EVERSHEDS SUTHERLAND

Extension of Time and Delay Analysis in Construction Disputes

What is realistic and achievable when claiming an EOT for reasons of social distancing, people self-isolating, or material shortages?

1. A general introduction to construction contract, and what is an Extension of time ("EoT"), looking at where the parties agree a start/end date

Keating notes:

*"The phrase "**construction contract**" is used to include any contract where one person agrees for valuable consideration to carry out construction works, which may include building or engineering works, for another"*

The term has a broad meaning, including a wide range of contractual relationships, but occurs generally where the principal parties to the construction contract being are the employer and the contractor. The traditional arrangement or method of procurement for a construction contracts being where the design is carried out by the design team for the Employer, and the contractor undertakes the works (with specialist sub-contractors, and a full design team, administering those works, having been appointed by the employer). Another common arrangements is a Design & Build where the contractor takes all the risk for the development, on a similar basis.

The most common form of standard Building Contracts in Ireland include the RIAI, Engineer Ireland, GCCC, JCT (which is the UK equivalent but now being used more frequently in the Irish construction sector), the NEC and the PWC Contract used for public sector works.

Generally speaking Construction contracts allow for an agreed construction period, which can be extended, where there is a delay, that is not the contractor's fault. This is described as an extension of time ("**EoT**"). When it becomes reasonably apparent that there is, or that there is likely to be, a delay that could merit an EoT the contractor is generally required to give written notice to the contract administrator, identifying the relevant event that has caused the delay, and in some cases the EoT sought and the costs for same. It will depend on what has been agreed between the parties but it is not uncommon for an EoT to be permitted, but with no additional entitlement for that EoT to the Contractor. It is usually left to the contract administrator to assess the delay complained of, and to determine if the circumstances outlined mitigate granting the requested EoT, and adjusting the completion date.

Relevant events that are more often than not cited include:

- Variations;
- Exceptionally adverse weather;
- Civil commotion or terrorism;
- Failure to provide information;
- Delay on the part of a nominated sub-contractor;
- Statutory undertaker's work;
- A delay in giving the contractor possession of the site;
- Force majeure (such as an epidemic or an 'act of God');

- Loss from a specified peril such as flood;
- The supply of materials and goods by the client;
- Strikes;
- Changes in statutory requirements; and
- Delays in receiving permissions that the contractor has taken reasonable steps to avoid.

The contractor is required to prevent or mitigate the delay and any resulting loss, even where the fault is not their own.
Assessing claims for an EoT are usually complicated and often lead to controversy. This is particularly the case where there have been multiple or concurrent delays, some of which are the contractor's fault and some not. There are many occasions where contractors contribute to delay themselves by their performance during design periods, when producing drawings, mock ups and samples or in inter-facing with sub-contractors.

Crucial in assessing applications for extension of time is the quality of the information provided and records available. In most common forms of construction contracts there is an agreed start date and end/completion date. Should the contractor fail to complete within the agreed completion date, they will be liable to pay damages to the employer for breach of their time obligations. This assessment is determined either by an agreed rate i.e. liquidated damages and ascertained damages, or if no such clause is included, the employer's actual losses must be claimed as general damages.

While uncommon, if there is no fixed period in the construction contract for completion, or should the completion date be "at large" due to default on the part of the employer, the contractor is still expected to ensure that it works towards completion within a reasonable time. The courts in Ireland would be expected to follow the UK courts, who are generally supportive of such an approach and have indicated a willingness to imply a contract completion date for completion of the works within a reasonable time.

It should also be noted that Construction Contracts in Ireland are also governed as to payment terms by the Construction Contracts Act 2013 (the "2013 Act"). The Act provides that construction contracts must specify adequate mechanisms to determine amounts to be paid, periods for interim payments and periods when payments fall due. It also provides the procedure for the referral of payment disputes to adjudication under the 2013 Act.

2. Impact of contractor caused delays on the ability to seek additional time to complete and/or damages.

As identified above, claims for delay in construction contracts are increasingly common, often leading to disputes between the parties on an entitlement to an EoT, and money, for the delay caused. Delays resulting in an EoT result in the moving out of the completion date on the contract. Generally, in contracts, the EoT clauses are seen as being for the primary benefit of the employer and employer friendly. As such, where delays are caused by the contractor, the employer usually incorporates LaD damage into the Appendix to the contract and reserves unto itself the entitlement to recover such LaDs for contractor delays to the completion date.

Where there are employer delays, a contractor must look to an express provision in the contract entitling it to claim time and/or money for such employer delay.

Interpretation of EoT clauses can be a thorny issue to assess and decide, particularly when it comes to assessing against whom EoT clauses are to be construed. Keating suggests that such clauses will be construed against the party seeking to rely upon an ambiguity within the clause. As such ambiguity within an EoT clause, is more than likely to be interpreted against a contractor seeking to rely upon it, and there will be very close scrutiny of the precise terms of the clause, and whether the purported EoT claim has complied with the strict provisions of the contract (ie condition precedents, as discussed further below).

Keating notes there are two types of delay events which give rise to an EoT, being (a) delay caused by employers and (b) delay not caused by employers i.e. neutral events/other parties. Importantly Keating notes that shortages of materials and labour events that may cause unavoidable delay, may not excuse a contractor for non-completion in circumstances where there is no express power to extend time for delay which is not the fault of the employer. The contractor in such a scenario bears the risk of delay and will not avoid LaDs.

For a contractor to rely on delay for an EoT, they must show that the delay event did in fact cause actual delay to the progress of the works, and to the ultimate completion date for the project as a whole. Therefore, if delay occurs that does not in fact impact completion of the works, a contractor will not be entitled to an EoT. However, in situations where there is concurrent delay, a contractor will be entitled to an EoT even where it is shown that the event being relied upon is not the sole or dominant cause of delay provided that it is an effective cause of delay i.e. effects completion.

3. An entitlement to time does not always equate to an entitlement to money – this will be subject to the contract conditions, including on notice.

Theoretically, both an employer and a contractor may be entitled to money where there is an EoT, but this is subject to the conditions of an individual contract, and the actions of the parties during the

Project. For employers, if the contractor is responsible for the delay or could have prevented it, then the employers will maintain an entitlement to recover LaDs, assuming it is permitted under the contract. If it is not permitted under the contract, the employer may still seek to recover its actual losses by way of a claim for general damages. (It should be noted that claims for general damages tend to be difficult to succeed on in construction contracts.)

Where the contrary position applies and the employer is responsible for the delay, it will not recover LaDs. The English principle of prevention provides that an employer cannot benefit from its own breach. If the employer is responsible for the delay and refuses to grant an EoT, where a contractor has such an entitlement, then the employer will lose its entitlement to recover LaDs. I have addressed the Prevention Principle in further detail in Section 5 below.

For contractors, an EoT may prolong construction and lead to disruption costs which they may claim from the employer by way of damages. However, the contractors entitlement to such damages is dependent upon the provisions of the contract and if the delay event is a compensable delay. Issues of concurrency of delay will also come into play in assessing entitlements to time and/or money.

4. How are claims for EoT assessed and against what i.e. usually critical path milestones

There are delay claim experts who have expertise in analysing the causes of delay helping legal teams and parties to contracts to determine if there is a legal right to secure contract EoT entitlements.

Various methodologies are often deployed in delay claim analysis and include:

(a) impacted as-planned;

(b) time impact analysis;

(c) time slice window analysis;

(d) as-planned vs as-built window analysis;

(e) retrospective longest path analysis; and

(f) collapsed as-built analysis.

Delay experts often start by looking at the contractor's base line, as-planned programme or as-built programme. The as-planned programme/as built programme should show the planned works and enable the delay analysis expert to identify what caused the delay and what delay actually occurred, at any one time. These programmes also allow experts to conduct what is known as critical path analysis. The SCL Delay and Disruption Protocol defines critical path as:

"the sequence of activities through a project network from start to finish, the sum of whose durations determines the overall project duration"

The critical path is the string of activities or planned works that takes the construction project up to the completion date. The critical path method requires activities to occur in sequence and therefore any delay to works on the critical path will have the effect of delaying the construction project as a whole and push out the completion date. Critical path analysis allows experts to determine delay that is critical and non-critical which in turn assists in establishing EoT entitlements. Critical path programmes are designed to assist in showing cause and effect of delays to completion of works. The activities therefore on the critical path can be described as the driving force of a construction project.

Critical path *milestones* are essential when using the critical path method. Critical milestones identify major phases of work throughout the course of a project. Critical path milestones allow project co-ordinators to identify tasks which are required before a project can proceed onto the next phase of works. When using a delay analysis mythology, project milestones will enable experts to identify delays that occur outside of float periods, enabling experts to identify critical delay and in turn help establish EoT claims/entitlements.

5. The impact of COVID and other developments (i.e. Brexit and Ukraine) on EoT claims – looking at the contracts, i.e. RIAI, FIDIC, NEC, JCT etc…

Global events such as COVID, Brexit and Russia's invasion of Ukraine have contributed to supply chain disruptions and site closures, thus giving rise to EoT claims. (The previous speaker has touched on "*Force majeure*" and I have not strayed (in this paper) into this area too, save to say that the FM issues can also give rise to similar claims.)

During COVID, (unlike Ireland) construction sites in England and Wales remained open and operational. In Ireland, the Gov't response was more emphatic and dramatic, with a full site shutdown from the back end of March 2020 to until Mid-May 2020. The exception being for essential health and related projects, relevant to COVID and also critical infrastructure projects. With the various other Covid shutdowns, differing approaches were taken, culminating, in scenarios, were similar activities were closed or open, depending on their stage of progress or if they were deemed "essential" for infrastructure, housing or otherwise.

Prior to COVID standard form contracts (and bespoke amended forms of contract) frequently include provisions to assist in the determination of contractor EoT claims, with or without money.

The RIAI – Without Quantities 2017 standard form contract permits an extension of time for various reasons which cause delay but do not permit for money:

Clause 30

"*If in the opinion of the Architect the works be delayed:*

(a) By force majeure; or
(b) Because possession of the site was not given to the Contractor in accordance with the terms of Clause 28; or
(c) By reason of any exceptionally inclement weather; or
(d) By reason of loss or damage to the Works Ancillary Items which is covered by Clause 21(A) to 26 inclusive of these Conditions; or
(e) By reasons of civil commotion, local combination of workmen, strike or lockout affecting any of the trades employed upon the Works; or
(f) By reason of any Architect's Instructions given in pursuance of Clause 2 of these Conditions
(g) Because the Contractor has not received in due time necessary instructions from the Architect for which the Contractor has specifically applied in writing; or
(h) Because the Contractor or any Nominated Sub-Contractor or Nominated Supplier has been unable for reasons beyond the control of the Contractor (or of the Sub-Contractor or Supplier as the case may be) to secure such labour and materials as may be essential to the proper execution of the Works; or
(i) By delay on the part of other contractors, artists or tradesmen engage by the Employer in executing work not forming part of this Contract; or
(j) By reason of any act or default of the Employer causing delay in the progress of the Works as provided for in Clause 29(b).

Then in any such case the Architect shall, as soon as it is possible for the Architect to do so, make a fair and reasonable extension of time for completion of the Works. Upon the happening of any such event causing delay the Contractor shall immediately give notice thereof in writing to the Architect but the Contractor shall nevertheless use constantly the Contractor's best endeavours to prevent delay and to proceed with the Works. In determining what extension of time (if any) is fair and reasonable under paragraph for loss or damage to the Works or Ancillary Items the Architect shall have regard in particular to any negligence, omission or default of the Contractor which caused or contributed thereto."

Often, when we adopt this clause in our own Building Contracts, we amend it to remove clause 30(h) for being a reason to allow extension.
In our own Building Contracts, we often use the following EoT clause which permits time but not money:

"*If it becomes apparent that the Works will not be completed by the Date for Completion as set out in the Contract for reasons beyond the control of the Contractor, then the Contractor shall so notify the Architect who shall grant, in writing, such extension of the time for the Date for Completion as he may consider reasonable."*

I have also looked at the provisions in some of the standard forms of contracts, namely:

RIAI

Under the RIAI - Without Quantities 2017, for private contracts, where the cost of performance of the contract increased or decreased due to legislative amendments, the contract sum was to be amended to reflect the legislative change arising.

In Ireland, there was considerable debate within the wider industry whether the COVID emergency legislation actually triggered the price increase clauses. By way of example in the March/April 2020 COVID legislation, the Gov't was careful not to expressly state that building sites were to "close". Rather the approach was to impose restrictions on travel outside areas (within which we resided) (ie 2kms, later increased to 5kms), save for certain exempted services deemed as essential services. In retrospect, I believe this was carefully planned and the upshot of the legislation made it impossible for people to attend building sites, to work, to take deliveries etc. This impact was felt on the ground on sites, and in the supply chains for materials and by staff/workforces generally.

The COVID arguments I have seen have involved claims for EoTs on the basis of site closures/stoppages/slowdowns either as a result of a force majeure event (for the first lockdown) or for legislative changes, resulting in the closures, and resulting social distancing measures imposed post re-opening and delays in the supply chain.

In Public Works Contracts the recommendation made was to permit time and a % of the increased costs being encountered. Private contracts, such as those generally seen under RIAI form of contracts, were different and involved significant transfer of risk issues, through the entire supply chain, but without the same pressures to share the risk that might otherwise exist on private contracts.

This was particularly evident in contracts drafted post June 2022, where we saw plenty of examples of Employers seeking to address the COVID impact and prevent contractors claiming at least money for delayed completion; if not time & money to defend for EoT claims. As such Employers and Funders were seeking to pass the risk of future delays (or at least the cost of those delay events to the contractors/sub-contractors). Equally, we saw Employers seeking to avoid being caught with

the additional on-site costs of social distancing measures imposed to comply with COVID, and/or delays in the supply of materials due to COVID, Ukraine and/or Brexit.

Despite this it has become increasingly familiar to see sub-contractor (even more than contractor) claims in adjudication seeking COVID costs. This often involves attempts to side-step agreed condition precedents as to entitlements both with respect to a general entitlement or failing that on the timelines for issuing and the content of delay notices. This applied to social distancing, additional PPE costs and related COVID costs asserted to be causing on-site delays.

In unamended, RIAI contracts, it is possible for contractors/sub-contractors, to submit claims for EoTs, by referencing to force majeure (but as the industry became more familiar with COVID or the existence of war in the Ukraine) this became more difficult to sustain. Difficulties in securing labour and/or materials, which were essential to the proper execution of the works, which were out of their control, were generally seen as a valid basis for succeeding in getting time at a minimum. Securing claims for lost costs was and remains more difficult, but this does still mean that COVID and Ukraine related delays are a basis to defend Employer LaD claims and are a convincing *shield*, if not a *sword*, for contractors.

PWC

The (unamended) Public Works Contract ("**PWC**") details certain delay events, entitling the contractor to an EoT, and in some cases, also to money too. By way of example, if the Employer's representatives instructed the works to be suspended, then the contractor was entitled time & money.

The PWC-CF1 standard form incorporated a new clause 14 (COVID-19 Mandatory Closure) clause, providing that the contractor's remedies for a COVID-19 Mandatory closure, but which were limited to those listed in sub-clause 9.3 for a Delay Event (Appendix 1). The amended contract further provided that in the event of a mandatory closure, the contractor is entitled to an additional amount on the Contract Sum for the period of the closure, save for the first 7 days of closure, and where the contractor could demonstrate that the closure was not due to the contractor's own default, and it had made all reasonable efforts to avoid and minimise the adverse effects of the closure.

Arguably, the private contracts could learn from this approach, as it may facilitate the wider Industry in the event of further industry closures, and/or disruption due to another wave of the pandemic. Arguably, an overly aggressive employer stance will be damaging to the wider market – and common sense should prevail.

FIDIC

Interestingly, FIDIC issued guidance to FIDIC users during COVID, directing them on how they might adopt an appropriate contractual strategy, which might facilitate the granting of an EoT claim &/or money for disruption under clause 8.4 and/or clause 8.5 of the FIDIC **Red Book** 1999**.** It placed particular emphasis on circumstances where COVID issues resulted in personnel shortages or where there were delays due to a contractor following mandated procedures from public authorities (for public health reasons).

However, this suggested flexible approach was not followed through in the texts of all the FIDIC books; the FIDIC **Silver Book** 2017, limited a Contractor's entitlements to an EoT to where it could demonstrate that there were unforeseeable shortages in the availability of employer-supplied materials caused by governmental actions. No mention is made to the provision of a financial remedy for such an EoT.

The FIDIC **Yellow Book** 1999, provides for a number of delay events entitling a contractor to time and/or money, referencing in some cases a contractor's entitlement to "*plus reasonable profit*", where an EoT had been granted. The contractor was also entitled to an EoT if it had *"diligently followed"* directions, resulting in delays &/or disruptions, necessitated by a public authority ie social distancing, limits on social interactions, remote working, self-isolation etc… Similarly, delays necessitated due to a change in law impacting the base date would entitle a contractor to time and money. The Yellow book also references force majeure events but not what occurs in the event of a pandemic, or war.

NEC

The Construction Leadership Council published guidance on how to deal with COVID under NEC3/4 contracts, providing that if secondary option x2 was included (in the contract), then any statutory changes in the country where the site was located will be treated as *a compensation event,* if it impedes progress. It advised that for post-COVID contracts such continuing effects were not forecasted and that the parties should incorporate additional provisions to manage risk. This is very much in keeping with the collaborative approach of mutual trust and co-operation, sought to be achieved in the NEC4 contract, and is not reflected in other contracts readily used within the industry. This contract aims to facilitate possible circumstances for making claims for time and money but does require that the contractor, in turn, submit estimates outlining effects and changes in costs. These often take the form of condition precedents and the wording needs to be carefully checked from contract to contract.

JCT

The JCT Design & Build 2016 ("**JCT D&B 2016**") contract creates an overarching obligation to use best endeavours to prevent delay (including those caused by force majeure). Contractors may have an entitlement to time and/or money under this contract, but only where there is a *Relevant Event* ("**RE**") as listed in the contract entitling the contractor to maintain the EoT claim and money. See Appendix 2 for definition of Relevant Events and Relevant Matters ("**RM**").

Generally, should an employer instruct a contractor to carry out works in a restrictive manner or to postpone works, this should qualify as both a RE and a RM, giving rise to an entitlement to make a claim for both an EoT and money, but often subject to prescriptive condition precedents to ensure such entitlements.

Where statutory measures result in delays and/or site closures, these events will generally entitle a contractor to an EoT **but not** to money, as they are not an RM. Should no statutory measure arise, and a contractor still decides to suspend, then this would be deemed to be the contractor's own decision. Therefore, to get an EoT and/or money the contractor will have to show that there was direct impact upon the works and this should include delays and disturbance caused by issues such as social distancing, travel restrictions, personnel shortages etc…

Guidance for NEC and JCT

The Construction Leadership Council advised on amendments to the JCT D&B 2016 and NEC4 contract.

For JCT D&B 2016, it suggests adding the following to the definitions to clause 1.1:

"*A Pandemic Event means:*
- *i) any pandemic (including, but not limited to, the COVID-19 coronavirus outbreak and/or any mutation thereof and any other outbreak of an infectious human disease);*
- *ii) any measures, recommendations, regulations and legislation issued by the government and/or public authorities in relation to any pandemic from time to time, and/or*
- *iii) any consequences of any pandemic which are*
- *iv) outside the reasonable control of the Contractor, which affects the Works including without limitation the Contractor being unable to reasonably access the Site, delay in or non-delivery of any materials required for the Works, the Contractor being unable to reasonably adequately resource the Works."*

It provides two options, one for an EoT, with no monetary compensation under new clause 2.26.15) and the other where there is an entitlement to both time and money (see new clause 2.26.15 and clause 4.21.6).
The wording of new clause 4.18.3 provides:

"*Notwithstanding clause 4.19.1, in the event of the regular progress of the Works or any part of them being materially affected by the Relevant Matter referred to at clause 4.21.6, the Contractor shall only be entitled to the reimbursement of [•]% of the direct loss and expense which it would otherwise be entitled to as a result of such circumstances under these clauses 4.19 – 4.23*."

NEC4 Engineering & Construction Contract, has suggested the following new clause 11.2 (12A):

"A Pandemic Event means:
- *i. any pandemic (including, but not limited to, the COVID-19 coronavirus outbreak and/or any mutation thereof and any other outbreak of an infectious human disease),*
- *ii. any measures, recommendations, regulations and legislation issued by the government and/or public authorities in relation to any pandemic from time to time, and/or*
- *iii. any consequences of any pandemic which are outside the reasonable control of the Contractor, which affects the works including without limitation the Contractor being unable to reasonably access the Site, delay in or non-delivery of any materials required for the works or the Contractor being unable to reasonably adequately resource the works."*

Two options for an EoT but for no money are included in new clause 60.1 (22) and add new clause 61.8 states: "*Notwithstanding any other provision in this contract, there shall be no change to the Prices where and to the extent that a compensation event is an event of the type referred to in clause 60.1(22)) and the other for both time and money (add new clause 60.1 (22))."*

For there to be an EoT and (a %) for money, the same new clause 11.2(12A) is recommended and insertion of new clause 60.1(22) and insertion of new clause 63.12: *"Notwithstanding any other provision in this contract, any increase to the Prices as a result of a compensation event of the type referred to in clause 60.1(22) shall be reduced by [•]%."*

The Prevention Principle

The common law doctrine of prevention, where an employer cannot enforce contractual obligations (i.e. specified completion date and claim for liquidated damages) where the employer has prevented the contractor from completing by the specified date can be an issue that arises in adjudication quite frequently. However, even if such circumstances and the contractor suffers delay it must still complete the works within a reasonable time. *In Multiplex Constructions (UK) Limited v Honeywell Control Systems Limited (No.*

2)[1][1], Jackson J summarised the ambit and scope of the prevention principle in these terms:

(1) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause the delay beyond the contractual completion date.

(2) Acts of prevention by an employer do not set time at large, if the contract provides for an extension of time in respect of those events.

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

In the case of *Token Construction Co Ltd v Charlton Estates Ltd*, it was held that an employer could not LaDs until all the contractor's applications for extensions of time had been adjudicated upon. This case may be limited to its own facts but has relevance to the application of the prevention principle.

The courts have also indicated that implied terms are a mechanism by which the prevention principle can be implied into a contract – see *North Midland Building Limited v Cyden Homes Limited [2018] EWCA Civ. 1744.* This we believe would be followed in Ireland too.

Equally if the Employer is the party who has impeded completion by the Contractor then the Employer will lose its entitlement to maintain a claim for LADs and/or its entitlement to rely upon the pre-agreed completion date by failing to provide information when required if the prevention principle had an application in this instance.

Holme v Guppy [1838] 3 M&W 387; Dodd v Churton [1897] 1 QB 56- have recognised that construction contracts, like the Building Contract on this project, incorporate extension of time clauses, which provide for extension of the date for completion but also for levying of liquidated damages for any period after the expiry of the extended completion date. As such a contractor may not provide excuses for their own delay and not be obligated to abide by validly imposed LADs when they failed to achieve timely completion (to the extended date permitted) see Lord Coulson on North Midland.

6. Although contracts may incorporate provisions permitting EoTs – they also commonly contain strict condition precedents as a precondition to securing such time/money for delays and disturbance resulting from social distancing, isolation, and material shortages that no money will travel.

Time-bar condition precedents to securing an entitlement to time and/or money are becoming increasingly common in construction contracts. Under FIDIC Yellow Book 1999 clause 20.1, incorporates an onerous time-bar provisions as a condition precedent to any contractor claims. It provides notice must be given within 28 days of the date upon which the contractor became aware or should have become aware. The FIDIC Gold Book 2008 states that if the contractor failed to give its notice within 42 days, then the contractor's claim would lapse.

Other standard form contracts adopt similarly strict provisions ie clause 61.3 of NEC3, prevents contractor claims should it fail to notify the project manager within 8 weeks of becoming aware of the event in question.

Clause 10.3.1 of the PWC, states *"as soon as practicable and in any event within 20 working days"* after becoming aware or should have become aware, the contractor must notify the employer's representative of such an entitlement to delay. Within a further 20 working days, it must provide more details to the employer's representative.

The FIDIC Gold Book 2008, sub-clause 20(1)(a), gives a Dispute Board an element of discretion for any late submissions of claims based on circumstances, but contractors need to be wary should they flagrantly fail to discharge their notice obligation.

The courts themselves have also strictly interpreted any clause which appears to be a condition precedent. In *Bremer Handelgeselschaft mbH v Vanden Avenne Izegem nv* [1978] CSOH 190, the Scottish court determined that for a notice provision to be a condition precedent and binding that the following conditions had to be met:

i) it should state the precise time within which the notice was to be served; and
ii) it should state in plain and express language that unless that notice was served within the stipulated time, then the party making the claim would lose its rights under the clause.

A similar approach was taken in the Northern Irish courts in *Glen Water Ltd v Northern Ireland Water Ltd* [2017] NIQB 20. It held that where the required content of the notice provision is clearly

[1] [2007] BLR 195.

identifiable the courts are likely to require strict compliance with its terms.

The Supreme Court of Western Australia found in *CMA Assets Pty Ltd v John Holland Pty Ltd [No. 6]* [2015] WASC 217, that even where the employer is aware of the delay, the contractor must strictly comply with the requirements of the notice provision, even in terms of form of notice, to be entitled to an EoT.

Where the employer was the cause of the delay, the contractor was still required to comply with the requirements of the notice provision as condition precedent. In *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* [2007] EWHC 447 (TCC), the court held that a builder cannot rely on the principle of prevention, which would have entitled it to an EoT, for failing to exercise a contractual right (the notice provision) which could have negated the effect of the employer's conduct.

However, the notice provisions can be waived. In *City Inn Ltd v Shepherd Construction Ltd* [2007] CSOH 190, both the employer and the architect stated that the contractor was not entitled to an EoT but did not rely on the failure to operate the condition precedent (clause 13.8 JCT Standard Form (Private Editions with Quantities) 1980) as a reason. Lord Osbourne stated that "*silence in relation to a point that might be taken may give rise to the inference of waiver of that point. In my view that equitable principle can and should operate in the circumstances of this case".*

Thus, if there is a notice provision contained in the contract, whether it be standard form or bespoke, and the requirements are clearly identifiable then it should be treated as a condition precedent.

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Appendix 1

Public Works Contract for Building Works Designed by the Employer

Clause 9.3 **Delay and Extension of Time**

9.3.1 If the Contractor becomes aware that work under the Contract is being or is likely to be delayed for any reason, it shall as soon as practicable notify the Employer's Representative of the delay and its cause. As soon as practicable after that, and in any event within 40 working days after the Contractor became aware of the delay, the Contractor shall give the Employer's Representative full details of the delay and its effect on the progress of the Works. But if the Contractor has given notice and details of the delay under sub-clause 10.3.1 it does not have to give notice or details again under this sub-clause 9.3.1 for the same delay. In any event, the Contractor shall promptly give any further information about the delay the Employer's Representative directs.

9.3.2 If Substantial Completion of the Works or any Section has been, is being or will be delayed beyond the Date for Substantial Completion by a Delay Event and if all of the following apply:
(1) the Delay Event is not a result of the Contractor's or Contractor's Personnel's act or
omission or the Contractor's breach of the Contract
(2) the Contractor makes all reasonable efforts to avoid and minimise the delay
(3) the Contract does not provide otherwise

then, subject to this sub-clause 9.3, sub-clause 9.4 and clause 10, there shall be an extension to the Date for Substantial Completion of the Works and any affected Section equal to the amount of the delay beyond the Date for Substantial Completion caused by the Delay Event taking into account only Site Working Days. The Contractor and the Employer's Representative shall follow the procedure in clause 10.

9.3.3 The Employer's Representative may, at any time, revise a determination of an extension to the Date for Substantial Completion of the Works or any Section, but shall not bring those dates forward except by agreement with the Contractor under sub-clause 9.5 when work has been omitted.

1. Variations;
2. Exceptionally adverse weather;
3. Civil commotion or terrorism;
4. Failure to provide information;
5. Delay on the part of a nominated sub-contractor;
6. Statutory undertaker's work;
7. A delay in giving the contractor possession of the site;
8. Force majeure (such as an epidemic or an 'act of God');
9. Loss from a specified peril such as flood;
10. The supply of materials and goods by the client;
11. Strikes;
12. Changes in statutory requirements; and
13. Delays in receiving permissions that the contractor has taken reasonable steps to avoid.

Appendix 2

JCT Design & Build Contract 2016

Relevant Events

2.26 The following are the Relevant Events referred to in clauses 2.24 and 2.25:

2.26.1 Changes and any other matters or instructions which under these Conditions are to be treated as, or as required, a Change;

2.26.2 Employer's instructions:
(1) under clause 2.13, except for any instructions relating to a discrepancy or divergence in or between the Contractor's Proposals and/or other Contractor's Design Documents;
(2) under clause 3.10 or 3.11; or
(3) for the opening up for inspection or testing of any work, materials or goods under clause 3.12 or 3.13.3 (including making good), unless the inspection or test shows that the work, materials or goods are not in accordance with this Contract;

2.26.3 Deferment of the giving of possession of the site or any Section under clause 2.4;

2.26.4 Compliance with clause 3.15.1 or with the Employer's instructions under clause 3.15.2;

2.26.5 Suspension by the Contractor under clause 4.11 of the performance of any or all of his obligations under this Contract;

2.26.6 Any impediment, prevention or default, whether by act or omission, by the Employer or any Employer's Person, except to the extent caused or contributed to by any default, whether by act of omission, of the Contractor or any Contractor's Person;

2.26.7 The carrying out by a Statutory Undertaker of work in pursuance of its statutory obligations in relation to the Works, or the failure to carry out such work;

2.26.8 Exceptionally adverse weather conditions;

2.26.9 Loss or damage occasioned by any Specified Peril;

2.26.10 Civil commotion or the use or threat of terrorism and/or activities of the relevant authorities in dealing with such event or threat;

2.26.11 Strike, lock-out or local combination of workmen affecting any trade employed upon the Works or engaged in the preparation, manufacture or transportation of any of the goods or materials required for them or any persons engaged in design work for the Works;

2.26.12 The exercise after the Base Date by the United Kingdom Government or any Local or Public Authority of any statutory power that is not occasioned by a default of the Contractor or any Contractor's Person but which directly affects the execution of the Works;

2.26.13 Delay in receipt of any necessary permission or approval of any statutory body which the Contractor has taken all practicable steps to avoid or reduce;

2.26.14 Force majeure.

Relevant Matters

4.21 The following are the Relevant Matters:

4.21.1 Changes and any other matters or instructions which under these Conditions are to be treated as a Change;

4.21.2 Employer's instructions:
(1) under clause 3.10 or 3.11; or
(2) for the opening up for inspection or testing of any work, materials or goods under clause 3.12 (including making good), unless the inspection or test shows that the work, materials or goods are not in accordance with this Contract;

4.21.3 Compliance with clause 3.15.1 or with Employer's instructions under clause 3.15.2;

4.21.4 Delay in receipt of any permission or approval for the purposes of Development Control requirements necessary for the Works to be carried out or proceed, which delay the Contractor has taken all practicable steps to avoid or reduce;

4.21.5 Any impediment, prevention or default, whether by act or omission, by the Employer or any Employer's person, except to the extent caused or contributed to by any default, whether by act or omission, of the Contractor or any Contractor's Person.