

Variations & Delay: Nothing ever stays the same

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Introduction

Nothing ever stays the same...



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Variations in Construction Contracts

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Agenda

- What are variations and why do they arise on construction contracts?
- Limitations on the instruction of and payment for variations
- Procedure for agreeing variations
- Valuing variations
- Practical points to consider

What are variations?

- An alteration to the original scope of work specified in the contract.
 - Additions
 - Omissions
 - Changes to the nature and quality of the works
- Change in the timing, sequence or method by which the works are to be performed.

Why do they arise on construction contracts?

- Contracts agreed before the design or scope of works is finalised.
- Inconsistencies or discrepancies within contract documents.
- Requirement to make savings.
- Changing requirements of the works e.g. due to unforeseen site conditions etc.

Limitations on the instruction of and payment for variations

Entitlement to vary the works

HHJ Humphrey LLOYD QC in *Abbey Developments Ltd v PP Brickwork Ltd* [2003] EWHC 1987 (TCC) said that:

“A contract for the execution of work confers on the contractor not only the duty to carry out the work but the corresponding right to be able to complete the work which it contracted to carry out. To take away or to vary the work is an intrusion into and an infringement of that right”.

Contractual definition of variations

- JCT Standard Building Contract With Quantities 2016 defines a variation at clause 5.1 as:
 - “1 *the alteration or modification of the design, quality or quantity of the Works including:*
 - 1 *the addition, omission or substitution of any work;*
 - 2 *the alteration of the kind or standard of any of the materials or goods to be used in the Works;*
 - 3 *the removal from site of any work executed or Site Materials other than work, materials or goods which are not in accordance with this Contract;*
 - 2 *the imposition by the Employer of any obligations or restrictions in regard to the following matters or any addition to or alteration or omission of any such obligations or restrictions that are so imposed or are imposed by the Specification/Work Schedules of the Employer’s Requirements in regard to:*
 - 1 *access to the site or use of specific parts of the site;*
 - 2 *limitations of working space;*
 - 3 *limitation of working hours; or*
 - 4 *the execution or completion of the work in a specific order.”*

Definition of the works

- How is the work to be carried out defined?
- Work not expressly referred to in the technical documents may be considered to be implicit as part of the obligation to build the defined works.
- Obligation to provide everything “*indispensably necessary*” in order to complete the works.

In *Williams v Fitzmaurice* (1858) 157 ER 709 the contractor had agreed to build a house

“to be completed and dry and fit for...occupation” and to provide *“the whole of the materials... necessary for the completion of the work”*

The court held that notwithstanding the specification did not mention floorboards, based on the language in the specification, it was clear the floorboards were required in order to complete the house.

Fundamental changes in the nature of work

- For an item of work to be a variation it must be of such quantity and nature that it would be considered to be associated with the original works.
- Where the employer instructs additional work which is entirely different to the original scope of works or is of such a large scope that it changes the nature of the original works, it may be that the instruction falls outside the ambit of the variation provisions under the contract and creates an entirely new contract.

Omission of work

- A contractor has a right to complete all of the works it was contracted to carry out (*Abbey Developments Ltd v PP Brickwork Ltd*).
- Current guidance from the courts:
 - A contract for the execution of work confers on the contractor not only a duty to carry out the work but a corresponding right to complete the work which it contracted to carry out.
 - Clear words are needed if the employer is to be entitled to remove work from the contractor in order to have it done by somebody else.
 - There are circumstances where work may be omitted and given to others provided the contractual provisions relied upon are wide enough to permit the omission. The employer's motive or reason for instructing the omission of the work is irrelevant.

No automatic right to payment

There is no automatic right to be paid in respect of a change to the works. The Contractor may need to demonstrate:

- The alleged extra work was not already included within the contractual works.
- There is an express or implied right to payment.
- That the employer requested it, or any agent ordering the work was properly authorised.
- Any conditions precedent with regard to payment set out in the contract have been complied with.

Procedure for agreeing variations

- Under JCT there are detailed provisions relating to the issuing and confirmation of instructions including in relation to variations to the works.
- The NEC adopts a strict approach. For example, the Engineering and Construction Contract (ECC) provides, at clause 12.3 that:

“No change to this contract, unless provided for by the conditions of contract, has effect unless it has been agreed, confirmed in writing and signed by the Parties.”

Valuing variations

A mechanism for valuing variations instructed.

- Under the JCT Standard Building Contract With Quantities 2016, the value of any variation

"shall be such amount as is agreed by the Employer and the Contractor or, where not agreed... valued by the Quantity Surveyor"

Alternatively, the Contract Administrator may ask the contractor to submit a "Variation Quotation" when a variation is instructed.

- Valuation using a separate price schedule
 - Prices for additional (identified) items of work that may be required.
 - It may provide rates for various defined staff, labour, materials and plant, which may be used to build up the valuation of the additional work.

Practical points

- For employers
 - Ensure there are appropriate mechanisms to permit variations and assess the impact they have on time and cost.
 - Ensure all necessary requirements are included, such as variations shall be given or confirmed in writing.
 - Try to identify risks and minimise the potential for variations by ensuring as far as possible that uncertainties are eliminated prior to contract.
- For contractors
 - Ensure all variations are issued (or, in the case of oral instructions, confirmed) in writing.
 - Try to agree the impact of a variation, including time, cost and consequences for other work, before the additional work is undertaken.
 - Ensure you understand and comply with any conditions precedent to payment for variations.

Delay in Construction Contracts

Lyndon Smith



Agenda

- Time for completion
- What we mean by delay
- Mechanism for dealing with delay
- Procedure and notice requirements
- Analysing delay
- Obligation to mitigate delays
- Practical points to consider

Time for completion

Time is generally a significant factor in construction contracts.

The key contractual elements relating to time are:

- Completion date
- Consequences of delay
- Mechanism for dealing with delay

What we mean by delay

The term delay is generally used to describe the situation where the works are affected by events that have a critical effect on progress such that the contractor is not able to complete the works by the completion date.

The three categories of delay are:

1. Delay caused by events for which the contractor is responsible.
2. Delay caused by events for which the employer is responsible; and
3. Delay caused by neutral events, i.e. where neither the contractor nor the employer are at fault.

Distinction between “critical” and “non-critical” delay

A "critical" delay is a delay to the progress of a critical activity which has the effect of extending the overall project duration and the completion date because it causes a knock on delay to subsequent critical activities. Critical delay is a necessary component of an extension of time claim.

A "non-critical" activity is an activity not necessary to achieving the completion date and it will not be on the critical path. That means a delay to a non-critical activity will not delay the completion date. A "non-critical" delay is a delay to a non-critical activity.

Concurrent delay

The generally accepted definition of concurrent delay is:

“a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency”

The general approach to concurrent delay

The general approach adopted by the English courts is set out in the judgment of Mr Justice Akenhead in *Walter Lily v MacKay & Others* [2012] EWHC 1173 (TCC):

“I am clearly of the view that, where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time...”

BUT...

Contracts can be and often are drafted so as to exclude concurrent delays from any assessment of entitlement to extension of time. In *North Midland Building Ltd v Cyden Homes Ltd* [2017] EWHC 2414 (TCC) the standard JCT extension of time wording was amended to include a concurrent delay exclusion as follows:

“any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account”

A mechanism for dealing with delay

- Allocation of risk
 - Many contracts will identify the events which may entitle the employer to claim liquidated or general damages for delayed completion. With regard to the contractor they may be entitled to an extension of time as per, for example, clause 2.29 of the JCT Standard Building Contract 2016, which identifies certain delay events referred to as 'Relevant Events'
- Extension of time
 - To enable an extension of time to be granted to take account of delays for which the contractor is not responsible, the contract must contain an express contractual power to re-fix the completion date
- Consequences of delay
 - Damages for delay
 - Right of termination

Procedure and notice requirements

- Notice of delay events

“If and whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed the Contractor shall forthwith give written notice...of the material circumstances, including the cause and causes of the delay, and shall identify in the notice any event which in his opinion is a Relevant Event” (JCT SBC 2016, clause 2.27.1)

- Expected effects

“In respect of each event identified in the notice the Contractor shall, if practicable in such notice or otherwise in writing as soon as possible thereafter, give particulars of its expected effects, including an estimate of any expected delay in the completion of the Works or any Section beyond the relevant Completion Date”. (JCT SBC 2016, clause 2.27.2)

Conditions precedent

- Certain contracts, such as NEC 3 and 4 have adopted a stricter approach to notifying delay. Clause 61.3 provides:

“The Contractor notifies the Project Manager of an event which has happened or which he expects to happen as a compensation event if

- *the Contractor believes that the event is a compensation event and*
- *the Project Manager has not notified the event to the Contractor.*

If the Contractor does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the Project Manager should have notified the event to the Contractor but did not.”

Analysing delay

- The contractor's as-planned programme
 - Is the starting point for an analysis of a contractor's progress with the works and any delay thereto. It must be realistic and capable of being achieved within the period for completion of the works.
 - Should be updated from time to time as necessary to correlate with the timing of any delay events that are to be analysed.
- Methodologies for analysing delay
- Record keeping
 - Accurate, contemporary and detailed records are crucial for delay analysis.
 - Many claims fail because of poor records.

Obligation to mitigate delays

- General duty to mitigate.
- Express obligations to mitigate.
 - The JCT Standard Building Contract 2016 requires the contractor to use his “*best endeavours*” to prevent delay works.
 - Obligations such as to use ‘*best endeavours*’ or ‘*all reasonable endeavours*’ are generally regarded as being more onerous than the common duty to mitigate. According to *Keating on Construction Contracts* (11th Edition):

“in some cases it might be the Contractor’s duty to re-programme the Works either to prevent or to reduce delay. How far the Contractor must take other steps depends upon the circumstances of each case, but it is thought that the proviso does not contemplate the expenditure of substantial sums of money” (21-140)

Practical points to consider

Allocation of risk

- Be aware of risk allocation
- take appropriate steps to mitigate delays

Notices

- Contractors should be aware of
 - any procedural requirements regarding service of notices and the provision of information
 - the potential consequences of non-compliance with those requirements
- Employers should
 - Consider including express words in the extension of time clause clarifying the consequences of non-compliance, being clear that compliance is a condition precedent to entitlement.
- **Good record keeping**
 - Over the period of a major project, memories fade and those involved in the project come and go. Therefore good record keeping is essential.

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Questions?
Thank you

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Webinar

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Next webinar:

A new directions for witness evidence?

Thursday, 1 July 2021

12pm (40mins + 10mins Q&A)



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