CONSTRUCTION LAW

What does 'time at large' mean?

Barrister Omar Eljadi of Atkin Chambers says the judicial rationale for doubts over whether time is set at large when no extension is awarded might be open to question. A deeper examination of the prevention principle is needed, he argues.

KEY POINTS

- Time may be set 'at large' where the employer, even by legitimate conduct, prevents the contractor from completing within the agreed timescale
- The modern drafting and interpretation of extension of time clauses has drastically reduced the scope for arguing that time has been set at large by an act of employer prevention
- The English courts have doubted that time is set at large where no extension of time is awarded because the contractor failed to serve a notice required as a condition precedent to the extension
- Upon closer examination, the judicial rationale for these doubts might be open to question: the position is less straightforward than it initially appears
- The resolution of this issue may lie in a deeper examination of the prevention principle, including its nature and its effects

The expression 'time at large' refers to the absence of a fixed timeframe within which the contractor is obliged to complete its work. The contractor is instead required to complete its work within a reasonable time. The principal effect of this is that the contractor cannot be held liable for liquidated damages: there is no fixed date from which such damages accrue. Rather, the employer's remedy is unliquidated damages for loss caused by the contractor's failure to complete the works within a reasonable time.

On rare occasions time may be at large because the parties have failed to agree a fixed date or period for completion. However, even where a fixed timescale is agreed, time will be set at large if the employer's actions prevent the contractor from completing within that timescale. This is the 'prevention principle'. An act of prevention need not be a breach of contract: entirely legitimate conduct, such as exercising a contractual power to instruct variations, can amount to prevention.

Extension of time clauses

The prospect of time being set at large led to the introduction into construction contracts of extension of time provisions whose purpose is to enable a fixed completion date to be retained, but adjusted to account for the effects of the employer's prevention. This was to the employer's benefit: its purpose was to preserve the employer's remedy of liquidated damages. Historically, extension of time provisions did not always achieve their goal. The powers to extend time were often narrowly circumscribed and did not extend to the act of prevention at hand. This difficulty was magnified by the courts' antipathy towards liquidated damages provisions, which manifested itself in a restrictive approach to the interpretation of extension of time clauses. Times have changed:

- The drafting of extension of time provisions is now more sophisticated. Industry standard forms augment specifically enumerated grounds for extension with widely drafted catch-all provisions.
- No longer are liquidated damages clauses regarded with suspicion. The courts favour interpreting extension of time provisions in a way that permits appropriate extensions of time for acts of prevention: ***Multiplex v Honeywell [2007] EWHC 447 (TCC) at [57].***

Both developments have significantly reduced the prospect of successfully arguing time has been set at large. However, one prevalent feature of modern extension of time provisions could yet provide scope for arguing time has been set at large by prevention: the incorporation of provisions requiring the contractor to give notice within a

particular timeframe as a condition precedent to an extension of time.

Failure of a condition precedent

In ***Gaymark Investments v Walter Construction (1999) NTSC 143***, the Northern Territory Supreme Court decided there was no manifest error in an arbitrator's decision that the prevention principle barred the employer's claim for liquidated damages in circumstances where the contractor had failed to comply with compulsory notice provisions and that failure had prevented an extension of time being granted. Since ***Gaymark***, contractors making that argument in England and Australia have encountered difficulty.

At first instance, the English courts have doubted (albeit obiter dicta) that ***Gaymark*** represents English law. First, in ***Multiplex***, Jackson J said (at [103]) that ***Gaymark*** would permit a contractor to 'disregard with impunity any provision making proper notice a condition precedent' despite such provisions serving the dual purpose of permitting investigation while still current and enabling the employer to withdraw instructions once the consequences are apparent. The contractor could set time at large 'at his option'. Secondly, in ***Steria v Sigma [2007] EWHC 3454 (TCC)*** at [95], HHJ Stephen Davies said that ***Gaymark*** was 'commercially absurd' because it 'would result in the contractor being better off by deliberately failing to comply with the notice condition than by complying with it' and would allow the contractor to obtain a 'benefit from its own breach', which was 'the converse of the prevention principle' and 'equally objectionable'.

Given these criticisms, the present orthodox view is that under English law the prevention principle will not be engaged, and time will not be set at large, where the employer prevents the contractor from performing the works within the agreed timescale, but the contractor subsequently fails to serve the notice required as a condition precedent to an extension of time being granted. However, in England, the point has not yet been decided at appellate level. Should that time ever come, the arguments might not be quite so one-sided as is often assumed. A careful re-examination of the point, and not merely a recitation of the prevailing orthodoxy, is merited.

Are the judicial criticisms merited?

The practical effect of an argument often provides a good common sense check. The effect of rejecting ***Gaymark*** is that the employer becomes entitled to recover liquidated damages for a period of delay caused by its own act of prevention. That is, it must be said, precisely the mischief against which the prevention principle was intended to guard.

The frequent riposte is to claim that it is the contractor's failure to comply with the condition precedent, not the employer's act of prevention, which has 'caused' the contractor's liability for liquidated damages; thus, the prevention principle is not engaged. That argument is not so compelling as it might initially seem. First, it fails to distinguish primary and secondary obligations:

- The prevention principle is engaged where the employer prevents the contractor from performing its primary obligation: to complete the works by the completion date. It is not the failure to serve a notice that causes that failure; it is the employer's act of prevention.
- While the contractor could, by service of the requisite notice, have prevented its secondary obligation – to pay liquidated damages – arising, that is a quite separate point. It has no bearing on whether the contractor was prevented from performing its primary obligation.

Second, to suggest that the contractor is the author of its own misfortune because it failed to avail itself of the contractual mechanism for protecting itself against the secondary obligations coming into effect is perhaps to look at the extension of time clause in the wrong way. The clause's purpose is not to protect the contractor. Traditionally, it is regarded as inserted for the employer's benefit: to preserve its right to liquidated damages, even where it has prevented performance of the works. Seen in that light, the point could be turned on its head:

- It is orthodox to suggest that where the employer has failed to provide for an extension of time for a particular act of prevention, the employer is the author of its own misfortune when that prevention occurs and time is set at large because there is no power to extend time.
- Might it not follow that if the employer has predicated its power to extend time on the service of a notice by the contractor, it takes the risk that the contractor will fail to serve the notice, and is therefore equally the author of its own misfortune if that risk eventuates?

Undoubtedly, notice provisions serve important practical functions, as expressed in ***Multiplex***. However, this argument can also be overstated:

- In many cases, the employer will be fully aware of the act of prevention because it has positively caused it. In such cases, the employer will already be in a position to investigate and collect information. The employer may even be in a position to judge (at least broadly) the likely effect of the prevention. Thus, a notice might conceivably not tell the employer much it did not already know.
- Where that is so (and, conceivably, even where it is not) the employer might not have acted very differently had it received the notice, such that the absence of a notice will be of no, or very little, causal significance to the delay. The outright rejection of the ***Gaymark*** argument makes no allowance for this situation: it simply permits the employer to collect liquidated damages for its own prevention.

Further, adopting the ***Gaymark*** approach need not result in permitting contractors to 'disregard with impunity' valuable notice provisions. The requirement to serve a timely notice could be drafted as an obligation, rather than a condition precedent. If a contractor were to fail to comply with that obligation, and the employer could show the delay would have been avoided or mitigated had the notice been served, a reduction in the extension of time might be appropriate because the contractor could be said to have 'caused' the delay. This would arguably be a more appropriate balance between the commercial purpose of the notice provisions and respect for the prevention principle.

Finally, there are difficulties with proposition that ***Gaymark*** allows contractors to set time at large 'at will' and to 'benefit from their own breach'.

First, that criticism assumes the employer has no control, which is not always correct. The employer can often waive the condition precedent and grant an extension of time, thereby preserving the completion date and the right to liquidated damages. If ***Gaymark*** were adopted, it might well increase the frequency of express provisions empowering the employer to do this.

Second, the 'benefit' to contractors of time being set at large may be more perceived than real. Certainly, liability for liquidated damages is avoided. However:

- On profit making projects (particularly energy projects) the spectre of liability for the employer's actual losses may be even worse. The negotiated rate of liquidated damages is often significantly lower than the losses likely to be sustained. It is by no means obvious that the liquidated damages clause will provide a cap on the recoverable losses.
- The obligation to complete the works within a 'reasonable time' carries uncertainty and risk. During the works, the contractor cannot know whether it is on course to complete the works within a 'reasonable time'. It will not be able to plan, or adjust, its resources or programme accordingly. The certainty of a defined completion date might well be preferable.

Prevention revisited

None of this is to suggest that ***Gaymark*** is necessarily correct, or that the issue is straightforward. Rather, the issue requires a deeper examination of the prevention principle than the English courts have so far had occasion to conduct.

In particular:

- The nature of the prevention principle is relevant. If (as is usually thought to be the case under English law) the prevention principle is rooted in an implied term reflecting the intentions of the parties, why should the parties not be free to agree (assuming they do so clearly and expressly) that if the contractor fails to serve a notice by a deadline, it may be liable in liquidated damages for delay caused by the employer's act of prevention? If the prevention principle were instead a rule of law, freedom of contract concerns might not be so obviously compelling.
- The effect of the prevention principle requires reconsideration. If an extension of time cannot be granted, the effect of an act of prevention is severe: time is set at large and no liquidated damages are recoverable. Seen in this light, the judicial reluctance to extend the application of the prevention principle to novel contexts is unsurprising. If 'time at large' is a relic of the historical antipathy towards liquidated damages, following the decision in ***Cavendish v El Makdessi [2015] UKSC 67*** the time may have come to decide whether the prevention principle can be given effect in a less draconian way: by reducing the recoverable liquidated damages. CL