

COURT OF APPEAL UPHOLDS EXTENSION OF TIME ANOMALY

Aidan Steensma and Kathryn Moffett

Last summer we reported on a TCC decision which had identified, for the first time, an anomaly commonly present in the extension of time provisions of traditionally drafted construction sub-contracts. The anomaly arises where a Sub-contractor becomes entitled to an extension of time for an event occurring after the contractual date for completion and can result in the Sub-contractor's liability being greater or lesser than the true consequences of its delay. In a decision last week, the Court of Appeal has upheld the TCC's decision, noting that the potential unfairness produced was not sufficient to overcome the standard drafting of the sub-contract in question.

Carillion Construction Ltd v Woods Bagot Europe Ltd: a recap

As discussed in our previous Law-Now (available [here](#)) construction contracts will normally allow a Contractor or Sub-contractor to claim an extension of time for events occurring after the contractual date for completion. There are no difficulties for a contract with a liquidated damages clause, where damages due to the Employer or Contractor are fixed. However, liquidated damages clauses are rare for sub-contracts, and where unliquidated damages apply the granting of extensions for events occurring after the contractual date for completion can lead to unexpected results.

As explained in more detail in our previous Law-Now, a Sub-contractor in such circumstances will already be in breach of contract for failing to meet the agreed completion date when the event giving rise to an extension of time arises (such as a new variation). Simply extending the existing date for completion will mean that the previous culpable delay in breach of contract will be erased and effectively "moved forward" by the amount of the extension. This creates a disconnect between the actual period when

the Sub-contractor was causing delay and the Sub-contractor's contractual liability for delay. The period for which the Contractor is entitled to claim delay damages will be disconnected from the actual effects of the delay caused by the Sub-contractor. The outcome is likely to be that one party receives a windfall whilst the other is unfairly prejudiced.

In the present case, Carillion as main contractor entered into an M&E sub-contract with EMCOR under the DOM/2 JCT form in relation to the construction of the Rolls Building in London. Carillion started proceedings against EMCOR seeking to recover liquidated damages levied against it under the main contract due to delays in carrying out the sub-contract as well as its own costs of delay. EMCOR claimed for extensions of time for events which arose after the contractual date for completion. Carillion claimed that any extension awarded for such events should be "discontinuous" and not simply added to the existing date for completion, so as to preserve the connection with any culpable delay by EMCOR prior to the event in question.

The TCC rejected Carillion's argument finding that any extension of time should be added contiguously to the existing date for completion. Carillion appealed.



The Court of Appeal

In a decision last week, the Court of Appeal has upheld the TCC's decision:

- The court agreed that the natural meaning of the words used in the DOM/2 form, in keeping with most other construction contracts, showed that contiguous extensions of time were intended.
- Although noting that no previous cases (either in England or abroad) appeared to have considered the possibility of discontinuous extensions of time, the court noted that previous cases dealing with extensions of time for events occurring after an originally agreed date for completion had all granted contiguous extensions of time. These cases supported the TCC's finding as to how a reasonable person with the relevant background knowledge would understand the sub-contract to work.
- Like the TCC, the court accepted that the anomaly pointed out by Carillion was real and that unfairness was likely to result.

Whilst perhaps being "*more troubled*" than the TCC about this, the court nonetheless found itself unable to allow this consideration to drive it from the natural meaning of the sub-contract provisions.

Conclusions and implications

The Court of Appeal's decision reinforces the potential exposure highlighted in the TCC's original decision for parties to construction contracts which provide for unliquidated damages in relation to delay. An entitlement to an extension of time arising after the contractual date for completion can result in delay related losses being unrecoverable by an Employer or Main Contractor, or disproportionate and unfair levels of loss being shouldered by a Main Contractor or Sub-contractor.

A right to claim unliquidated damages for delay is most commonly included in sub-contracts to avoid the difficulties of agreeing an appropriate rate for liquidated damages in circumstances where a Contractor may be entitled to recover several sets of liquidated damages from different Sub-contractors. Contractors and Sub-contractors in particular should be aware of the potential anomaly which arises on such an approach and consider whether special drafting is required to remove the inconsistency. Such drafting might provide for discontinuous extensions of time, as argued for by Carillion, or provide for other means of apportioning the total delay related losses suffered by a Contractor among those Sub-contractors actually responsible for all or part the delay.

About the Authors



Aidan Steensma

Aidan is a solicitor specialising in construction disputes work. He has significant experience in disputes concerning large scale construction and infrastructure projects, including power plants, oil and gas facilities, chemical plants, rail and highway concessions, hospital developments and sporting facilities.

Kathyn is a lawyer in the UK Construction Team. She specialises in construction disputes and has a range of experience in all types of dispute resolution, including adjudication, litigation and formal negotiation.



Kathryn Moffett