Early Completion and its Effect on the Contractor

By Andrew Stephenson

1 Introduction

This article addresses two questions related to early completion.[1] The first is whether the contractor is entitled to complete early. The answer to this at general law appears to be yes, although in practice this will depend on the terms of the written contract. Whether the owner is obliged to facilitate early completion varies under the standard form contracts.

The second question is whether a contractor is entitled to an extension of time where it plans to complete early and can still do so, but is delayed in achieving completion. This depends upon which party has the benefit of the "contingency" under the construction contract. This again varies under standard form contracts.

Since standard form contracts deal with these issues in different ways, it is appropriate to consider a number of example contracts used in different jurisdictions. This article considers the following contracts:

- PC-1 (Australia);
- MDB[2] (based on the FIDIC "Red Book");
- JCTSBC[3] (UK); and
- the Public Sector Standard Conditions of Contract for Design and Build, 5th edn (2008) (PSSCOC) (Singapore).

It is important to emphasise two preliminary concepts before turning to a detailed analysis of these contracts.

2 Background

2.1 Obligation to complete by a particular date

In all three jurisdictions the subject of this paper (Australia, Singapore and the UK), the various forms of contract in common use require the contractor to reach a specified level of completion (such as practical completion, mechanical completion or substantial completion) by a specified time.

2.2 Properly drawn construction contracts must give the contractor a right to an extension of time

Pursuant to common law, where there has been delay to completion caused by an act or omission of the owner, unless the contract provides a mechanism by which that delay can be

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[1] The paper forms part of a broader investigation into time in construction contracts: see A. Stephenson, "Concurrency, Causation, Commonsense and Compensation (Part 1)" (2010) 27(2) I.C.L. Rev. 166 and I. Bailey, "Concurrency, Causation, Commonsense and Compensation (Part 2)" (2010) 27(2) (I.C.L. Rev. 197.

[2] FIDIC Conditions of Contract for Building and Engineering Works Designed by the Employer—Multilateral Development Bank Harmonised Edition, June 2010.

[3] JCT05—Standard Building Contract without Quantities (SBC)—Main Contract, Revision 2, May 2009.

disentangled from delay which is the responsibility of the contractor, the owner cannot enforce the obligation to complete by the specified time and therefore any right to general or liquidated damages for failing to complete by the specified time is also lost.[4] Instead, the contractor's obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time and to pay general damages for breach.

Accordingly, the four standard form contracts considered by this article expressly stipulate that the contractor is entitled to extensions of time for delay caused by acts or omissions of the owner.[5]

3 General law rights of the contractor to complete early

In the English case of *Glenlion*,[6] the court considered a contract that did not explicitly deal with a programme planning early completion. Two of the three major questions raised in *Glenlion* where:

- whether the contractor was entitled to carry out the works in accordance with the programme and to complete the works on the programme completion date; and
- whether there was an implied term that the owner should perform the contract so as to enable the contractor to comply with an "early" completion date (i.e. where the programmed date for completion was earlier than the contractual date for completion).

In this case, the response to the first question was "self evident". Clause 21 of the 1963 JCT standard form contract to which the parties had agreed provides that the contractor must complete "*on or before the Date for Completion* stated in the Appendix subject nevertheless to the provisions for extension of time".[7] It was further held that, if the contractor was entitled to complete by the programme date, then it was also entitled to carry out the works in such a manner to complete by an earlier date.

The second issue was whether, when proceeding with the works on the accelerated programme, the contractor could expect the cooperation of the owner so that the owner had to accelerate the things that it was to do under the contract so as to allow the contractor to complete within the accelerated time frame.

As a general proposition, the law will, where the purpose of the contract requires the cooperation of the parties, imply an obligation on all parties to do whatever is necessary to enable the contract to be carried out.[8] However, that obligation is limited; as Devlin J puts it, cooperation may be enforced only "to the extent that it is necessary to make the contract

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[4] See for example *Holme v Guppy* 150 E.R. 1195; (1838) 3 M. & W. 387; *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* 1 B.L.R. 111; 69 L.G.R. 1; *SKM Cabinets v Hili Modern Electrics* [1984] VR 391.

[5] Clause 10 of PC-1; cl.14 of PSSCOC; cl.2.28 of JCT Standard Building Contract (without Quantities); and cl.8.4 of the FIDIC MDB**.**

[6] *Glenlion Construction Ltd v Guinness Trust* 39 B.L.R. 94; 11 Con. L.R. 126; (1988) 4 Const. L.J. 39.

[7] *Glenlion* 39 B.L.R. 94 at 95–96; 11 Con. L.R. 126 (emphasis added).

[8] There is a long line of authority for this proposition, starting with the English decision in *Mackay v Dick* (1881) 6 App. Cas. 251 at 263; (1881) 8 R. (H.L.) 37. See also *Butt v M'Donald* (1896) 7 QLJ 68 at 70–71; *Secured IncomeReal Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 C.L.R. 596 at 607; *Peters (WA) Ltd v Petersville Ltd* (2001) 205 C.L.R. 126 at 142.

workable".[9] The cooperation required is "for the benefit of the contract"[10] rather than of one party.

In *Glenlion*, the court refused to imply an obligation on the owner to assist with the accelerated programme. The critical distinction made in that case was that while the contractor was entitled to complete early, it was not obliged to do so. (It was not obliged to because the programme in question was merely descriptive and did not constitute a contractual obligation).[11]

The general duty to cooperate can only be implied where there is both an entitlement to complete early and an obligation to finish by the earlier date. It is only in that situation that failure to cooperate will affect the workability of the contract rather than merely the benefit to one party.

The entitlement–obligation distinction was approved in *Finnegan*.[12] There too it was held that the contractor was entitled to plan to finish early but that it could not rely on the owner's cooperation for early completion. If, however, the programme attained contractual status, "different considerations would have applied".[13] This view was supported in the Australian case of *Alucraft*.[14]

In *Alucraft*, the Victorian Supreme Court explicitly considered the entitlement–obligation distinction and commented that it could not see why a programme "might not become a contractual document with contractual force".[15] In this case, the contract did not specify starting or finishing dates and simply referred to the programme, which was "to be advised".[16] The contractor approved the programme of a subcontractor which set out start and finish dates. The contract required the subcontractor to comply with the approved programme. Accordingly, upon approval, the subcontractor was at risk of a claim for damages by the contractor for failure to comply with the programme. There was no express term requiring the contractor to provide access in accordance with the programme.

The subcontractor argued that a term should be implied that the contractor "would afford the [subcontractor] sufficient access to the site to enable it to complete the works in accordance with the [subcontractor's] approved programme".[17]

While Smith J agreed with the contractor that such a term could not be implied as a matter of law, he concluded that such a term could be implied as a matter of fact pursuant to the test laid down in *Codelfa Construction*[18] and *BP Refinery*.[19] While the careful reasoning justifies the conclusion that the term can be implied as a matter of fact, it is submitted that such a term could have been justified on the basis that it was simply an example of the duty

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[9] *Mona Oil Equipment & Supply Co v Rhodesia Railways Ltd* [1949] 2 All E.R. 1014 at 1018; (1949–50) 83 Ll. L. Rep. 178; [1950] W.N. 10.
[10] N.C. Seddon and M.P. Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 8th Australian edn (2002), p.417.
[11] *Glenlion* 39 B.L.R. 94 at 103; 11 Con. L.R. 126.
[12] *JF Finnegan Ltd v Sheffield City Council* (1988) 43 B.L.R. 130 at 133.
[13] *Finnegan* (1988) 43 B.L.R. 130 at 133.
[14] *Alucraft Pty Ltd (in liq) v Grocon Ltd* unreported 22 April 1994 Supreme Court of Victoria, Smith J, (Exhibition Hall Contract at p.27).
[15] *Alucraft* unreported 22 April 1994 Supreme Court of Victoria at [27].
[16] *Alucraft* unreported 22 April 1994 Supreme Court of Victoria at [1].
[17] *Alucraft* unreported 22 April 1994 Supreme Court of Victoria at [6].
[18] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 C.L.R. 337.
[19] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* 180 C.L.R. 266; (1977) 16 A.L.R. 363; (1977) 52 A.L.J.R. 20.

to co-operate, implied in all contracts, by law, in accordance with the principle established in *Mackay*.[20]

Alucraft concerned the relationship between contractor and subcontractor. The contractor has significant power over the site and the project by comparison with the owner, especially under design-and-construct delivery. Even in that situation, however, the owner will be responsible for site access and reviewing design documents, and perhaps for delivering owner-supplied items. There is no reason to think that Smith J's reasoning regarding the contractor–subcontractor relationship should not apply to the owner and contractor under the main contract.

The *Alucraft* case is important because, by extension, it establishes that where the contractor has programmed to complete early and has assumed a contractual obligation to so complete, the owner has an obligation to co-operate with the accelerated programme.

Thus, it appears that the contractor is generally entitled to finish—and to plan to finish—early. That is clear under the JCT contract, and appears unlikely to be limited to its wording. However, *Glenlion*, *Finnegan* and *Alucraft* suggest that the term that the owner must perform the agreement so as to allow the contractor to meet the programme will only be implied where the contractor is obliged to follow the programme.

4 Contractual rights of the contractor to complete early

4.1 PC-1 (Australian standard form contract)

PC-1 is a contract developed by the Property Council of Australia that explicitly emphasises the owner's interests. It is also a very versatile contract; it can accommodate construct-only or design-and-construct delivery and lump sum or remeasurement pricing—or combinations of any of these.[21] For these reasons, PC-1 provides an interesting contrast with the other standard forms of contract considered in this article.

Clause 10 of PC-1 deals with time generally. It also specifically requires the contractor to provide a programme.

Clause 10.2 provides that the contractor must within 14 days of the award date prepare a programme of the contractor's activities containing the details required by the contract or which the contract administrator otherwise reasonably directs. The contractor must update the programme at the times specified in the contract particulars to reflect any changes in the programme or delays that have occurred and must give the updated programme to the contract administrator for approval.

Notwithstanding cl.10.2, the effect of the programme is somewhat attenuated by cl.10.3, which provides that any review of, comments upon or approval of, or any failure to review or comment upon, a programme by the contract administrator will not relieve the contractor from any liabilities or obligations under the contract, especially (without limitation) the obligation to achieve completion by each date for completion. Nor will it alter the time for performance of the contractor's activities or the owner's or contract administrator's contractual obligations. It will specifically not necessitate the granting of an extension of time or an instruction to accelerate, or constitute a disruption, prolongation or variation of the contractor's activities.

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[20] *Mackay* (1881) 6 App. Cas. 251 at 263; (1881) 8 R. (H.L.) 37.

[21] See generally S. Capelli, "The Property Council of Australia Standard Form Contract—A User's Guide" (1999) 66 *Australia Construction Law Newsletter* 16 at 17.

Clause 10.4 addresses the possibility raised in *Glenlion* that the programme could be binding[22] and so reinforces the entitlement–obligation distinction. If the contractor chooses to accelerate progress, cl.10.4 provides that despite cl.3.3 (which provides that the owner and contractor must cooperate with each other in performing their obligations), neither the owner nor the contract administrator will be obliged to assist or enable the contractor to achieve completion before the contractual completion date and the time for performance of the owner's or the contract administrator's obligations will not be affected.

Thus, the following comments can be made about the programming provision set out in PC-1.

- PC-1 does not make the programme part of the contract; nor does it provide that failure to adhere to the programme is a breach of contract.
- The contractor can accelerate the works without direction; however this in no way affects the owner's obligations under the contract. Unless the owner demands acceleration, the contractor will not be entitled to any extra payment.
- The focus of PC-1 is on achieving completion by the contractual date for completion. The contractor does not suffer the threat of breach through noncompliance with an accelerated program as it is not obliged to perform the works in accordance with a programme that plans early completion. Rather, the programme, which the contractor must provide under cl.10.2, is designed to allow all parties to monitor performance and so ensure that works are finished by the date for completion.

4.2 FIDIC MDB (international standard form contract)

In 1999, the Fédération Internationale des Ingénieurs-Conseils (FIDIC) published four standard form contracts intended to replace its earlier suite. These contracts were the Conditions of Contract for Construction, the Conditions of Contract for EPC/Turnkey Projects, the Conditions of Contract for Plant and Design-Build and the Short Form of Contract. In June 2010, FIDIC released the Multilateral Development Bank "Harmonised Edition" of the Standard Red Book (MDB). The MDB is examined here, although the findings apply equally to Revision 2 of the Conditions of Contract for Design, Build and Operate Projects (DBO).

The programming clause in MDB is cl.8.3. The clause introduces the Programme and stresses its importance.

> "The Contractor shall submit a detailed time programme to the Engineer within 28 days after receiving the notice under Sub-Clause 8.1 [*Commencement of Works*]. The Contractor shall also submit a revised programme whenever the previous programme is inconsistent with actual progress or with the Contractor's obligations".

After considering what the Programme should include, the clause continues.

> "Unless the Engineer, within 21 days after receiving a programme, gives notice to the Contractor stating the extent to which it does not comply with the Contract, the Contractor shall proceed in accordance with the programme, subject to his other

[22] *Glenlion* 39 B.L.R. 94 at 103; 11 Con. L.R. 126.

obligations under the Contract. The Employer's Personnel shall be entitled to rely upon the programme when planning their activities" (emphasis added).

Clause 8.2 sets out the contractor's obligation to complete thus.

> "The Contractor shall complete the whole of the Works, and each Section (if any), within the Time for Completion of the Works or Section (as the case may be)" (emphasis added).

Finally, cl..4 provides that:

> "[t]he Contractor shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to an extension of the Time for Completion if and to the extent that completion ... is or will be delayed"

and then specifies qualifying causes of delay (this is discussed below in section 5.3).

It is clear that the contractor will be entitled to complete "within" the time for completion and is therefore entitled to plan to finish before the contractual date of completion.

However, if the contractor plans to complete early, it is arguable that it may be obliged rather than merely entitled to complete by the programme date; there is some evidence that the programme is to be considered binding. Clause 8.3 states that "the Contractor shall proceed in accordance with the programme". It also states that the "Employer's Personnel shall be entitled to rely upon the programme when planning their activities". The right of the employer's personnel to rely on the programme (for example when supplying materials, providing personnel or participating in commissioning) might provide the employer opportunities to recover costs from the contractor in the event that such reliance led to extra costs being incurred as a consequence of non-compliance with the programme. It would be unusual for this right (of the Employer to rely upon the programme) not to be matched by an obligation on the contractor's part.

Therefore, the contractor may well be obliged to complete by the programme date. It is less clear whether the owner must perform its obligations in line with the programme. As extracted above, the employer's personnel are "entitled to rely upon the programme when planning their activities". Nothing in the contract stipulates that that entitlement gives rise to an obligation to cooperate with the contractor to achieve early completion. It is clearly arguable, though, that the phrase shows that the programme is intended to affect the behaviour of both parties.

In common law countries, however, *Glenlion* is authority for the proposition that if (as seems to be the case) the contractor is obliged to comply with the programme, the owner must perform the agreement so as to allow the earlier completion.

In the context of a design-and-construct contract such as MDB (or JCTSBC or even PC-1 when used for design-and-construct delivery), the owner has less opportunity to interfere with earlier completion than under a construct-only arrangement. Nonetheless, delays in providing access to the site, in reviewing design documents or in delivering owner-supplied items like artistic works or specialist machinery could easily prevent the contractor from complying with the programme and so from finishing early.

4.3 JCTSBC (UK standard form contract)

The JCTSBC is a standard building contract used in the UK. Clause 2.31 sets out the contractor's obligation to complete. It requires that the contractor complete "by the relevant Completion Date". Accordingly, the contractor can complete early, as such completion will satisfy the requirement that completion be achieved "by" the relevant date for completion. Therefore, it is entitled to programme to complete early.

The requirement to provide a master programme is set out in cl.2.9. As soon as possible after execution of the contract, the contractor must provide to the Architect or the contract administrator two copies of the programme

> "but nothing in the ... master programme or any amendment or revision of it ... shall impose any obligation beyond those imposed by the Contract documents".

This position has the effect that compliance with the master programme showing early completion is not obligatory and therefore does not require the contractor to complete by the programmed date.

There are no provisions which specifically address the issue of accelerating the programme. Further, as there is no contractual obligation to complete by any programmed early date for completion, the common law will not imply an obligation on the owner to co-operate with the contractor to achieve early completion.

4.4 PSSCOC (Singapore standard form contract)

The Public Sector Standard Conditions of Contract for Design and Build 2008 (PSSCOC) were developed to enable a common contract form to be used in all public sector construction projects in Singapore. This contract was first issued in 1995 and the form considered here is the 2008 version.

Clause 9.1(1) requires the contractor to submit a programme to the superintending officer.

Clause 14.1 requires the contractor to complete the works within the time or times for completion. Therefore, subject to the discussion in relation to cl.9.2 below, the contractor is entitled to plan to complete early: early completion will satisfy cl.14.1 because completion will be within the time for completion.

Clause 9.2 entitles the superintending officer to instruct the contractor to accelerate the performance of the works if progress does not conform with the programme. Read in isolation, this may suggest that the contractor is required to comply with the programme. However, the clause goes on to say that the degree of acceleration which the contract administrator can order is limited to that required to ensure completion of the works within the time for completion.

Accordingly, while the contractor may programme to complete the works early, such a programme is unlikely to give rise to an obligation to complete early. It follows, adopting the logic in *Glenlion*,[23] that the duty to co-operate implied by common law does not give rise to an obligation in the owner to co-operate with the contractor to achieve early completion.

5 If the contractor has planned to complete early and can still do so, if it is delayed by an excusable delay, is it entitled to an extension of time?

[23] *Glenlion* 39 B.L.R. 94 at 103; 11 Con. L.R. 126.

In most construction contracts, the risk of delay is shared between the owner and the contractor. The allocation of risk is determined by the type of delay actually suffered. Hence, this paper divides delays into three types:

- delays caused by the owner or contract administrator;
- delays caused by events beyond the control of all parties (i.e., neutral delays); and
- delays that result from the acts or omissions of the contractor or otherwise delays in respect of which the contractor has accepted the risk.

The contract may explicitly deal with these delays, in which case the allocation will be governed by the contract. Where the contract does not deal with delay, the parties will be left with the default common law allocation of risk. That is, the contractor will not be entitled to any extensions of time. However, to the extent that delay has been caused by an act or omission of the owner, the contactor's express warranty to complete by the contractual date will be unenforceable and will be replaced by an obligation to complete within a reasonable time.

Commercially, the risk associated with delays is often shared by contract as follows.

- Where the delay is caused by the owner or its servants and agents, then the contractor is entitled to:
  - an extension of time, which relieves the contractor from the imposition of liquidated damages; and
  - reimbursement for extra costs incurred as a result of the delay.

Therefore, the owner is allocated the whole risk of the delay.

- With respect to neutral delays:
  - the contractor is entitled to an extension of time, and is thereby relieved from liquidated or general damages, so that the owner bears the costs it incurs as a result of the delays; but
  - the contractor is not entitled to any extra remuneration for neutral delays, and similarly bears its own costs.

Thus, the risk of delay is shared.

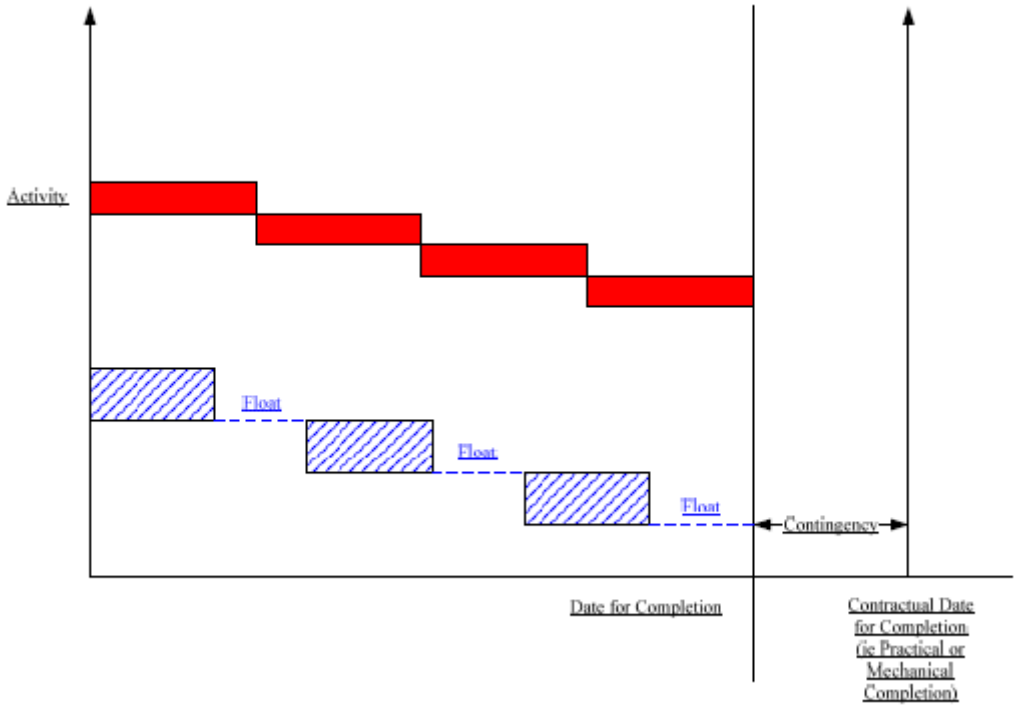
- Where the delay is caused by the contractor:
  - the contractor is not entitled to an extension of time and will be liable for liquidated damages unless it overcomes the delay by acceleration; and
  - it is not entitled to extra remuneration as a result of the delay, and is therefore obliged to absorb its own prolongation costs.

The entire risk of such delays rests with the contractor provided that liquidated damages are sufficient to meet the owner's delay costs.

As will be seen below, the standard form contracts considered may allow changes to the default risk allocation through appropriate entries in the appendix.

Before considering these contracts, however, it is useful to discuss the concept of "float". Float is the period by which a non-critical activity can be delayed before that activity becomes critical.

Figure 1—Float



The first activity depicted above is “critical”. This means that any delay to that activity will also cause a delay to the completion of the whole project. The second activity is non-critical. The late completion of noncritical path activities will not affect the date for practical completion if the extent of the delay is less than or equal to the available float.

5.1 Right to an extension of time where the contractor’s programme anticipates early completion or shows float

A distinction may be drawn between:

- a programme that shows early completion; and
- a programme that shows float.

The critical path to a programme finishes at the date of planned completion, not the contractual date. The gap between the planned date for completion and the contractual date for completion has no programming significance. However, this gap is sometimes referred to in the industry as “float”. This is confusing. For the purposes of this article, it is important to distinguish between this gap and float. The expression “float” when referred to in this article refers only to the amount of time available in non-critical activities which can be consumed without causing a delay to the planned date for completion (i.e., not the contractual date for completion).

The question of criticality (and hence float as defined) is determined by reference to the planned date for completion rather than the contractual date. The slack or available time between the date for planned completion and the date for contractual completion is referred to in this article as “contingency”. That contingency is identified in Figure 1

(above). The reason for making the distinction between "float" and "contingency" as defined above is that under the standard conditions of contract discussed in this article, the effect of these two types of slack periods is quite different. The effect of each under the standard form contracts considered in this article is discussed below.

5.2 PC-1 (Australian standard form contract)

The contractor is entitled to claim an extension of time under cl.10.5 of PC-1 if, prior to the date for completion of the works, or a stage, the contractor is, or is likely to be, delayed by an act of prevention or a cause described in the contract particulars which will prevent it from achieving completion of the works or the stage by the relevant date for completion.

After the date for completion of the works or a stage, the contractor is entitled to claim an extension of time if an act of prevention will, or is likely to, delay it in achieving completion of the works or the stage.

PC-1 makes two things clear. In respect of delays before the date for completion.

- The contractor is not entitled to an extension of time unless it can show that there has been a delay to the critical path to completion. This is made clear because of the requirement that there be a delay "to completion of the works". Accordingly, in so far as there is float that is consumed by the delay, subject to what is said below in relation to concurrent delays, the contractor will not be entitled to an extension of time.
- Even where there is a delay to the critical path, the contractor will not be entitled to an extension of time to the extent that it can still complete by the due date for completion. This is clear because the clause requires that the delay be such as to delay the contractor from "achieving Completion by the relevant Date for Completion". Hence, unlike some of the other contracts considered in this article, the contingency is available for both the owner and contractor to use. Arguably, the contingency is available to be consumed on a "first come, first serve basis"; that is, the party first in time that causes a delay has the benefit of the contingency. However, there are two qualifications to this general principle. First, if the delay is attributable to a breach of contract by one of the parties, the defaulting party will be liable to the innocent party for damages. If the loss of contingency causes a loss, such as prolongation costs, or exposes the contractor to higher risk of liquidated damages, such a loss should be recoverable as general damages. Secondly, such a delay in combination with other delays may cause a delay to completion beyond the date for completion. The first and second delays will co-operate to cause the delay to completion and will therefore be a concurrent cause of delay.[24]

5.3 FIDIC MDB (international standard form contract)

Clause 8.4 entitles a contractor to an extension of time to the extent that the completion of the works is delayed due to one of the reasons specified in that clause, including variations, adverse weather conditions, acts of prevention, unforeseeable shortages in personnel or goods due to government actions and delays caused by authorities. Importantly, what is required is a delay to completion of the works. There is no added requirement that the

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[24] Whether a contractor is entitled to an extension of time in these circumstances is dealt with in Stephenson, "Concurrency, Causation, Commonsense and Compensation (Part 1)" (2010) 27(2) I.C.L. Rev. 166.

contractor also be unable to complete by the relevant date for completion. Therefore, in circumstances where the contractor has planned to complete early and the extent of the delay is such that not all of the contingency has been consumed, the contractor will still be entitled to an extension of time. The effect of such an extension will be to reinstate the contingency that existed before the delaying event occurred. Accordingly, the contingency will only be consumed by delays for which the contractor is responsible. The contractor owns the contingency and is the only party entitled to consume it.

5.4 JCTSBC (UK standard form contract)

Clauses 2.26–2.29 of the JCTSBC contract are in essence a redrafting of cl.25 of the 1998 WCD contract, which clause was previously called "Extension of Time". The title of cl.2.28 is "Fixing Completion Date". The altered title more accurately reflects the fact that the completion date can be adjusted to allow a shorter time for carrying out the works if work is omitted.[25]

Clause 2.27 requires the contractor to give notice to the architect/contract administrator when there is a delay. The notice must set out the material circumstances including the cause or causes of the delay and identify those which, in the contractor's opinion, are relevant events.

Clause 2.28 states as follows.

> "If ... on receiving a notice and particulars under clause 2.27:
> 1. any of the events which are stated to be a cause of delay is a Relevant Event; and
> 2. completion of the Works or of any Section is likely to be delayed thereby beyond the relevant Completion Date,
> then, save that these Conditions expressly provide otherwise, the Architect/Contract Administrator shall give an extension of time by fixing such later date as the Completion Date for the Works or Section as he then estimates to be fair and reasonable."

Clause 2.28 sets out the contractor's entitlement to an extension of time in respect of relevant events. The clause requires that the cause of the delay be a relevant event that will delay completion of the works (i.e., a delay to a critical activity is required) so that completion will occur after the completion date. Therefore, JCTSBC is similar to PC-1 as the contractor is not entitled to an extension, even if there has been a delay to completion, if the contractor can still complete on or before the completion date. Accordingly, the ownership of the contingency is shared so that it is available to the party who is delayed (provided the contingency has not previously been consumed by earlier delays). However, as discussed in respect of PC-1, the effect of this sharing may be modified if the delay is caused by a breach of contract or if other delays subsequently occur which cause a delay beyond the contractual date, thereby making the first delay part of the causal chain resulting in a delay to completion beyond the date for completion.

Where the conditions for an extension of time are satisfied, the architect/contract administrator is to give a new date for completion being the date "he estimates to be fair and reasonable".

Clause 2.28.5 requires the architect/contract administrator to deal finally with the question of extension of time within a period of 12 weeks from the date of practical completion. The architect/contract administrator must review extensions comprehensively

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[25] *Keating on JCT Contracts*, (London: Sweet & Maxwell),Vol.1, Commentary.

and must then grant fair and reasonable extensions of time. Extensions of time previously granted may only be reduced if there have been relevant omissions justifying a reduction since the last occasion upon which a completion date was fixed.

In some cases dealing with concurrent causes of delay, it has been suggested that the stipulation that the architect/contract administrator grant extensions of time which he/she estimates to be "fair and reasonable" allows the architect/contract administrator to apportion delay caused by both a relevant event and another event and grant the contractor an extension of time in relation to a proportion of the delay.

What might be fair and reasonable depends upon a consideration of the effect caused by the delay. There are a number of recent cases which deal with the proper analysis of the effect of concurrent delays. The first is *City Inn,*[26] which has been affirmed on appeal.[27] The usual approach requires an analysis of the effect on the critical path of each delay to an activity to establish how much of the delay to completion is attributable to each of the delays to the various activities. In *City Inn*, this was not possible as the court rejected the critical path evidence advanced. The court therefore had to consider what contribution a number of delays, occurring concurrently, had to the overall delay to completion. Instead of the usual approach, the court apportioned the delay between the owner and the contractor. Insofar as the owner was held responsible for the delay, the contractor was entitled to an extension of time and prolongation costs.

It is submitted that this approach can only be acceptable where:

- the contractor has established on a balance of probabilities that delays for which the owner is responsible caused some delay to completion; but
- it is not possible to do a proper analysis to establish the extent of the effect of owner delays to completion; and
- the word 'apportionment' does not mean sharing the delay by reference to what might be just and equitable having regard to the respective share of responsibility which each party has for the delay. Such an appointment is permitted by statutory schemes associated with contributory negligence or contribution between tortfeasors. Outside those regimes 'apportionment' has no relevance.[28]

In this situation it is legitimate for the courts to determine the amount of the delay caused by the relevant acts by apportioning the total delay, having regard to the effect of the evidence as a whole.

Interesting issues arise in the unusual situation where there are two delays occurring at the same time both of which are sufficient to cause the delay, one of which is the responsibility of the contractor, the other the responsibility of the employer. The correct approach where there is this type of concurrent delay is demonstrated by the recent English case of *De Beers.*[29] That case also dealt with circumstances in which a critical path analysis was not available. However, on the facts of that case, Edwards-Stewart J was nonetheless able to determine, on a balance of probabilities, that two delays (one attributable to the

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[26] *City Inn Ltd v Shepherd Construction Ltd* [2008] B.L.R. 271.

[27] *City Inn Ltd v Shepherd Construction Ltd* [2010] CSIH 68; 2011 S.C. 127; [2010] B.L.R. 473 at 494 (Lord Osborne), but contra Lord Carlowayat 499 in dissent on this point.

[28] See for example *Astley v Austrust* [1999] HCA 99; *I&L Securities Pty Ltd v HTW Valuers Brisbane* (2002) 210 CLR and *Walter Lilly & Co v MacKay* [2012] EWHC 1773.

[29] *De Beers UK Ltd (formerly Diamond Trading Co Ltd) v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC); [2011] B.L.R. 274; 134 Con. L.R. 151 . The judgment in *De Beers* does not refer to *City Inn*.

owner, the other attributable to the contractor) were both causes of the same delay to completion. In that case it was held as follows.

> "The general rule in construction and engineering cases is that where there is concurrent delay to completion caused by matters for which both the employer and contractor are responsible, the contractor is entitled to an extension of time but it cannot recover in respect of the loss caused by the delay. In the case of the former, this is because the rule where delay is caused by the employer is that not only must the contractor complete within a reasonable time but also the contractor must have a reasonable time within which to complete. It therefore does not matter if the contractor would have been able to complete by the contractual completion date if there had been no breaches of contract by the employer (or other event which entitled the contractor to an extension of time), because he is entitled to have the time within which to complete which the contract allows or which the employer's conduct has made reasonably necessary. By contrast, the contractor cannot recover damages for delay in circumstances where he would have suffered exactly the same loss as a result of causes within his control or for which he is contractually responsible."[30]

The conclusion reached in these paragraphs is, it is submitted, not only correct in the context of construction cases, but is premised on logic of universal application.[31]

City Inn and *De Beers* thus demonstrate two approaches in which a critical path analysis is not possible. The difference between them is that in *De Beers*, Edwards-Stuart J found that there was sufficient factual evidence to make a determination, on the balance of probabilities, as to causal connection between particular delays and delay to completion, whereas in *City Inn* such an analysis was not possible. Insofar as *City Inn* rests on apportionment of the type found in contributory negligence or contribution legislation, it is contrary to well settled principle.[32] However, if the 'apportionment' referred to in that case is merely the weighing of the evidence to determine, on a balance of probabilities, the amount of delay caused by an event, it is submitted that it is conventional.[33]

5.5 PSSCOC (Singapore standard form contract)

Clause 14.1 requires the contractor to complete the works within the time for completion stated in either the letter of acceptance or the appendix as the case may be.

Clause 14.2 provides that the superintending officer may grant an extension either prospectively or retrospectively

> "as may reasonably reflect the delay in Completion of the Works, notwithstanding due diligence and the taking of all reasonable steps by the Contractor to avoid or reduce such delay as, will or might be or has been caused"

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[30] *De Beers* [2011] B.L.R. 274; 134 Con. L.R. 151 at [175]–[177]..

[31] See generally Stephenson, "Concurrency, Causation, Commonsense and Compensation (Part 1)" (2010) 27(2) I.C.L. Rev. 166, which explains the general approach of the common law to concurrent causes of the same loss and then applies it to delay in construction cases.

[32] See *I&L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109.

[33] See further Stephenson, "Concurrency, Causation, Commonsense and Compensation (Part 1)" (2010) 27(2) I.C.L. Rev. 166.

by specified events.

The specified events include variations, adverse weather conditions, force majeure, industrial action, acts of prevention and any other grounds expressly mentioned in the contract. The contractor is entitled to an extension of time whenever there has been a delay to completion by a specified event.

When assessing the contractor's right to an extension of time, cl.14.3(3) obliges the superintending officer to determine what is "fair, reasonable and necessary for the completion of the Works". As with the MDB form, the contractor must show that there has been a delay to completion. Therefore, the delay must be to a critical path activity. However, there is no requirement that the contractor be unable to complete by the contractual completion date. Accordingly, where the contractor has planned to complete early and can still do so, the contractor will be entitled to an extension of time which will have the effect of reinstating the contingency.

6 Conclusion

This article has considered early completion at general law and under four standard form contracts used in Australia, Singapore, the UK and internationally: PC-1, MDB, JCTSBC and PSSCOC.

The first conclusion is that at general law, a contractor may complete early. However, whether the owner has any obligation to assist the contractor to finish before the contractual date for completion will depend on whether the contractor is obliged or merely entitled to complete early. This differs under the standard forms: early completion in accordance with the programme seems a mere entitlement under PC-1, JCTSBC and PSSCOC, but is arguably an obligation under MDB.

The second conclusion concerns whether a contractor is entitled to an extension of time where it plans to complete early and can still do so, but is delayed in achieving planned completion. As noted at the outset, this depends upon which party has the benefit of the "contingency" under the construction contract, (a related but distinct question also addressed above being which party has the benefit of any float in the programme.) Subject to the qualifications above, PC-1 and JCTSBC are drafted such that the contingency is shared, and will benefit the parties on a first come, first served basis. By contrast, MDB and PSSCOC provide the contractor the benefit of the contingency.