

How to Claim EOT The Contractual Issues

by

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Delays & EOT

Most Common Dispute

Most Complex Dispute

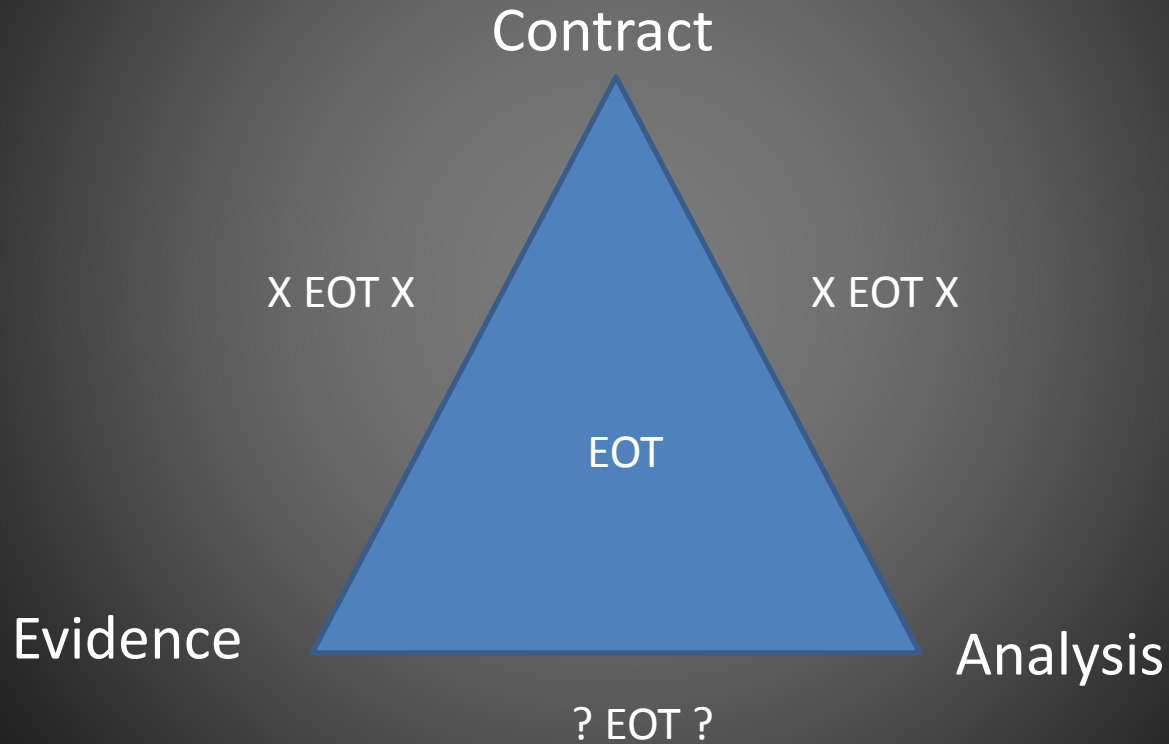
Most Uncertain Dispute

Construction & Time

“It has been said that the only major construction project to finish on time and to budget was a church where, presumably, divine intervention played a role”

Dr. Julian Critchlow

The Trinity



The Contract

- Excusable Delay
- Condition Precedent Notice
- Mitigation
- Prospective or Retrospective Analysis

Excusable Delays

- List of Delay Causes = EOT
- Limited List on Neutral Delay Events ✓
- Limited List on Employer/Agents Culpable Delay Events X

Why?

Time At Large

- Otherwise Unfair on Contractor
 - Dodd v Churton [1887] 1 QB 562
 - Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151
 - Thamesia Designs SB v Kuching Hotels SB [1993] 3 MLJ 25
- No LAD & Reasonable Time to Complete
- What is the End Result?

Time at Large

- Reasonable Time = EOT Time
- EOT Time = Agreed by Parties
- EOT Time = Determined by Arbitrator/Court
- Further Delays = Compensable Actual Damages

Avoiding Such Time at Large

- Exhaustive List of Delay Causes???
- Catch-All Act of Prevention Clause
- PAM 98' & 2006'
- *any act of prevention or breach of contract by Employer*
- Interpretation in the hand of SO/ER
- Employer includes Agents/Consultants/3rd Parties within Employer's obligation

Acts of Prevention

- Variations are not acts of Prevention
- If agree that no excusable delay for Variation – time not at large

Luxor(Eastbourne) Ltd v Cooper [1941] AC 108

- Delays in Permits or Delays by Public Authorities – not act of Prevention

Davy Offshore Ltd v Emerald Field Contracting Ltd [1991] 55 BLR 1

Other Time at Large Situations

EOT not assessed within contractual time frame or reasonable time

- *Hawl-Mac Construction Ltd v Candle River* 50 BCLR 57
- *Anderson v Tnapeka County Council* [1900] 19NZLR 1
- *Bernhard's Rugby Landscape Ltd v Stockly Park Consortium Ltd* [1998] All ER 249
- *Amalgamated Building Contractors Ltd v Wathams Holy Cross UDC* – distinguished EOT assessments of acts of prevention to neutral events

Notice Requirements

- Is it a Condition Precedent?
 - Must be clear
 - Standard Forms now use words “*shall be a condition precedent*”
 - Ambiguities = *Contra Proferentum*

- Is the Notice Period Clear?
 - Forthwith, Soon Thereafter, No. of Days
 - Time Runs From? = delay commence v knowledge
 - Objective Knowledge = reasonably apparent

Notice Requirements

- Notice Period Unworkable or Impossible
 - All delay events \neq delay the Completion Date
 - Time for Analysis of Criticality
 - Notice of Events Affecting Progress

Notice Requirements

- Required Accompaniments Effects Period
 - Particulars of Expected Effects
 - Estimate of EOT Required
 - For a reasonable estimate = Delay Event Cease
- Mitigation requirements impact notice period

Notice Requirements

- Should the Notice be Condition Precedent when:
 - Delay event known by the Parties/SO
 - Where Delay event caused by the Employer?
 - Where Act of Prevention
- Otherwise Unfair?
- Does lack of or delayed notice prejudice Employer?
 - Only if it prevent Employer from mitigation

Notice Requirements

- Delay Event within the knowledge of the SO
 - Condition Precedent to Contractor's application
 - Condition Precedent to SO's duty to give EOT?
 - London Borough of Merton v Stanley Hugh Leach Ltd [1985] 39 BLR 51
 - PAM 2006' retrospective duty post CPC

Notice Requirements

Etlis v New Age Construction (NSW) Pty Ltd
[2005] NSWCA 165

“objective interpretation to notices taking into account the contextual scene”

(at least for Employer’s causal delays – avoid absurdity)

Notice Requirement

- Delay Caused by Employer/Act of Prevention
 - Gaymark Investments v Walter Construction Group [1999] NTSC 143
 - Keating on Building Contracts
 - Considered Wrong Legal View
 - The late Prof. Ian Duncan Wallace : Informed Drafting
 - Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd [2002] NSWCA 211

Notice Requirement

Turner Corp v Austotel [1994] 13 BCL 374

“A party to a contract cannot rely upon the preventing conduct of the other party where it failed to exercise a contractual right which would have negated the effect of that preventing conduct”

(equates to mitigation)

Rely on Failure of Condition Precedent Notice?

- Risk of Converting LAD to Penalty - Prevention
 - Can SO issue CNC?
 - Can SO honestly state works ought to be completed by the CNC date?
 - Can Employer benefit LAD when it caused the delay?
 - Will that not make the LAD a penalty?
 - Is this a genuine pre-estimate of loss when there is no loss? Cured by Informed Drafting?

LAD despite causing the Delay

Dodd v Churton

“I think that such a construction as is contended for ought not to be put on an ambiguous clause and that it would require very clear language to show that a man had undertaken a responsibility which very few men will undertake with their eyes open”

Prof. Doug Jones “Can Prevention be cured by Time Bars” [2009] 1CLR Pt157, argues that clear language is needed.

LAD despite causing the Delay

Example:

“and in the event the Contractor fails to fulfill the condition precedent notice requirements for his entitlement to EOT, the Contractor agrees to complete the works by the date specified (not extended) by acceleration at the Contractor’s own cost notwithstanding that the Contractor may have in that instance been delayed by acts of prevention by the Employer”

Notice Requirement

X Gaymark

- lack of notice in an act of prevention causes time at large because SO prevented from granting EOT
- Contractor cannot benefit from own breach of no notice and get loss & expense

✓ Gaymark

- implication that relying on lack of notice will lead to LAD being unenforceable
- Employer cannot benefit where it has committed wrong
- *Multiplex Constructions (UK) Ltd v Honeywell Control Systems* [2007] EWCH 447 (refers to prejudice to Employer)

Avoiding the Pitfall on Notice Requirements

- SO assess delay without prejudice to right to refuse due to lack of notice?
- Employer agrees EOT with no loss & expense?
- Employer Unilateral Right to grant EOT
- Australian Std Forms (PC-1, NPWC3, AS 4300)
- CNC based on contractual extensions and not SO's opinion?
- Employer waives LAD for the affected period?

Mitigation

- Reasonable steps = financially & resource feasible
- Actions which are in the normal course of business
- Causes an overall cost saving to Contractor rather than a mere expense
- Question of Fact, Not Law
- Burden discharged easily by assertions (evidence of ability generally lies with contractor)
- Evidential burden switches to other Party to Prove No Reasonable Mitigation

Mitigation

- Cost Incurred in Mitigation Recoverable
- Failure to Mitigate = Contractor's Culpable Delay?
 - RP Wallace Inc v The US
- Best Endeavors?
 - IBM v Rockware Glass Ltd [1980] FSR 335
 - Steps that are within the power and ability but limited to those that are in self-interest

Mitigation

- Standard Forms = Ineffective Mitigation Provisions
- Joint Effort Mitigation is Needed
 - NEC Contracts
 - Early Warning Procedure
 - Risk Reduction Meeting & Risk Register
 - Agreed Steps & Cost of Mitigation
 - Pending Determination of EOT, Cost Shared

- Stop fighting and get on with the job
- Problem solving
- Management procedures

- Bonus for early finish
- Low performance damages
- Penalty - 25% deduction from payment if fail to provide an update work program
- No end float

- “early warning procedure” – delay & cost
– Risk reduction meeting
- “compensation events” – delay & cost mitigation steps

Prospective v Retrospective Assessment

- Truly Prospective – Likely/Probable Delay
 - How to really consider Mitigation effects?
 - Unless Recovery/Catch-Up Program Issued
 - Without prejudice recovery/catch-up programs and constructive acceleration
 - PAM 98' : upon receipt of notice & on likely delay

Prospective v Retrospective Assessment

- Completion Date Prospective but Retrospective Delay Event
 - PWD 203 Rev 2007 : as soon as able to estimate the length of delay
 - PAM 2006 : upon receipt of final application within 28 days after cause of delay ended
 - SIA : after delaying factor ceases and possible to decide length of EOT

Prospective v Retrospective Assessment

- Truly Retrospective – just before or after CNC/CPC
 - PAM 2006 : within 12 weeks after CPC review and assess regardless of lack of notice
- Arbitrator & Analysis – to follow requirement of Contract?

SCL Protocol

- Excusable delay with catch-all prevention clause
- Avoid strict condition precedent notice requirements
- Application & Assessment close to time of delay event
- Prospective determination which are retrospective delay event



The End

Thank You

Q & A