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EARLY COMPLETION – SOME ENGLISH AND AUSTRALIAN AUTHORITIES

GLOBAL CONSTRUCTION

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It is not uncommon for construction contracts to contain, not only dates for commencement and completion, but also a provision for submittal of contract programmes. Sometimes, the contractor will put forward a programme which shows a completion date earlier than the date for completion. The purpose of this note is to consider some English authorities on the rights and obligations in cases where the contractor is prevented or impeded by the employer from achieving such an early completion date.

Glenlion Construction *Limited v Guinness Trust* (1987) 39 BLR 89 was a case which arose out of a 1963 edition of the JCT standard form of building contract. It contained not only the usual start and finish provisions but also the following provision at Clause 3.13.4 in the bills of quantities:

> **Progress Chart**
>
> Provide within 1 week from the date of possession, a programme chart of the whole of the works, including the works of nominated subcontractors and suppliers and contractors and others employed direct including public utility companies and showing a completion date no later than the date for completion. The chart to be a bar chart in an approved form.
>
> Forward 2 copies to the architect, 1 copy to the quantity surveyor and keep up to date. Modify or re-draft.

Three questions of law came before the court; the second and third of them were as follows:

2. Whether on a true construction of Clause 21 of the conditions, namely the 1963 JCT standard form of contract and Clause 3.13.4 of the contract bills, if and in so far as the programme showed a completion date before the date for completion, the contractor was entitled to carry out the works in accordance with the programme and to complete the works on the said completion date.
3. Whether there was an implied term of the contract between the applicant and the respondent that, if and in so far as the programme showed a completion date before the date for completion the employer by himself, his servants or agents should so perform the said agreement as to enable the contractor to carry out the works in accordance with the programme and to complete the works on the said completion date.

The answer given by the court to these questions was "yes" and "no". In other words, although the contractor was entitled to complete the work early, he was not obliged to do so and accordingly there was no implied obligation on the owner to facilitate such early completion.

The express terms of the contract were not such as to entitle the contractor to an extension of time unless he was delayed beyond the date for completion; the relevant clause providing as follows:

> 23. Upon it becoming reasonably apparent that the progress of the works is delayed, the contractor shall forthwith give written notice of the cause of the delay to the Architect, and if in the opinion of the Architect the completion of the works is likely to be or has been delayed beyond the Date for Completion stated in the Appendix to these conditions or beyond any extended time previously fixed under either this clause or clause 33(1)(c) of these conditions…

So the owner doing something which prevented the contractor from obtaining early completion would not entitle the contractor to an extension of time. The contractor was looking for an alternative route whereby he could claim damages for breach of an implied term. But the judge was having none of it; he said:

> The answer to the question must be "no". It is not suggested by Glenlion that they were entitled and obliged to finish by the earlier completion date. If there is such an implied term, it imposed an obligation on the Trust but none on Glenlion.
>
> It is not immediately apparent why it is reasonable or equitable that a unilateral absolute obligation should be placed on an employer.

The decision in *Glenlion* was then applied in the case of *Finnegan v Sheffield* (1988) 39 BLR 94. The court was required to consider what was the start of the prolongation period for which the contractor was entitled to recover prolongation costs. As in the *Glenlion* case, the court found that the relevant period of time started at the date for completion in the contract, which defined the relevant obligation is to when the contractor was obliged to complete. There were special conditions in the contract bills which provide for the thirty-four houses to be handed over in weekly batches of four and, by Special Condition 3, the contractor is required to complete all work to each batch in ten weeks, but these special conditions did not overreach the underlying Date for Completion. The judge considered the various provisions, and concluded that:

> This seems to me to indicate that all these provisions relate to programming rather than giving rise to a time-related contractual obligation. That the contractor must have regarded it as such seems to me apparent from his own pricing for plant, tools and vehicles in the preliminaries of the contract bills.

But this is not to say, of course, that programmes might not, in other contractual circumstances, enjoy a more elevated status, such that a failure by either party to adhere to a contract programme might be actionable, either by way of time and/or money being payable pursuant to the express terms of the contract, or by way of damages for breach of contract. Such circumstances arose in the Australian case of *Alucraft Pty Ltd v Grocon Ltd* (Number 6 – the Exhibition Hall Contract) (1994)[1]. In that case, the contract did not specify a finished date for the subcontractor's work, but instead referred to a contract programme "to be advised". There was such a programme, which was approved by the head contractor. There was no express provision in the contract requiring the head contractor to provide access in accordance with that, or any other program, but Smith J found that such a term should be implied into the subcontract. The court was referred to the *Glenlion* case, but did not think that it was of direct relevance, saying –

> The other authority relied upon was *Kitson's Sheet Metal Ltd. v. Matthew Hall Mechanical and Electrical Engineers Ltd.* (1989) 47 B.L.R. 82. This case is relied upon to support the proposition that the programme is simply an instrument or tool used by a contractor to order its works and does not have contractual force.
>
> There are passages in the reasons which in the circumstances of that particular case are to that effect. I can see no reason, however, why in a particular case a programme might not become a contractual document with contractual force…In my view the term alleged in paragraph 6A of the Statement of Claim should be implied –

"that Grocon would afford to Alucraft sufficient access to the site to enable it to complete the works in accordance with its approved sub-contract programme".

1. www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VicSC/1994/187.html

These authorities would appear to suggest that whether or not a contractor can recover in cases where he has been impeded in achieving early completion depends upon whether the early completion is an obligation, or merely an entitlement. It is not clear, however, that this neat distinction is always applied. In *John Barker Construction v London Portman Hotel* [1997] 83 BLR 31. In that case, Mr Recorder Roger Toulson QC[2] was asked to consider the terms of an Acceleration Agreement whereby the Contractor was to be paid £20,000 if it achieved completion by a certain date. The Court found that it was impossible to tell whether, as a matter of probability, the Plaintiffs would or not have finished by that date but for further changes made after the Acceleration Agreement, and the Court, somewhat unusually, adopted the "loss of a chance" line, finding that the Plaintiffs were entitled to damages of a chance equal to 50% of the agreed performance bonus. The basis for the finding appears principally to have rested on an implied term, that the owner would not hinder the contractor in its efforts to obtain that early completion bonus. The court said:

> The plaintiffs' primary contention was that the final £20,000 payable under the acceleration agreement was intended to be paid on completion, whether or not the plaintiffs completed by 26 August 1994. I do not accept this. From the evidence of Mr Jolly and Mr Baillie and the wording of Mr Jolly's letter dated 20 July 1994 I conclude that the £20,000 was agreed to be a performance related payment if the plaintiffs completed by 26 August 1994. This was the defendants' primary pleaded case, although abandoned in their closing submissions.
>
> It was also an express term of the acceleration agreement that the defendants would supply the plaintiffs with all outstanding information by the end of 12 July 1994, and I accept that there were implied non-hindrance terms as pleaded in paragraph 7 of the re-amended statement of claim.
>
> By reason of the numerous changes made after the acceleration agreement the defendants were in breach of those implied terms, if not also of the express term. The latter point turns on whether the express duty was conditional upon receipt of a specific request for information from the plaintiffs. I doubt that it was, but the point is academic.
>
> It is impossible to tell whether, as a matter of probability, the plaintiffs would or would not have finished by 26 August 1994, but for those changes. They would have had a reasonable opportunity of doing so, but they could easily have failed for all manner of reasons. In those circumstances I would hold that the plaintiffs are entitled to damages for loss of that chance equal to 50 per cent of the agreed performance bonus, or £10,000.

There seems to have been no suggestion in that case that the contractor was obliged to have completed by the target date, but the lack of such an obligation was not fatal to the contractor's claim.

Since those cases, the Society of Construction Law in the UK published its Delay and Disruption Protocol. The protocol is not intended to be a contractual document, but rather to provide useful guidance on delay and disruption issues; it puts forward a scheme for dealing with delay and disruption issues that is "balanced and viable". Its guidance includes the following:

> Thirdly, float is sometimes used to describe a contractor's float. The contract period may be, for example for a year from January 1 to December 31. The contractor may, however, decide that he wishes to complete the work by the end of October. The months of November and December are sometimes described as float. Consider another scenario — where the employer's architect issued instructions, the result of which is that the contractor finishes at the end of November instead of the end of October. The position in this case under the JCT Contract is reasonably clear. The contractor is not entitled to an extension of time as such, because under clause 25.3.1, extensions of time are only due if completion of the works is delayed beyond the completion date. In *Glenlion Construction v The Guinness Trust*, H.H. Judge Fox-Andrews QC found that there was no term to be implied into a JCT contract that, if and so far as the programme shows a completion date before the date for completion, the employer must enable the contractor to carry out the works in accordance with the earlier date. Nevertheless, if the contractor can show that he has been caused loss and expense by reason of the delay, he may be entitled to claim it under clause 26 (The position may depend on the reason for the delay. If a contractor is delayed or disrupted by an instruction ordering additional work, he is entitled to loss and expense regardless of whether the additional work delayed the contractor in the completion of the works)...
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> **1.12 Float as it relates to compensation**
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> 1.12.1 If as a result of an Employer Delay, the Contractor is prevented from completing the works by the Contractor's planned completion date (being a date earlier than the contract completion date), the Contractor should in principle be entitled to be paid the costs directly caused by the Employer Delay, notwithstanding that there is no delay to the contract completion date (and therefore no entitlement to an EOT),provided also that at the time they enter into the contract, the Employer is aware of the Contractor's intention

2. As he then was..

to complete the works prior to the contract completion date, and that intention is realistic and achievable.

1.12.2 Guidance: It is important to understand the significance of the statement above, and to contrast it with the position taken in the Protocol on the effect of total float on EOT (see Guidance Section 1.3). In relation to EOT, the Protocol takes the position that an Employer Delay should not result in an EOT unless it is predicted to reduce to below zero the total float on the activity paths affected by the Employer Delay. When it comes to compensation, the Protocol considers that, unless there is agreement to the contrary, the Contractor should be entitled to compensation for the delay, even if the delay does not result in an EOT. As with the effect of float on entitlement to EOT, the Protocol recommends that contracting parties expressly address this issue in their contract. They should ask themselves the question: if the Contractor is prevented by the Employer from completing on a date earlier than the contract completion date, should it have a remedy? If so, in precisely what circumstances? If not, then the contract should say so expressly.

1.12.3 Where the parties have not addressed this issue in their contract, for the Contractor to have a valid claim, the Employer must be aware at the time the contract is entered into of the Contractor's intention to complete prior to the contract completion date. It is not permissible for the Contractor, after the contract has been entered into, to state that it intends to complete early, and claim additional costs for being prevented from doing so.

1.12.4 The Protocol recognises that the position it takes on this issue might be thought to conflict with the decision of HH Judge Fox-Andrews in the (English) Technology and Construction Court in *Glenlion Construction Ltd v The Guinness Trust* (1987) 39 BLR 89, where it was held that there was no implied term of the building contract in question that the Employer in that case should so perform the contract as to enable the Contractor to complete the works in accordance with a programme that showed the works being completed before the contract completion date. Providing the Employer is aware of the Contractor's intention prior to the contract being entered into, there should be no such conflict. The Protocol considers that, as a matter of policy, contractors ought not to be discouraged from planning to achieve early completion, because of the price advantage that being able to complete early is likely to have for the Employer. But the potential for conflict reinforces why the issue should be addressed directly in every contract.

The protocol was first published in 2002, but it is only fairly recently that it has been picking up authoritative momentum in the courts. Thus, for example, in *Alstom Ltd v Yokogawa (No 7)* [2012] SASC 49, Justice Bleby, sitting in the Supreme Court of South Australia paid considerable attention to the protocol, and dismissed the analysis of one of the parties' experts at least partly on the basis of what the protocol said:

> 1282 The first problem with this method is that it is not an accepted method of delay analysis for construction programming practitioners. Mr King had never encountered this particular method before. It is not mentioned in the Protocol as a recognised method of delay analysis. Mr Lynas also agreed that this method, to the best of his recollection, was not mentioned in the text *Delay and Disruption in Construction Contracts* by Keith Pickavance, which Mr Lynas himself described as the most comprehensive work on the subject of which he is aware, and an extract from which was relied on by Alstom for other purposes. Nor was Mr Lynas aware of any documented reference to this particular method in any other text on construction law. It seems to have been a creature of TBH alone. I am satisfied that the Resource Analysis method is not a method recognised within the engineering profession. It should be rejected for that reason alone.

Ultimately, of course, the question of whether a contractor can recover compensation where he is prevented from achieving an early completion hinges on the express terms of the contract, and whatever terms might be implied into the contract. But there seems to be some reason to believe that the courts are more willing than they once were to allow the compensation of a contractor in these circumstances.

ABOUT THE AUTHOR

Robert Fenwick Elliott is a barrister, now based in South Australia, and an International Member of Keating Chambers in London. He was formerly senior partner of the international practice of Fenwick Elliott LLP. Robert has practised as a specialist in construction, engineering and energy law. He has a wealth of experience in the resolution of many disputes involving in aggregate many hundreds of millions of dollars. As a strategist, he is particularly known for obtaining substantial recoveries for clients in difficult cases. He has particular expertise as an advocate in intermediate dispute resolution process such as adjudication, mini-trial, mediation and expert determinations.