in the wordings of the EoT clauses itself.⁵²

⁴⁹ An exception would be CIDB Standard Form of Building Contract (2000 Edition). See *Balfour Beatty Building Ltd v. Chestermount Properties Ltd* (1993) 62 BLR 1.

⁵⁰ See the discussion in Oon Chee Kheng, *Standard Construction Contracts in Malaysia: Issues and Challenges*, paper presented in a seminar entitled "Innovations in Construction Contracts" held in Melaka on 31 May 2002, pp. 8 – 9 and the argument therein presented. See also *Bremer Handelsgesellschaft MBH v. Vanden Avenne-Izegem* [1978] 2 LLR 109.

⁵¹ See the discussion in Oon Chee Kheng, *Standard Construction Contracts in Malaysia: Issues and Challenges* paper presented in a seminar entitled "Innovations in Construction Contracts" held in Melaka on 31 May 2002, pp. 8 – 9 and the argument therein presented.

There are many ways of determining the quantum of EoT which should be granted to the Contractor⁵³ and sophisticated computer programmes have also been developed for this purpose.⁵⁴

The determination of the quantum of EoT becomes even more complex when there are several causes of delay some of which give the Contractor entitlement to EoT and some do not; these are sometimes called “concurrent delays”.⁵⁵ For each and every of this delay event on which the Contractor is entitled to EoT, a causal link must also be established.⁵⁶ There are several ways of dealing with this situation when a determination of the entitlement and quantum of EoT is called for.⁵⁷

7.1 The Apportionment Approach

In this approach, the delay and its consequences are apportioned between the Contractor and the Employer. This approach, however, does not find support. It will be apparent that the express terms of the contract (in most standard contract forms) do not permit such an approach. Further, its actual application of this approach to real situation is also filled with much uncertainty.

7.2 The American Approach

American construction jurisprudence recognizes three distinct types of delay:

- (a) excusable delay – this delay will ordinarily entitle the Contractor to an EoT;
- (b) compensable delay – this comprises delay for which the Employer is at fault;
- (c) inexcusable delay – this comprises delay which is the fault of the Contractor or for which he assumes the risks.

For excusable delay, the Contractor is entitled to an EoT but there will be no financial compensation. For compensable delay, the Contractor is entitled not only to an EoT but also to financial compensation. For inexcusable delay, the Contractor is entitled to neither an EoT nor financial compensation. Examples of excusable delay would be exceptionally inclement weather, act of God etc. The issuance of a variation order or the discovery of a design errors would be

⁵² In PAM 98 Standard Building Form (Clause 23.3), IEM Standard Civil Engineering Form (Clause 43), and JKR 203 Standard Form (Clause 43), the requirement is for the Engineer/Architect/S.O. to grant EoT which is “fair and reasonable” whereas in CIDB Standard Form of Building Contract (2000 Edition), the S.O. is to grant EoT which “may reasonably reflect the delay in completion of the Works” (Clause 24.1).

⁵³ See Tony Farrow, *Delay Analysis – Methodology and Mythology*, (2001) being a paper based on a talk given to Society of Construction Law on 6 November 2001.

⁵⁴ For example, Artemis, Plantrax etc.

⁵⁵ See John Marrin QC, *Concurrent Delay*, being a paper given at a meeting of the Society of Construction Law in London on 5 May 2002.

⁵⁶ See for a detailed discussion, Nicholas J Carnell, *Causation and Delay in Construction Disputes*, 1st Edition (2000).

⁵⁷ The discussion below draws heavily from John Marrin’s paper, *ibid*.

examples of compensable delay whereas inexcusable delay would be delay due to time spent in rectifying defects. The American courts have also not taken into account delays which are not on the critical path even though such a delay is a compensable delay.

Two common approaches as example:

- (i) When an excusable delay occurs concurrently with inexcusable delay, neither the Contractor and the Employer can recover financial compensation: the Contractor would be given an EoT but not “loss and expense”, by granting EoT to the Contractor it also denies the Employer of any financial compensation in the form of LD.
- (ii) When compensable delay occurs concurrently with non-compensable delay, the Contractor is allowed Eot but denied financial compensation.

This concept of division into types of delay may not find favour here as, for example, there are grounds in commonly drafted EoT clauses which permit deduction for LD but under this American system, eh Employer can only recover to the extent that it is established that inexcusable delay by the Contractor is the sole cause of delay.

7.3 The “but for” Test

This approach seeks to settle the question of entitlement and quantum of EoT by asserting that the delay would not have occurred but for, for example, the variation orders issued by the Engineer.

7.4 The Dominant Cause Approach

This approach is the approach favoured and supported in *Keating on Building Contracts*:

“If there are two causes, one the contractual responsibility of the Defendant and the other the contractual responsibility of the Plaintiff, the Plaintiff succeeds if he establishes that the cause for which the Defendant is responsible is the effective, dominant cause. Which cause is dominant is a question of fact, which is not solved by mere point of order in time, but is to be decided by applying common sense standards.”⁵⁸

It essentially also has strong link to the concept of critical path in network analysis programme. It may be said that the dominant cause approach has been rejected by the English court.⁵⁹

⁵⁸ Sir Anthony May, *Keating on Building Contracts*, 7th Edition, para 8-26(b), p. 246.

⁵⁹ See *H Fairweather and Co Ltd v. London Borough of Wandsworth* (1987) 39 BLR 106.

7.5 The Malmaison Approach

This approach takes its name from a decision of HHJ Dyson (as His Lordship then was) in *Henry Boot Construction (UK) Ltd v. Malmaison Hotel (Manchester) Ltd*⁶⁰:

“... if there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event.”⁶¹

We respectfully concur with Mr Justice Dyson that this is the correct position and should be the adopted test. It is suggested that the main contender of the *Malmaison* approach is the dominant cause approach.

8.0 PROGRAMMES

Programmes are used frequently in construction projects and if one were to walk to any site office, it would be unusual if there is no a programme of sort pasted on the wall. The programmes can take the form of a bar chart⁶², network programme⁶³ indicating for example critical path network and line of balance method. Suffice to say each type of programme has its own usefulness and it all depends the use to which the programme is intended. Programmes serve a variety of purpose and what concerns us here is what is commonly called “the Contract Programme”. Programmes prepared for senior executives and also for project monitoring purposes is not herein discussed.

Two relevant piece of information can be extracted from a programme: firstly the duration i.e. commencement and planned completion of each and every major activity which is reflected on the programme, and secondly the planned sequence of the Works, or strictly the planned sequence of each and every work item the completion of which constitute the construction contract. It can readily inferred from this of the undesirability of making the programme a contract document. If a programme were to be made a contract document, it has the effect of making the commencement and completion time of each and every activity shown therein of the essence; this and as discussed earlier, would be impractical and would give rise to unwanted and unintended contractual conclusions. A programme may be a document submitted as part compliance with a contractual provision but it is *per*

⁶⁰ (1999) 70 ConLR 32

⁶¹ *Ibid.*, at p. 37.

⁶² Gantt chart.

⁶³ This can either be in the form of “activity-on-arrow” or “activity-on-node”.

se not a contract document, or should not be one document, forming the contract between the Contractor and the Employer.⁶⁴

It is possible that for programme to indicate a completion date well before the contractual completion date but any EoT to be granted shall be governed by the same principle discussed above, the Engineer/Architect/S.O. is not obligated to certify EoT to the indicated completion date as shown on the programme; EoT means extension of time to the contractual completion date or earlier extended date not an extension of time to the late completion as shown in the contract programme.

9.0 GROUNDS FOR CERTIFYING EOT

As discussed earlier, it is to the Employer's interests to have all possible causes of delay which are either occur neutrally or are direct consequence of Employer's default. It is to be appreciated that no all EoT's will carry with them financial compensation.⁶⁵ Generally, delays due to neutral events which occasion EoT will not carry with them financial entitlement whereas those due to the Employer's defaults will. It is therefore important for the Engineer/Architect/S.O. to certify EoT and specifying the grounds provided for in the EoT clause that allows him to so certify.⁶⁶

10.0 ACCELERATION

If there had been delay to the completion of the Works and the Contractor is rightfully entitled to EoT but, if the Employer still desires the Works to be completed by the contractual completion date, instruction can be issued to the Contractor to increase his resources so as to catch-up with the shortfall. This would be straightforward if there is provision in the contract which allows for such a move. Alternatively, a supplementary agreement can be entered into between the Employer and the Contractor to such effect.

Imagine another situation. If the Contractor feels, correctly as it later turns out, that he is entitled to EoT but none has been awarded, or the award of such EoT is delayed, and fearful that LD may be imposed, he without any instruction from the Engineer/Architect/S.O. increase his resources. Question: in such a situation can he claim for "loss and expense" or "Costs" as the case may be?

⁶⁴ See *Glenlion Construction Ltd v. Guinness Trust* (1987) 39 BLR 89. PAM 1998 has gone to the extent of providing that even if a programme is not to be incorporated into the Contract Documents: Clause 3.5. See also Clause 5.2(a) of CIDB Standard Form of Building Contract for Building Works (2000) Edition, Clause 5.2(a).

⁶⁵ This financial compensation is called "loss and expense" in PAM, IEM, JKR and CIDB forms of contract; in FIDIC and ICE standard forms, it is called "Costs".

⁶⁶ See Sundra Rajoo, *The Malaysian Standard Form of Building Contract (The PAM 1998 Form)*, 2nd Edition (1999) at pp. 216 – 229.

This situation would be called “constructive acceleration” in law. English law, for that matter by inference in this regard Malaysian law, does not seem to tacitly accept this concept of constructive acceleration even though American law does.⁶⁷

In a decision of New South Wales Supreme Court, it was held that as the certifier persistently ignores the Contractor’s request for EoT as a consequence of which the Contractor accelerated to complete on time. The court decided the claim in favour of the Contractor.⁶⁸ It is opinion of this writer that the law in this area is still not settled: there are powerful and persuasive arguments to the contrary.

It remains to be said that even if “loss and expense” or “Costs” of constructive acceleration is claimable, this is strictly beyond the jurisdiction of the Engineer/Architect/S.O. and the same can only be pursued in arbitration or litigation. “Loss and expense” and “Costs” are both contractual financial compensation mechanisms and the Engineer/Architect/S.O. can only certify these arising from constructive acceleration if there are contractual provisions to that effect.

11.0 LIQUIDATED DAMAGES

It is the experience of this writer that almost all construction contracts will have as their provisions deduction for LD by the Employer if the Contractor fails to complete by the contractual or extended completion date. There are some confusions if “liquidated damages” means the same and carry the same legal meaning and legal effects as “liquidated and ascertained damages” but it is respectfully submitted that any attempt to force a distinction in the meaning of these two terms is misplaced. In commercial law, damages can be of two types: liquidated damages and unliquidated damages. The word “liquidated” already suggests a fixed and specified sum, the use of the word “ascertained” is strictly superfluous.⁶⁹

As stated earlier, the Employer would lose its entitlement to LD if time for completion is “at large”.⁷⁰

The use of the term “liquidated damages” in commercial contracts (for which construction contracts undoubtedly are) is strictly a misnomer. In England, there is a clear legal distinction between liquidated damages and what is called penalty

⁶⁷ See Nicholas Lane, *Constructive Acceleration*, (2000) 16 Const LJ 231.

⁶⁸ *Perini Corporation v. Commonwealth of Australia* (1969) 12 BLR 90.

⁶⁹ It may be that this is an attempt in England where “liquidated damages” is to be contrasted with “penalty” and the use of the word “ascertained” will lend more weight to the argument that the liquidated damages is a genuine and ascertained pre-estimate of the Employer’s loss; there is no such distinction in Malaysia between liquidated damages and penalty; strictly in Malaysian law, all liquidated damages are penalties; see note 72 below.

⁷⁰ *Thamesa Designs Sdn Bhd v. Kuching Hotels Sdn Bhd* [1993] 3 MLJ 25; also *Sim Chio Huat v. Wong Ted Fui* [1983] 1 MLJ 151.

with the former representing a genuine pre-estimate of the loss to likely be suffered by the Employer as a result of the Contractor's breach whereas "penalty" will denote that the sum so stated is extravagant in relation to the loss likely to be suffered by the Employer.⁷¹ In Malaysia however the provision in section 75 Contracts Act 1950 is such that there is no such distinction.⁷²

Section 75 Contracts Act provides as follows:

“When a contract has been broken, *if a sum is named in the contract as the amount to be paid in case of such breach*, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, *whether or not actual damage or loss is proved to have been caused thereby*, to receive from the party who has broken the contract reasonable compensation *not exceeding the amount so named or, as the case may be, the penalty stipulated for.*” (emphasis supplied)

In the context so provided for in section 75 Contracts Act 1950, the “sum named in the contract to be paid in case of such breach” is what is understood by most as the “liquidated damages”. As explained by Sir Roberts CJ in *Chung Syn Kheng*:

“This means that the amount provided for liquidated damages will only be enforced in favour of the plaintiff if it can be shown that this amount was a genuine pre-estimate of the damages likely to flow from the specified breach. The amount of loss or damage which has actually occurred must be a major factor in deciding whether the amount provided for was an honest pre-estimate of the likely loss or damage. If the actual loss or damage suffered is very much less than the sum agreed, the court will refuse to enforce the agreement to pay a specified sum by way of liquidated damages.”⁷³

The above statement, though pronounced in Brunei court, is undoubtedly the law in Malaysia.

The next question to ask is this: must the Employer prove what loss he had suffered before he can deduct LD? The wordings of section 75 *viz.* “*whether or not actual damage or loss is proved to have been caused thereby*” suggests that he will not be required to do so. This however is not the case. In *Selvakumar a/l Murugiah v. Thiagarajah a/l Retnasamy*⁷⁴ the Federal Court held that the Employer would still have to prove loss; by having this requirement to prove loss, it is suggested that there is in Malaysia no liquidated damages as it is popularly

⁷¹ *Dunlop Pneumatic Tyre Co Ltd v. New Garage Motor Co Ltd* [1915] AC 79.

⁷² *Chung Syn Kheng Electrical Co Bhd v. Regional Construction Sdn Bhd* [1987] 2 MLJ 763. See also *SS Maniam v. State of Perak* [1957] MLJ 75.

⁷³ *Ibid.*, at pp. 764 – 765.

⁷⁴ [1995] 2 MLJ 817.

understood to be. *Selvakumar* has been followed by the Malaysian Court of Appeal in *Reliance Shipping & Travel Agencies v. Low Ban Siong*.⁷⁵ It may be undesirable from certain viewpoint, but it is submitted that this is now settled law.

It may not be audacious to ask that if this is the position of Malaysian law caused by section 75 Contracts Act 1950, would it be possible to by way of express provisions contract out of this section 75 and its effects? Contracting out of certain provisions of Contracts Act is possible⁷⁶ and such has been suggested in the case of construction contracts.⁷⁷ Another attempt is the provision in the form of Clauses 22.1 and 22.2 of PAM Standard Form of Building Contract.

It is often the case that before the Employer can deduct from the amount due to the Contractor as LD payable, the pre-conditions in the LD clause itself would need to be satisfied; very often what is called a certificate of non-completion would need to be issued by the Engineer/Architect/S.O.⁷⁸ It must be stressed that a delay to the contractual completion date and the issuance of a certificate of non-completion *per se* only entitle (subject to the proof for loss suffered) the Employer to deduct sum due, or claim from the Contractor, liquidated damages. The Employer can choose not to do so. It is therefore wrong for an Engineer/Architect/S.O. to indicate and to deduct an amount purportedly payable as LD in any interim certificate. The Engineer's/Architect's/S.O.'s duty is to certify if completion was not achieved which it ought reasonably to have been, and to issue the certificate of non-completion is there is what the contract requires, payment matter is not their concern

If liquidated damages are deducted and it is subsequently found that less or no damages ought to be deducted, the Contractor is entitled to interests on damages which are repayable.⁷⁹

It is suggested that if the Employer has lost its right to claim for LD, and unless the contract expressly provides otherwise, he can still claim for general damages, this of course has to be pleaded and similarly, he still has to prove and can only entitle to be awarded the amount which he can prove. However, the words *not exceeding the amount so named* in section 75 Contracts Act 1950 should be noted. It is unlikely that even if the Employer can successfully claim an amount for general damages, this would not exceed the amount which he could have claimed had the LD clause were to be valid or had he not lost his right to levy LD.

⁷⁵ [1996] 2 MLJ 543.

⁷⁶ *Ooi Boon Leong v. Citibank NA* [1984] 1 MLJ 222.

⁷⁷ See Lim Chong Fong, *Enforcement of Liquidated Damages: To Prove Actual Loss?* [1993] 1 MLJ lxxxii.

⁷⁸ See Clause 22.1 of PAM 98 Form, Clause 26.1(a) of CIDB Standard Form of Building Contract (2000 Edition) and Clause 40 of IEM. CE 1/89.

⁷⁹ *Department of the Environment for Northern Ireland v. Farrans* (1981) 19 BLR 1.

11.0 CONCLUSION

The two issues dealt with in this paper, *viz.* extension of time and liquidated damages are complex legal issues and both of them are inter-linked. Further, they are also linked to other aspects of construction contracts which are not specifically dealt with in this paper such as the question of liquidated damages if and when the employment of the Contractor under the contract is determined. For day to day contracts administration, the basic rules governing liquidated damages and extension of time will need to be understood, only then will a recourse to the court or the service of an arbitral tribunal be avoided.

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