

Council wins in battle with contractor

By Sam Dorne

In [*Thomas Barnes & Sons plc v Blackburn with Darwen Borough Council* \[2022\] EWHC 2598 \(ICC\)](#), the English High Court dismissed a claim for wrongful termination from a contractor despite agreeing that they were entitled to an extension of time.

The facts

The English High Court has found in favour of Blackburn with Darwen Borough Council, in a dispute with contractor Thomas Barnes & Sons plc (**Thomas Barnes**) (in administration) with whom the Council contracted to build the town's new bus station.

The project incurred a series of delays for which Thomas Barnes claimed extensions of time. Exasperated by the delays, the Council terminated the contract with Thomas Barnes and appointed a new contractor. Thomas Barnes fell into administration shortly thereafter. They blamed this on the Council's failure to make interim payments and wrongful termination of the contract.

The administrators for Thomas Barnes brought proceedings against the Council seeking various remedies contesting the termination of the contract. They sought to establish a right to extension of time and claimed damages for wrongful termination of approximately £1.7 million.

The Council disputed the entire claim and said in fact it was Thomas Barnes who owed the Council over £1.8 million. This was based on contractual provisions, as the Council claimed it was within its rights to validly terminate the contract and to charge Thomas Barnes for what it had to pay the other contractor to complete the work.

However, the Council did not pursue this, since it would be a fruitless exercise given that Barnes is in administration with - according to the administrators' progress reports - no prospect of recovery for unsecured creditors.¹

¹ At [8].

The key dispute related to the allegation that works following the erection of structural steelwork were delayed because of deflection and associated issues requiring remedial works, which caused a delay to the critical path. Thomas Barnes argued that the Council was responsible for the steelwork design.

However, another separate delay occurred around the same time with Thomas Barnes' roof covering work. The question was whether this contractor delay offset the Council's steelwork design issues such that no extension of time was due. This was an example of 'concurrent delay'. This is where more than one event occurs simultaneously and there is a mix of responsibility between contractor and employer.

The Court's ruling on concurrent delay

The Court acknowledged that historically there had been much debate about concurrent delay but that the law was now *settled and accurately summarised* in Keating on Construction Contracts 11th edition.

The test to be applied is the 'effective cause' test, which stipulates that a contractor will be entitled to an extension of time if the event relied upon was an effective cause of the delay, even if there was a concurrent cause of the same delay.

As such, if the employer delay event would have delayed completion in the absence of the concurrent contractor delay event, an extension of time is usually due.

The Court held that the common objective of any method of delay analysis is to assess the impact of delay to practical completion caused by particular items on the *critical path* to completion. This depends on the facts.

The Court decided that the steel deflection and roof coverings issues were concurrent over the period of delay caused by the roof coverings. Both of the works items were on the critical path. Both were causing delay over the same period and, as such, Thomas Barnes was entitled to an extension of time. Thomas Barnes was therefore entitled to delay-related costs.

However, this was not the end of the matter.

The contract was entitled to be terminated

The Court held that the Council was entitled to terminate the contract for delay-related default and treat the contract as discharged. The Council was, therefore, able to remove Thomas Barnes from the site and engage replacement contractors to complete the works. This meant that Thomas Barnes had no prospect of recovering any sums, since any entitlement it might have established under a final account analysis would be extinguished by the Council's right to recover and set off the cost of having the contract completed by replacement contractors. His Honour Judge Stephen Davies held that Thomas Barnes had *no prospect of recovering anything in this litigation*. The claim was therefore dismissed.

Conclusion

Cases involving concurrent delay are usually highly complicated affairs, so any dispute arising out of these is likely to require some kind of dispute resolution from an outside body. The case also shows the importance when terminating

a contract to make sure that there is a justified reason for doing so, and to make sure the termination steps are precisely followed to avoid a wrongful termination claim.

ABOUT THE AUTHOR



Sam Dorne is a member of The ADR Centre's Knowledge Management team and provides technical support to the Building Dispute Tribunal. Sam recently returned back to NZ after nearly 19 years of living in the UK where he spent the last several years working as a civil litigation solicitor mainly dealing with the recoverability of legal costs and consumer claim cases. He has experience in advocacy, case management and legal drafting and had several cases go to the Court of Appeal in England.

