

Time when at large in construction contracts

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While inviting tenders, the employer stipulates the time within which it is required of the successful bidder to complete the work. Accordingly, the successful bidder works out the details as to the manner in which he will achieve the objective of time stipulation. At the tender stage, no bidder envisages the problems likely to be encountered by him which may prevent him from achieving the completion of the work within the agreed time.

Need and purpose for extending time

It is not unusual to experience that there are many problems which the contractor faces while executing the work on account of default of the employer or his Engineer. This is a factor which retards the progress of the work with the result that the date targeted by the parties, at the time of entering into contract, cannot be achieved. To overcome this situation, a clause relating to extension of time is generally inserted in the contract. Another clause relating to liquidated damages is also incorporated in the contract. In the event of delays contributed by the employer, contractor will be qualified to be granted extension of time but if the employer is convinced that the contractor is wholly at fault, then while refusing grant of extension of time, the competent authority named in the contract will levy liquidated damages at the specified rate.

The period during which the contract remains valid is a matter of agreement and if the period originally set for the completion of the work comes to an end, nothing short of agreement of the parties can extend the subsistence and validity of the contract. When the period fixed for the completion of the contract is about to expire, the question of grant of extension of time for completion of the work can be considered by the competent authority at the instance of either party to the contract. However, the extension of time, in order to have a binding affect, must meet the agreement of the parties either expressly or impliedly. The department can also *suo motu* grant extension of time when the contractor does not apply for the same in order to keep the contract alive. This failure to extend the time on or before the date on which

the period, whether originally fixed or extended, expires will render the authority competent to grant extension of time without any remedy for operating on the clause relating to liquidated damages.

In many cases the time fixed by the contract ceases to be applicable on account of some act or default of the employer or his architect or engineer. A provision is generally inserted in order to avoid such acts or default, destroying the liquidated damages clause by which the architect or engineer is empowered to grant extension of time on the happening of certain specified events, and the contractor is bound, when such an extension has been properly granted, to complete within the extended time. This has the effect of substituting for the time fixed by the contract a new time from which the liquidated damages are to run. Such a new date can only be substituted for the original time, under such a power, where the extension is given under the circumstances and on the happening of the events expressly provided by the contract.¹

Where time is of the essence of the contract, the parties may agree to vary the time provisions, in which case the variation will be final. Alternatively, the party having the benefit of the time provision may waive the right to insist on performance by the stipulated time and allow an extension, in which case his act does not operate as an entire waiver of the essential condition as to time, but merely has the effect of substituting the extended time for that originally fixed.²

Where there is an extension of time clause, this is regarded as being inserted for the benefit of the employer, since it operates to keep alive the liquidated damages clause in the event of delay being due to an act of the employer or his agent.

The extension must in any case be made at a reasonable time before the time limited for completion of the work has expired (unless there is some power in the contract to extend the time after completion), so that the contractor may know the time within which he has to complete and arrange his work accordingly³.

Extension of time cannot be granted unilaterally

Extension of time can be made effective only if both the parties agree to the

¹. *Wells v. Army & Navy Co-op Society Ltd.*, (1902) 86 L.T. 764.

². *HALSBURY'S LAWS OF ENGLAND*, 4th ed., para 936, p. 689.

³. *HALSBURY'S LAWS OF ENGLAND*, 2nd ed., Vol. 3, p. 281.

period. Under Section 55 of the Contract Act, the promisee is given the option to avoid the contract here the promisor fails to perform the contract within the time allowed under the contract. It is not open to the promisee to exercise the option or to exercise the option at any time, but the promisee cannot by the mere fact of not exercising the option change or alter the date of performance fixed under the contract itself. Under Section 63 of the Contract Act, the promisee may make certain concession to the promisor which are advantageous to the promisor, and one of them is that may extend the time for such performance. But such an extension cannot be a unilateral extension on the part of the promisee.⁴

One party to the contract cannot unilaterally alter or vary the terms of the contract agreement duly entered into between the parties. If a party does not apply for extension of time, there is no bar that it cannot *suo motu* grant extension of time. But in order to make the extended time effective, it is imperative that the other party expresses its unequivocal and unconditional acceptance. The effect of extension of time is that it displaces the time originally stipulated in the contract. This is possible only if such extension of time is agreed to both the parties.

Grant of extension of time must be explicit

Generally it is said that when the employer continues to get the work done beyond the agreed date of completion of work inasmuch as running bills are also being paid to the contractor, it should be taken to have the implied consent of the employer insofar as extension of time is concerned. This cannot be taken to be a true statement. There is nothing known as 'implied' when a definite date for completion of work has been explicitly mentioned in the contract.

In the event the time is of the essence of the contract, question of there being any presumption or presumed extension or presumed acceptance of a renewed date would not arise. The extension of time, if there be any, should and ought to be categorical in nature rather than being vague or on the anvil of presumptions. In the event the parties knowingly give a go-by to the stipulation as regards the time and the same may have two several effects: (a) parties name a future specific date for delivery, and (b) parties may also agree to the abandonment of the contract. As regards (a) above, there must be a specific date within which delivery has to be effected and in the event there is no such specific date available in the course of the conduct of the

⁴. Anandram Mangturam v. Bholaram Tanumal, AIR 1946 Bom 1(DB).

parties, then and in that event, the courts are not left with any other conclusion but a finding that the parties themselves by their conduct have given a go-by to the original term of the contract as regards time being of the essence of the contract.⁵

Time at large – what is

When the contractor does not agree to unilateral extension of time granted by the employer, it can be said that time is at large. The expression 'time at large' is not a legal term but has acquired recognition by the courts over a period of time. When time is at large, there is no specified date within which the contracted work will be completed. However, it does not mean that parties cannot fix a reasonable period of time within which the work shall be completed.

A stipulation leading to time being at large may arise when unexpectedly the employer has run short of funds and cannot foresee as to when the financial stringency is likely to ease. In such a case, the work will move at a snail's pace and both the parties are not aware as to when the work under the contract shall approach the completion date.

When time is at large, the question of operation of the liquidated damages clause by the employer does not arise because there is no fixed time from which liquidated damages can be determined. In fact, in such a situation, it becomes an open-ended contract. Both the parties to the contract are not rigidly tied down to the terms of the contract.

Time when ceases to apply

There are a number of circumstances which may prevent completion of the work within the time agreed to between the parties. For example, extreme weather conditions, labour strike, non-availability of the required material in the market, hindrance/prevention by the employer of his workmen/other contractors, strikes or local disturbance etc. In case the delay is caused for no fault of the employer, the employer will have a right to deduct liquidated damages as provided for in the contract agreement. But if the contractor is not at fault, he shall be entitled to claim damages under the general law of contract. The foregoing remedies are available to the respective parties when time is the essence of the contract. However, the same shall not be available to either party if time had been set at large because there is no

⁵. *Arosan Enterprises v. Union of India*, (1999)9 SCC 449: AIR 1999 SC 3804: 1999(3) RAJ 297.

specific date from which the liquidated damages will run.

Prevention from completion

Generally, all construction contracts contain an extension of time clause in the contract on account of acts of prevention by the employer for whatever reasons. It is a wrong notion that extension of time clause in the contract is for the benefit of the contractor. On the contrary it is for the benefit of the employer since it operates to keep alive the liquidated damages clause in the event of delay being due to an act of the employer or his agent.

In the Court of Appeal, Lord Denning M.R. in *Trollope & Colls Ltd. vs Northwest Metropolitan Regional Hospital Board*,⁶ had held that act of prevention amounts to time at large. It was said:

“It is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if one party by his conduct – it may be quite a legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time”.

Delay caused due to failure of designs

The contract work involved erection of multi-storeyed blocks of flats. P was the main contractor and M was the sub-contractor who was to design and construct the foundation piles. M designed the piles and completed construction of piles and thereafter left the site. Thereafter, a very grave fault was found with one of the piles making it totally useless. Doubt, therefore, naturally arose that this may be the fate of the other piles. As a result of investigation, another solution was found. All in all, the said investigation took 58 weeks. Obviously there was a delay of 58 weeks in construction work a part of which was due to delay caused by the employer in investigation. The employer held M responsible for delay. Courts below held M responsible for delay. When the matter reached Court of Appeal, Salmond L.J. held:

“The liquidated damages clause contemplates a failure to complete

⁶. (1973) CLY 270.

on time due to the faults of the contractor. It is inserted by the employer for its own protection; for it enables him to recover a fixed sum as compensation for delay instead of facing the difficulty and expense of proving the actual damage which the delay may have caused him. If the failure to complete on time is due to fault of both the employer and the contractor, in my view, the clause does not _____ . I cannot see how, in the ordinary course, the employer can insist on compliance with a condition if it is partly his own fault that it cannot be fulfilled.”

In *Multiplex Constructions (U.K) Ltd. vs Honeywell Control Systems Ltd.*,⁷ Mr. Justice Jackson held that the prevention principle is the promisee cannot ask for performance which he himself has prevented the promisor from doing. He stated:

“In the field of construction law, one consequence of the prevention principle is that the employer cannot hold the contractor to a specified completion date, if the employer has by act or omission prevented the contractor from completing by that date. Instead time becomes at large and the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time. The same principle applies as between main contractor and sub-contractor. It is in order to avoid the operation of the prevention principle that many construction contracts and sub-contracts include provision for extension of time. Thus it can be seen that the extension of time clauses exists for the protection of both parties to a construction contract or sub-contract.”

Time whether at large

In the aforesaid case,⁸ it was laid down as to when time cannot be said to be at large. These are:

- (1) Actions by the employer which are perfectly legitimate under a construction contract may still be characterized as prevention, if those actions cause delay beyond the contractual completion date.
- (2) Act of prevention by an employer do not set time at large if the contract provides for extension of time in respect of those

⁷ {2007} EWHC 447 (TCC).

⁸ *ibid.*

events

- (3) Insofar as the extension of time clause is ambiguous, it should be construed in favour of the contractor.

A Rolls Royce car was not built by the agreed delivery date. Thereafter, new dates were agreed to between the parties. Respondent served a notice on the appellant that unless he received the car by the fixed date, four weeks away, he would not accept it. The appellant failed to fulfil the promise but offered it some months later. The respondent refused to accept the car. Held that the respondent was justified in refusing to take delivery since the respondent had made time of the essence of the contract.

Failure to grant extension amounts to time being at large

An interesting decision is seen in the case of *Hawlmac Construction v. Campbell River Co.*⁹, by the Supreme Court of British Columbia. There the contract provided that the building work should be completed by a fixed date subject to extension granted by the engineer. Two months before the completion date an application was made for an extension but the engineer failed to consider the application until the completion date. The works were completed 144 days after the original date of completion. When the contractor was sued for failure to complete in time, the Court held that the contract required the engineer to consider an application for extension of time upon receiving it and to fix the length of extension. Having failed to perform that obligation prior to the expiry of the original time for completion of the contract, there was no longer a specific date within which the contract was to be completed or from which penalties could be imposed.

ROPER J. in *Fernbrook Trading Co. Ltd. v. Taggart*¹⁰ held :

“In my opinion no one rule of construction to cover all circumstances can be postulated, and the best that can be said on the present state of authorities, is that whether the completion date is set at large by a delay in granting an extension, must depend on the particular circumstances prevailing.

“I think it must be explicit in the normal extension clause that the contractor is to be informed of his new completion date as soon as

⁹. 60 B.C.L.L. 57.

¹⁰. [1979] 1 N.Z.L.R. 556.

reasonably practicable. If the sole cause is the ordering of extra work, then in the normal course extension should be given at the time of ordering, so that the contractor has a target for which to aim. Where the cause of delay lies beyond the employer, and particularly where its duration is uncertain, then the extension date may be delayed, although even then it would be a reasonable inference to draw from the ordinary extension clause that the contractor should be given a reasonable time after the factors which will govern the exercise of the engineer's discretion have been established. Where there are multiple causes of delay, there may be no alternative but to leave the final decision until just before the issue of the final certificate."

Where extension of time was not intimated to the contractor despite his request for extension of time, abandonment of work by him is justified.¹¹

Ordinarily, the proper time for allowing an extension is when the event happens on which the extension depends. If, for example, extras are ordered which delay the work, an extension of time should be made before the time when the delay is thereby caused. The effect of delay caused by such an order would be to set time at large, at any rate for the time being, and it might be permanently.¹²

Make time essence to avoid time being at large

Where time has not been made of the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer by notice may fix a reasonable time for completion of the work and dismiss the contractor on a failure to complete by the date so fixed.¹³ In cases where the stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing reasonable time for completion stating that, in the event of the non-completion of the work within the time so fixed, he intends to enforce or abandon the contract. But the time fixed must be reasonable having regard to the position of things at the time when the notice is given, and to all the

¹¹ *Government of Madhya Pradesh v. Khusiram & Co.*, 1995(2) Arb LR 13 (DB) (MP).

¹² *Anderson v. Tuapeka County Council*, (1900) 19 N.Z.L.R. 1; *Murdoch v. Lockie*, (1986) 15 N.Z.L.R. 296; *Dodd v. Churton*, [1897] 1 QB 562 C.A.

¹³ *Halsbury's Laws of England*, 4th Ed., Vol. 4, para 1179.

circumstances of the case.¹⁴

If time is not of essence originally, it can be made of essence subsequently by serving notice on other party.¹⁵ Time will be of the essence of the contract if it is so provided in the contract or if one of the parties after unreasonable delay on the part of the other gives a reasonable notice to the other party making time of the essence of the contract. If none of the two has happened, reasonable time will be deemed to be the time which will be of the essence of the contract.¹⁶

References

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5. Keating on Contracts, 7th ed.
6. Law of Contract by Cheshire & Fifoot

¹⁴ *Dominion of India v. Raj Bahadur Seth Bhikhray Jaipuria*, AIR 1957 Pat 657: ILR 36 Pat 633 (DB).

¹⁵ *Gomathinayagam Pillai v. Palaniswami Nadar*, AIR 1967 SC 868: (1967)1 SCR 227; *Stickney v. Keeble*, 1915 AC 386: 112 LT 664: 84 LJ Ch 259; *Mangal Ram Namasudra v. Premananda Namasudra*, AIR 1972 A&N 8: (1972) Assam LR 17.

¹⁶ *Sat Prakash L. Tara Chand v. Dr. Bodhraj L. Bhagwan Das*, AIR 1958 Punj 111: 60 PLR 97 (DB); *Bal Saroop Daulat Ram v. Lakhbir Singh Kirpal Singh*, AIR 1964 Punj 375 (DB).