EXTENSIONS OF TIME AND LIQUIDATED DAMAGES
IN CONSTRUCTION CONTRACTS IN ENGLAND AND WALES

Building projects often cost more and take longer than originally planned. Delays may occur for example because the contractor was working inefficiently, which is its own fault, or because the employer instructed additional work, for which the contractor will be entitled to additional payment. If delays impacted upon the critical path rather than merely taking up available float, such that the contractor failed to meet the contractual completion date (“Critical Delay”), the contract will generally entitle the contractor to an extension of time to the completion date (an “EOT”) for delaying events which under the contract are the responsibility of the employer. The contractor may also be entitled to its loss and expense, for example in the form of additional preliminaries (that is, the fixed cost of setting up and running the site per week).

The building contract should provide that the employer may grant an EOT if Critical Delay occurs which is the responsibility of the employer. In practice, EOTs are granted on behalf of the employer by the architect or contract administrator acting impartially between the parties. The contract may also provide that, if Critical Delay occurs which is the responsibility of the contractor (“Culpable Delay”), the employer may claim liquidated and ascertained damages (“LADs”) from the contractor. Thus, if a delay occurs, the contractor may seek an EOT, both as a defence to a claim for LADs and because it hopes to receive additional payment.

This article examines the relationship between EOTs and LADs, using the JCT 2009 form of building contract as an example. This form is commonly used in England, its provisions are typical and the principles apply to other forms of contract, although some are more prescriptive than others as to precisely how an EOT is to be assessed. It is not intended here to examine the relationship between EOTs and additional payment to the contractor, which is a function of the precise wording of the contract and the particular facts. Likewise, the focus is on the law of England and Wales, although some reliance is also placed on extra jurisdictional case law for illustrative purposes.
The relationship between EOTs and LADs is defined in the building contract and at common law. The first task is to examine the law in relation to each and then to examine the relationship between them.

1.1 EXTENSIONS OF TIME
The building contract regulates the relationship between the parties and apportions risk. It should list those events for which the contractor is entitled to an EOT if there is Critical Delay (“Relevant Events”), which will be at the employer’s risk. Events that are not listed will be at the contractor’s risk. The Relevant Events typically include: acts of default by the employer, such as failure to grant possession of the site by the start date and late provision of information; perfectly valid actions, such as instructing variations or additional work; and neutral events which the parties agree will be at the employer’s risk, such as unforeseen ground conditions and exceptionally adverse weather. Relevant Events vary between different forms of contract and are often amended by special conditions. This article is not concerned with the nature of Relevant Events, but considers the legal position when a Relevant Event has occurred.

When a delay occurs, there is a three-stage process: (1) assess whether the delay was caused by a Relevant Event. This is usually straightforward and depends upon the precise nature of the event and the words used in the contract, although it may be less straightforward if, for example, the contract has been amended to state that an event is not a Relevant Event if it arises from the contractor’s negligence. If it is not a Relevant Event, the contractor is not entitled to an EOT. (2) If it is a Relevant Event, the next question is whether it caused Critical Delay. If it did not, there is no EOT. (3) If it did, a “fair and reasonable” EOT should be granted (usually equal to the period of delay caused by the Relevant Event) and a new completion date should be set accordingly. In practice, the second and third questions overlap and it is here that difficulties arise, particularly when there are concurrent delaying events.

1.2 Concurrent Delay
Whether a Relevant Event caused Critical Delay depends upon an analysis of the facts as presented. The parties should maintain accurate contemporary records of events on site. However, it is not clear how EOTs should be assessed when Relevant Events occur concurrently with Culpable Delay.
In *Walter Lawrence v Commercial Union*,¹ the contractor was already in Culpable Delay but was entitled to an EOT for exceptionally adverse weather which caused further delay. In *Balfour Beatty v Chestermount Properties*,² the question was whether, under a JCT contract, an EOT for a Relevant Event occurring after the completion date should be calculated from the date of the event (the “gross” method) or from the date when the works ought to have been completed (the “net” method). Colman J held that the net method applied and the contractor was not relieved of liability for those delays for which it was responsible.

The decision in *Henry Boot v Malmaison*,³ is often cited as the leading modern authority on concurrent delay under the JCT contract. The parties agreed that:

“If there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event.”

This agreement formed the basis of Dyson J’s decision. In *Steria v Sigma*,⁴ HHJ Stephen Davies noted that the decision in *Malmaison* was approved in *Keating on Construction Contracts*,⁵ and added that although Dyson J was noting an agreement between counsel rather than reaching a decision himself, the fact that such an experienced judge “noted the agreement without adverse comment is a strong indication that he considered that it correctly stated the position. … Accordingly, I intend to adopt that approach …”. That approach was approved in *Motherwell Bridge v Micafil*,⁶ where it was emphasised that there should be common sense and fairness.

It is important to be clear as to what was decided in *Malmaison*. The issue before the learned judge was whether, in deciding the extent to which a Relevant Event caused

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¹ Walter Lawrence & Son Ltd v Commercial Union Properties (UK) Ltd [1984] 4 Con LR 37.
³ Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999) 70 Con LR 32.
⁴ Steria Ltd v Sigma Wireless Communications Ltd [2007] EWHC 3454 (TCC), at paras 130-131.
⁵ At para 8-021. *Keating on Construction Contracts*, Furst and Ramsey (8th Edition), is a well-regarded text on construction law and an authority that may be cited in court.
⁶ Motherwell Bridge Construction (t/a Motherwell Storage Tanks) v Micafil Vakuumtechnik and Another (2002) 81 Con LR 44.
Critical Delay during a period of Culpable Delay, the architect was permitted to consider the effect of other events. Dyson J held that he was permitted to consider whether the true cause of delay was other events for which the contractor was responsible. Malmaison is not clear authority, as is sometimes asserted, for the proposition that where there is a Relevant Event and Culpable Delay, the contractor is automatically entitled to an EOT despite its own default. If that was the case, there would be no purpose to the architect considering the effect of other events. The question is the extent to which a Relevant Event caused Critical Delay. A further difficulty arises as to the meaning of the word “concurrent,” because most delays are not truly concurrent, in that they start and stop at the same time, they are sequential, in that they operate in parallel but may start or finish at different times.

The decision in Malmaison was distinguished in Royal Brompton v Hammond,\(^7\) where HHJ Seymour said that it related to a situation where the works were proceeding in a regular fashion and then two delaying events occurred at the same time, one of which was a Relevant Event and one that was not. In that situation, there was genuine concurrency. That decision did not apply where the works were already in delay due to contractor default, and then a Relevant Event occurred. In this situation, by virtue of the existing delay, the Relevant Event might make no difference if its effect was not critical. Where events occur in sequence, it may not be immediately obvious which operations impact upon which other operations and it can be difficult for the architect to assess whether an EOT is merited.

Subsequently, in the Scottish case of City Inn v Shepherd Construction,\(^8\) Lord Drummond Young questioned HHJ Seymour’s distinction between situations where a Relevant Event occurs during a period of contractor delay, and situations where the delays occur at the same time. In his Lordship’s view, both situations involve concurrent delay and the architect should grant such EOT as he considers fair and reasonable. It is relevant to consider which event was the “dominant cause” of delay, but if that cannot be established then all concurrent causes must be considered. It may be appropriate to apportion responsibility for the delay between two causes,\(^9\) on a

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\(^7\) *Royal Brompton NHS Trust v Hammond and Others* [2000] EWHC (TCC) 39, paras 31 to 33.

\(^8\) *City Inn Ltd v Shepherd Construction Ltd* [2007] ScotCS CSOH 190, paras 16-21.

\(^9\) Following *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2004] ScotCS 141.
basis that is fair and reasonable. This is likely to be a question of the degree of culpability of each of the causes of delay and the significance of each factor in causing delay. The architect should exercise his judgment and aim to achieve fairness between the parties.

Three years later, City Inn’s appeal was rejected. In his leading judgment, Lord Osborne analysed existing case law and considered causation at length. He pointed out that “concurrent delaying events” could refer to a number of situations: events might start and end at the same time; they might share a common start point or end point; they might merely overlap; or they might affect completion of the works even though they do not overlap in time. He considered the decision in Royal Brompton to be “unnecessarily restrictive” and the principles of concurrency should apply whether events start at the same time or merely overlap. If there is no dominant cause, delays may be apportioned between competing events on the basis of what is fair and reasonable. He examined the authorities and formulated the following propositions:

1. It must first be shown that a Relevant Event has caused delay to the works.
2. Causation is an issue of fact to be resolved, not by the application of philosophical principles, but by common sense.
3. Causation may be decided on the basis of any acceptable factual evidence. A critical path analysis may help but is not indispensible.
4. If a dominant cause can be identified, other causes can be disregarding. If the dominant cause is not a Relevant Event, the claim for an EOT will fail.
5. If there are two operative causes, one of which is a Relevant Event and one is not, and neither is dominant, the claim for an EOT will not necessarily fail but the overall delay may be apportioned between the events.
6. Above all, the decision must be approached in a fair and reasonable manner.

Lord Kingarth agreed with Lord Osborne. Lord Carloway disagreed with some of the reasoning, but reached the same conclusion. He rejected apportionment and preferred a strict contractual interpretation. If a Relevant Event caused Critical Delay, the contractor is entitled to an EOT. The words “fair and reasonable” in the clause do not

\[\text{City Inn Ltd v Shepherd Construction Ltd} [2010] \text{ ScotCS CSIH 68.}\]
\[\text{At paragraph 42.}\]
relate to the determination of whether a Relevant Event has caused delay, but to the exercise of fixing a new completion date once causation has been established.

1.3 Discussion on Concurrency
The decision in *City Inn* is Scottish and is not binding in England, but as an appellate decision it may be persuasive. Patterson discussed the decision under the heading “Common sense wins out” (2010) and indicated that Lord Drummond Young’s emphasis on a “practical application of the rules of causation to delaying events” has been generally welcomed. However, “his approach to concurrent causes of delay both in definition and in their effect on the end date, by adopting “an apportionment approach” has been criticised”. Patterson also refers to concerns that the decision in *City Inn* “ran contrary to the principles within the Society of Construction Law Delay and Disruption Protocol (s 1.4).” It should be noted at this point that by Guidance Section 1.4 of the Protocol (SCL, 2002, p.15ff), the contractor is entitled to an EOT for a Relevant Event when the contractor delay is concurrent with an employer delay, and when the delays are sequential but have concurrent effect. The aim of the Protocol is set out in Guidance Note 1.4.11, namely “provide contracting parties with clarity and certainty about entitlement to EOT at the time delay events occur.”

When making their contract, the parties may agree to adopt the Protocol, in which case it will have contractual effect. It is submitted here that if the Protocol is not adopted in the contract, it is of no effect and it is not a statement of law or best practice.

The test is whether a Relevant Event caused Critical Delay and if so, what is a fair and reasonable EOT to grant. Where there is also Culpable Delay, the question is what contribution the Relevant Event had to delaying completion. By way of example, if a contractor is in Culpable Delay from January to July, and a flood occurs in April, which is a Specified Peril\(^\text{12}\) under the JCT contract and therefore a Relevant Event, and the contractor remedies the flood damage by June, the Relevant Event has caused no delay to completion of the works. If there had been no flood, completion would still have occurred in July, because the contractor’s Culpable Delay was the dominant cause. If the contractor can show that, in remedying the flood damage, it employed

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\(^{12}\) Specified Perils are listed in the JCT contract and include events such as fire, lightning, flooding, earthquakes, civil commotion and things dropped from aircrafts.
resources that it would otherwise have employed in putting right its Culpable Delay, and therefore the Relevant Event did cause some Critical Delay, it might be fair and reasonable to consider granting some amount of EOT.

Consideration should also be given to Lord Carloway’s assertion that the words “fair and reasonable” relate not to the determination of whether a Relevant Event has caused delay, but to the exercise of fixing a new completion date once causation has been established. This is a correct analysis of the words used in the JCT contract, but it is not satisfactory. The architect should act fairly and reasonably between the parties, both in deciding whether a Relevant Event has caused Critical Delay and in deciding what EOT to grant as a consequence. If the flood damage was not made good until August, and therefore is critical, its effect must be assessed. If the reason for late completion was that the contractor did not replace the flood-damaged lift until August, the architect must assess whether that was reasonable. If the new lift could have been fitted in June, but the Contractor delayed until August, in order to get an EOT for a Relevant Event, the architect may feel that is not fair and reasonable.

1.4 Apportionment

Lord Osborne did not define the word “apportionment” but he cited the decision in John Doyle Construction.\footnote{John Doyle Construction Ltd v Laing Management (Scotland) Ltd [2004] ScotCS 141.} In that case, in relation to apportionment of both time and money under a global claim, Lord Drummond Young stated:

“... if it cannot be said that events for which the employer is responsible are the dominant cause of the loss, it may be possible to apportion the loss between the causes for which the employer is responsible and other causes. ... Where the consequence is delay as against disruption, that can be done fairly readily on the basis of the time during which each of the causes was operative. During [that period] each should normally be treated as contributing to the loss, with the result that the employer is responsible for only part of the delay during that period. Unless there are special reasons to the contrary, responsibility during that period should probably be divided on an equal basis ...
“Where disruption to the contractor’s work is involved, matters become more complex. Nevertheless, we are of opinion that apportionment will frequently be possible in such cases, according to the relative importance of the various causative events in producing the loss. ... It may be said that such an approach produces a somewhat rough and ready result. This procedure does not, however, seem to us to be fundamentally different in nature from that used in relation to contributory negligence or contribution among joint wrongdoers.”

In should be noted that under two statutes there is a power to order a contribution from another person who contributed to the damage, which reduces the amount of damage for which the defendant is liable. However, under the Civil Liability (Contribution) Act 1978, this power relates to a contribution from a third party who contributed to the damage, not from the claimant. Under the Law Reform (Contributory Negligence) Act 1945, damages can be reduced for contributory negligence by the party suffering the damage, but this act does not apply to contractual claims.14

Where complex delaying events interact and it is not clear to what extent a Relevant Event caused Critical Delay, it may be appropriate to assess the effect of all contributory events and apportion delays between them. To this extent, apportionment is common sense. However, to the extent that Lord Drummond Young suggested in John Doyle that the architect should divide the delay on an equal basis between the employer and the contractor, there is weight to Lord Carloway’s dissenting argument in City Inn.15 It is one thing to apportion time between competing events when causation has been established, it is quite another matter to split the difference between the employer and the contractor when causation has not been established.

It is helpful at this point to consider the position in US law. In his well-researched article on apportionment, McAdam argues that US law is often cited because it is more developed and there are more reported cases (McAdam, 2009). In US law, concurrent and sequential delays are treated differently.16 McAdam argues that where delays are concurrent, the contractor may receive an EOT (thus defending it from

15 City Inn Ltd v Shepherd Construction Ltd [2010] ScotCS CSIH 68, at paras 105 to 114.
LADs) but not loss and expense. Where delays are sequential, apportionment may be sanctioned,\textsuperscript{17} although clear evidence is needed to establish apportionment.\textsuperscript{18}

1.5 Summary on Concurrency and Apportionment

In the absence of contractual provisions, such as adoption of the Society of Construction Law Delay and Disruption Protocol, there is no established approach in English law to granting EOTs when the effects of delays are concurrent. Various tests have been proposed, which may assist in reaching a decision in appropriate circumstances.

1. On the so-called “first past the post” test, the delay that occurs first is the operative event. In \textit{Royal Brompton}, the contractor was not entitled to an EOT because the Relevant Event occurred after the contractor delay. However, it is arguable that there may be an entitlement to an EOT if the Relevant Event continued after the contractor delay ceased.

2. The “but for” test receives little support in the courts. Where there are concurrent events, it produces the absurd result that neither is a cause of delay, because the delay would have occurred anyway as a result of the other event.

3. The Malmaison approach is to take the Relevant Event in isolation (the view of Lord Carloway in \textit{City Inn}) and grant the contractor an EOT regardless of its own Culpable Delay. This approach is adopted on the JCT Major Project Construction Contract, at clause 18.7.3.

4. The Dominant Cause test appears reasonable but is ineffective where it is not possible to decide the impact of concurrent events.

5. The principle of apportionment applies in Scotland if there is no dominant cause, but it has little support in England, where principles of causation generally lead to an “all or nothing” approach.

6. If it is not possible to determine which is the dominant cause, and one of the delays arises from a party’s breach of contract, the party responsible for the breach may be liable (the “Devlin Approach”).\textsuperscript{19}

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\textsuperscript{17} \textit{Robinson v Unite States}, 261 US 486; 43 S Ct 420; 67 L.Ed 760.
\textsuperscript{18} \textit{Cumberland Cas & Sur Co v United States}, Fed Ct 2008 WL 2628433.
\textsuperscript{19} See Devlin J in \textit{Heskell v Continental Express Ltd} [1950] 1 All ER 1033. See also Keating on Building Contracts, 7\textsuperscript{th} Edition, at page 246.
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If the Relevant Event happened before the Culpable Delay, the contractor gets an EOT. If they happened at the same time, the contractor gets an EOT. If the Culpable Delay happened first, it is necessary to consider whether the Relevant Event actually caused Critical Delay, which may necessitate apportioning delays between events. Where there is a Relevant Event, for example exceptionally adverse weather as in *Walter Lawrence*, 20 during which the contractor is unable to work, it clearly caused Critical Delay. Where it is not clear how to apportion time between Relevant Events and Culpable Delays, for example the contractor might have been able to proceed with other work that was on the critical path, there is no authority in English law for simply splitting the difference between the employer and the contractor.

It is rumoured that *City Inn* may be appealed to the Supreme Court, which may give a definitive opinion. Indeed, Lord Justice Dyson (as he is now) may be one of their Lordships to give an opinion and may explain his decision in *Malmaison*.

### 2.1 LIQUIDATED DAMAGES

It can be difficult and expensive to establish the precise amount of damage that flows from a particular delay, and therefore in their contract the parties may agree in advance a figure for LADs to be paid by the contractor if it is in Culpable Delay. The commercial benefit is that both parties know where they stand. The JCT provisions are typical: the parties record in the Contract Particulars a figure for LADs per week for Culpable Delay; the employer must give the contractor a notice of non-completion and that LADs may be levied; 21 the employer may then deduct LADs from payments otherwise due to the contractor, or recover the amount from the contractor as a debt. If an EOT is subsequently granted in relation to that period of delay, the employer must pay to the contractor the amount of LADs deducted, up to the new completion date.

The figure for LADs must be a genuine pre-estimate of the actual damage the employer is likely to suffer if delay occurs, typically comprising the costs of financing, alternative accommodation and lost income. If the figure is characterised as a penalty, intended to punish the contractor or deter it from causing delay, it may be

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21 A condition precedent, see *JF Finnegan Ltd v Community HA Ltd* 77 BLR 22.
characterised as a penalty which is unenforceable. In *Dunlop Pneumatic Tyre Company*,\(^\text{22}\) the House of Lords explained the position:

“The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage ... The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not of as at the time of the breach ... To assist this task of construction various tests have been suggested which, if applicable to the case under consideration, may prove helpful or even conclusive.

(a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach.

(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid ...

(c) There is a presumption (but no more) that it is a penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.

On the other hand:

(d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.”

That decision was approved by the Privy Council in *Philips v Attorney-General of Hong Kong*,\(^\text{23}\) which the Editors of BLR describe as providing “a contemporary review of well-established law”. Lord Woolf cited an Australian judgment, that the court’s function is “not to rewrite contracts imprudently made, but to relieve against provisions which are so unconscionable or oppressive that their nature is penal

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\(^\text{22}\) *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co* [1915] AC 79, per Lord Dunedin at 86.

\(^\text{23}\) *Philips Hong Kong Ltd v Attorney-General of Hong Kong* (1993) 61 BLR 41.
rather than compensatory”. He also cited a Canadian judgment, that “the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression.”

Lord Woolf went on to say that the court should not set too stringent a standard and should normally uphold what the parties have agreed, provided the sum payable is not extravagant compared to the range of losses that could reasonably have been anticipated. In the present case, there were individual rates of LADs for missed key dates and further LADs if practical completion was delayed. There was no reason to believe that the amounts were wrong and the clause was enforceable.

2.2 History of LADs
The rule against penalty clauses developed in the courts of equity and was adopted by the courts of common law. The figure must be in the right ball park, not necessarily strictly accurate, unless it is excessive compared to the likely damage. It should be acceptable if the amount is modest compared to the likely loss, but not if it is large, or if the contractor could be liable for delays caused by another party. It will be relevant to their negotiations that the parties were of similar bargaining strengths. If the figure is unenforceable as a penalty, it may be open to the employer to claim general damages, depending upon the precise words of the contract. Clear words must be used before the court will find that the parties agreed that no damages would be payable for delay. In the well-known case of Temloc v Errill, the figure for LADs was stated in the contract as “£ nil per week” and that was held to be an exhaustive remedy for delay, leaving the employer no entitlement to LADs or general damages. However, in the Australian case of J-Corp v Mladenis, the Supreme Court of Western Australia held that an entry of “Nil Dollars” did not preclude the recovery of

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24 AMEV UDC Finance Ltd v Austin (1986) 162 CLR 1770.
26 See Law v Local Board of Redditch [1892] 1 QB 127.
27 Alfred McAlpine Capital Projects Ltd v Tilebox Ltd [2005] EWHC 281 (TCC).
29 Jeancharm Ltd v Barnet Football Club Ltd [2003] EWCA Civ 58.
30 Brues of Doune Windfarm Ltd v Alfred McAlpine Business Services Ltd [2008] EWHC 426 (TCC).
31 Jeancharm Ltd v Barnet Football Club Ltd [2003] EWCA Civ 58.
34 J-Corp Pty Ltd v Mladenis [2010] 131 Con LR 188 SCWA.
general damages, because an exclusion clause should be narrowly construed and must be clearly stated to deprive a party of its rights. Whilst it is correct to say that an exclusion clause must be clearly stated and will be narrowly construed, this Australian decision runs contrary to the English Court of Appeal authority in Temloc v Errill.\textsuperscript{35}

2.3 A New Approach
More recently, the court has applied the test of whether the clause is “commercially justifiable”, rather than whether it is a genuine pre-estimate, although it must not be a penalty. In Azimut-Benetti v Healey,\textsuperscript{36} a ship-building contract provided that if payment was late, the builder could terminate the contract and retain 20% of the contract price. The buyer argued that this was unenforceable as a penalty. Blair J dismissed the assertion that he was obliged to hear lengthy evidence as to whether the amount was or was not a genuine pre-estimate. The clause provided a commercial balance between the parties, in that the builder would not have to wait for the boat to be sold before it could recover any money, and the buyer’s payments would be refunded less 20% of the contract price. Such a clause will only be a penalty if it is “extravagant and exorbitant”. Blair J held that the clause was not a penalty because:

1. It was clear that it was not the dominant purpose to deter breach of contract and it was commercially justified as providing a balance between the parties.
2. Both parties had the benefit of expert advice.
3. The terms were freely entered into.
4. The court will seek to uphold commercial agreements between the parties.

2.4 Damages for Breach of Contract
Where the contract provides for LADs for Culpable Delay, it is not open to the employer to seek further damages for breaches of other provisions of the contract. In Biffa Leicester,\textsuperscript{37} Biffa argued that the LAD provisions related only to “simple” delay, by which Biffa meant delay caused by the contractor’s failure to complete on time rather than other breaches of contract, and claimed unliquidated damages for the other breaches. The Honourable Mr Justice Ramsey felt it did not make commercial sense

\textsuperscript{35} Temloc v Errill Properties (1987) 39 BLR 30 (CA).
\textsuperscript{36} Azimut-Benetti Spa v Darrell Marcus Healey [2010] EWHC 2234 (Comm).
\textsuperscript{37} Biffa Leicester Ltd and Another v Maschinenfabrik Ernst GmbH and Others [2008] EWHC 6 (TCC).
to apply LADs only to “simple” delay and not to delay caused by other breaches, and the advantage of certainty to both parties would be lost. He approved the view expressed in *Keating on Construction Contracts* that if LAD provisions are expressed to be a complete remedy for delayed completion, they should be treated as a complete remedy (Furst and Ramsey, 2006, para. 9-006). If the delay arises from a breach of contract by the contractor, rather than its merely working slowly, that cannot affect the nature of the loss which the LADs are intended to compensate.

3.1 DISCUSSION

Whether an event is a Relevant Event which caused Critical Delay depends upon the particular facts. If the contractor is granted an EOT, that acts as a defence to a claim for LADs; if the contractor fails to obtain an EOT, the employer may be entitled to LADs, unless the LADs are unenforceable. In practice the relationship between EOTs and LADs is not always so straightforward.

3.2 Time at Large

The power to grant an EOT exists for the benefit of the employer, enabling it to grant EOTs for events for which it is responsible and preserve its right to LADs for Culpable Delays. If the contract does not include this power, and the employer commits an act which prevents the contractor from meeting the completion date, the contractor cannot be held liable for failing the delay and the employer cannot grant an EOT. In these circumstances, the contractual completion date falls away and time is said to be “at large” and the contractor is merely required to complete in a time that is reasonable in all the circumstances, to be judged as at the time when the question arises. Time will also be at large if the contract does not state a completion date. Because there is no fixed completion date, the employer is not entitled to LADs, although it may be entitled to general damages if the contractor fails to complete within a reasonable time. Opinion is that the employer’s general damages cannot exceed the specified amount of LADs, but the authorities are not clear on this point.

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38 See also *Pigott Foundations Ltd v Shepherd Construction Ltd* 67 BLR 53, per HHJ Gilliland at 67 G to I.
39 *Hick v Raymond & Reid* [1893] AC 22.
40 *Shawton Engineering Ltd v DGP International Ltd* [2005] EWC Civ 1359.
41 *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 111.
42 The decision in *Temloc v Errill Properties* (1987) 39 BLR 30 (CA) is cited as giving weight to this position, but is not conclusive.
In the Australian case of Gaymark,\(^{43}\) the contractor missed the completion date due to the employer’s act of prevention, but the contractor failed to give prompt notice of delay as required by the contract. The employer claimed LADs on the basis that the contractor was not entitled to an EOT because it had not given prompt notice. The court rejected this argument, holding that the employer could not benefit from its own act of prevention and derive an award of entirely unmeritorious LADs for a delay of its own making; the employer was unable to grant an EOT; therefore time was at large. However, in Multiplex v Honeywell,\(^{44}\) Jackson J doubted that Gaymark represented the position in English law and noted that the New South Wales Court of Appeal declined to follow Gaymark, feeling that it extended the prevention theory too far.\(^{45}\) In Steria v Sigma,\(^{46}\) HHJ Stephen Davies agreed but pointed out that Jackson J’s views were obiter and therefore not binding. It is submitted that in circumstances where the contractor has failed to give requisite notice and is therefore not entitled to an EOT, it would be inequitable to allow the employer to levy LADs for its own act of prevention. Both parties should bear responsibility for their respective failures: the contractor gets no loss and expense and the employer gets no LADs.

The JCT contract lists an act of prevention by the employer as a Relevant Event and therefore time will never be at large by reason that the employer cannot grant an EOT. However, time could be at large if the contract does not state a completion date or if there is a serious failure of the EOT mechanism, for example if the contract provides that the architect must obtain the employer’s approval before granting an EOT, and such approval is not given. In the Canadian case of Hawl-Mac,\(^{47}\) the contractor applied for an EOT, which was not granted until much later. The judge felt that if the contractor had known the appropriate completion date in good time it could have employed additional resources to complete the works and avoid LADs for its own Culpable Delays. Taking this a stage further, where an EOT is granted by a tribunal during dispute resolution proceedings much later, it is arguable that the Hawl-Mac principle may apply. In both cases, if it can be shown that the employer’s failure to

\(^{43}\) Gaymark Investments Pty Ltd v Walter Construction Group Ltd [1999] NTSC 143.
\(^{44}\) Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd No 2 [2007] EWHC 447 (TCC)
\(^{45}\) Peninsula Balmain Pty v Abigroup Contractors Pty Limited [2002] NSWCA 211.
\(^{46}\) Steria Ltd v Sigma Wireless Communications Ltd [2007] EWHC 3454 (TCC), at paras 94-95.
\(^{47}\) Hawl-Mac Construction Ltd v Campbell River 60 BCLR 57, (1984-5) 1 Const LJ 370.
grant an EOT in good time contributed to the delay, it may be fair and reasonable to take that into consideration when deciding how much EOT to award.

The position therefore appears to be that if an EOT was merited but not granted, the tribunal will decide a new completion date. If an act of prevention by the employer delays completion, but the employer has no power to grant an EOT, or if no completion date is stated in the contract or if there is a serious failure of the EOT mechanism, time will be “at large”. If the contractor does not complete within a reasonable time, the employer is not entitled to LADs but may be entitled to general damages, although the amount of general damages may be limited to the amount stated for LADs.

3.3 Subsequent grant of EOT

If LADs have been deducted, and an EOT is granted subsequently, the LADs must be repaid to the extent of the EOT, within a reasonable time. In Reinwood v Brown, the employer issued a non-completion certificate and a notice of withholding of LADs, and two days later the architect fixed a new completion date. The House of Lords unanimously dismissed the contractor’s appeal, holding that although the EOT cancelled the non-completion certificate, it was not retrospective in effect and at the time of making its payment the employer was entitled to rely upon the current certificate, although the LADs had subsequently to be repaid. To hold otherwise would be unfair to the employer, who would be deemed to have under-paid due to an event which occurred after the certificate was issued.

3.4 Sectional Completion

A contract that provides for sectional completion should include separate LADs for each section, or LADs that reduce proportionately as each section is completed. In Liberty Mercian v Dean & Dyball, section 1 was delayed by 8 weeks, the architect granted an EOT of 4 weeks and the employer deducted LADs for the other 4 weeks. The architect granted EOTs of 4 weeks to each of the subsequent sections 2-5, on the

49 The decision in Temloc v Errill Properties (1987) 39 BLR 30 (CA) is cited as giving weight to this position, but is not conclusive.
basis that the Relevant Event to section 1 had caused delay to the subsequent sections. That left delays of 4 weeks on each of sections 2-5, for which no EOT was granted. The contractor argued that an appropriate EOT was 8 weeks for each section and that the LADs were a penalty, because it was penalised for the same delay in relation to each section. Coulson J noted the courts’ reluctance to allow a party to avoid the consequences of an LAD clause freely entered into, provided the amount was a fair estimate and not a penalty. In the present case it was not a penalty, because the works were always intended to be carried out sequentially and delay to one section would automatically mean delays to later sections. The amount of LADs varied between sections, showing that the sums were a genuine pre-estimate.

3.5 Partial Possession

If the employer takes possession of part of the works, practical completion of that part is deemed to have occurred.\textsuperscript{52} The effect is therefore the same as sectional completion. In \textit{Bramall & Ogden},\textsuperscript{53} the contract did not provide for sectional completion, but the defendant took partial possession. LAD provisions are construed strictly \textit{contra proferentem},\textsuperscript{54} and in this case they were a penalty because they were inconsistent with the definition of the works and the completion date, and the contract contained no mechanism by which the amount could be reduced upon partial possession. In \textit{Avoncroft v Sharba Homes}, Judge Frances Kirkham applied the principle in \textit{Bramall & Ogden}.\textsuperscript{55} Even if Sharba had been entitled to LADs, it could not set them off against the sum awarded by an adjudicator, because the contract contained no provision for such set-off.

3.6 Setting off LADs against sums awarded by an adjudicator

If an EOT is claimed for 10 weeks, and an adjudicator awards 6 weeks, it follows that LADs are due for the other 4 weeks, even if the adjudicator did not actually include LADs in his decision. The contractor is not required to issue a notice of withholding pursuant to s.111 of the Housing Grants, Construction and Regeneration Act 1996 to resist a claim for LADs, because that Act does not apply to claims for LADs.\textsuperscript{56}

\textsuperscript{52} Clause 2.31 of the JCT Design and Build Contract 2005, Revision 2 2009.
\textsuperscript{53} \textit{Bramall & Ogden Ltd v Sheffield City Council} (1983) 29 BLR 73.
\textsuperscript{54} Following \textit{Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd} (1970) 1 BLR 111.
\textsuperscript{55} \textit{Avoncroft Construction Limited v Sharba Homes (CN) Limited} [2008] EWHC 933 (TCC).
\textsuperscript{56} \textit{Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd} [2008] EWHC 3029.
In *Balfour Beatty v Serco*, Jackson J derived two principles from existing case law.57

“(a) Where it follows logically from an adjudicator’s decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator’s decision, provided that the employer has given proper notice (insofar as required).

(b) Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator’s decision, then the question whether the employer is entitled to set off liquidated and ascertained damages against sums awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case.”

In *Workspace v YJL London*,58 YJL sought to set off an amount of LADs that an adjudicator had found had been overpaid (albeit that he had not ordered repayment) against an amount that an arbitrator had separately ordered YJL to pay. Coulson J considered *Balfour Beatty v Serco* and held that, although generally a defendant cannot raise a counterclaim against an adverse arbitrator’s award,59 the present case was different because the defence was a binding adjudication decision rather than a counterclaim. The arbitrator’s decision had no higher status than the adjudicator’s, and an equitable set-off was permitted.

### 3.7 LADs after Termination of the contract

The employer is not entitled to further LADs after practical completion of the works,60 but difficulties may arise if the contract is determined before practical completion. In *British Glanzstoff*,61 the Contractor became insolvent, the employer determined the contract and engaged another contractor, who completed the works 6 weeks after the original completion date. The House of Lords held that the LADs

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57 *Balfour Beatty Construction Ltd v Serco Ltd* [2004] EWHC 3336, per Jackson J at paragraph 53.
60 This was accepted by Sharba in *Avoncroft v Sharba* [2008] EWHC 933 (TCC).
61 *British Glanzstoff Manufacturing Co Ltd v General Accident Assurance Corp Ltd* [1913] AC 143.
apply only where the contractor itself completed the works, not when control was taken out of its hands. Similarly in *Bovis v Whatlings*, the court held that:

> “Time is relevant to the performance of a contract during its existence but once the contract is determined by a repudiatory breach of whatever nature time ceases to have relevance. Damages thereafter flow from the repudiation resulting in non-performance and the need to provide for substitute performance.”

However, the opposite position was reached in *Hall and Shivers*, under a JCT Minor Works contract. The contractor abandoned the site and the works were completed by another contractor on 17th May 2008. Coulson J held that was the date of practical completion, the contractor was in Culpable Delay to that date, it was not entitled to abandon the site and therefore the employers were entitled to determine the contract. The employers had moved into the uncompleted property in December 2007, but the contractor’s liability to pay LADs did not cease until practical completion (note that the Minor Works contract makes no provision for partial possession). Having moved in, the employers saved the cost of alternative accommodation, but the amount of LADs was a genuine pre-estimate at the time the contract was made and was not a penalty. The contract did not provide that LADs would cease upon determination and Coulson J awarded LADs for the full period of delay. He rejected the contractor’s argument that liability to pay LADs ceased upon determination, as there was no such provision in the contract and any such term would reward the contractor for its own default by avoiding paying LADs.

Coulson J does not appear to have received the benefit of submissions from counsel as to awarding general damages and possibly he sought to help a residential occupier out of an expensive dispute. The JCT form of contract does not state that LADs survive determination, but it does provide that, following wrongful repudiation by the contractor, the employer is entitled to its direct loss and damage, comprising the cost of completing the works and of late completion. This appears to envisage general damages. It is arguable that under the contract, if the employer has put the requisite notices in place, it may be entitled to LADs up to the date of practical completion, but

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63 *Hall and Shivers v Mr Jan van der Heiden* [2010] EWHC 586 (TCC).
this is not clearly decided at common law and it conflicts with the House of Lords authority in *British Glanzstoff*,\(^{64}\) albeit a hundred years old. However, if it is correct that the employer may claim general damages where the LAD provisions do not apply,\(^{65}\) and that the amount of general damages is limited to the figure stated in the contract for LADs,\(^{66}\) then the figure for LADs will apply in any event. In cases like *Hall and Shivers*,\(^{67}\) of course, if general damages apply, the amount will not include the cost of alternative accommodation that will have been included when estimating the figure for LADs. A Court of Appeal decision on this point would be helpful.

4 SUMMARY

If Critical Delay occurs for which the employer is responsible, and the contract permits the employer to grant an EOT for that event, the award of an EOT will protect the contractor against LADs and may provide an entitlement to loss and expense. If the contract does not provide for the employer to grant an EOT for that event, or if there is no completion date stated in the contract, or if there is a failure of the EOT mechanism, time will be at large and the contractor must complete within a reasonable time. If the contractor has not given notice required by the contract, he may be entitled to an EOT in Australian law but not in English law, although it may be inequitable for the employer to levy LADs in relation to an employer act of prevention. Where the employer fails to grant an EOT in good time, and the contractor might have been able to avoid Culpable Delay had it known the correct completion date, there is scope for astute lawyers to argue that it is inequitable for the employer to levy LADs.

If the contractor is in Culpable Delay, the employer may be entitled to levy LADs, provided the LAD clause is effective. The test may be whether the clause is “commercially justifiable” rather than merely a genuine pre-estimate. If the clause is not effective, the employer may be entitled to general damages, subject to proof, but any figure stated for LADs will form a cap on the amount of general damages. If the amount stated is nil, the employer is entitled to no damages in English law, but may be entitled to general damages in Australian law. If LADs are levied and an EOT is

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\(^{64}\) *British Glanzstoff Manufacturing Co Ltd v General Accident Assurance Corp Ltd* [1913] AC 143.

\(^{65}\) Following *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 111.

\(^{66}\) As suggested by the decision in *Temloc v Errill Properties* (1987) 39 BLR 30 (CA).

\(^{67}\) *Hall and Shivers v Mr Jan van der Heiden* [2010] EWHC 586 (TCC).
granted subsequently, the amount of LADs levied should be paid to the contractor up to the new completion date. Where there is sectional completion, the contract should provide that the figure for LADs reduces to reflect completion of that section. Partial possession has the same effect as sectional completion. If the employer is unhappy with the amount of LADs, it cannot claim damages for delay under another clause of the contract. It is not clear whether, if the LAD provisions fail, the amount of the employer’s general damages will be limited to the amount stated for LADs. It is also unclear whether, upon termination of the contract for contractor default, the employer is entitled to LADs up to the date of practical completion by another contractor.

Where causation has been established, the contractor is entitled to an EOT for a Relevant Event that causes Critical Delay concurrently with Culpable Delay, but the position is not clear as to sequential delay. There is little sympathy for apportionment in English law, and no authority for simply splitting the difference unless causation has been established. It is not clear what Dyson J meant in Malmaison, that it is appropriate to consider the effect of other events, and an opinion of the Supreme Court would be helpful.

References


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