

Time at Large: Concept and How It Applies

Mohammad Akhtar Beg*

Abstract

An act of prevention of the employer, but for the power to extend the completion date, releases the contractor from his obligation to complete the project within or by any fixed completion date,¹ and the time of completion will be set at large. Nevertheless, time cannot be set at large if the contract provides for an extension of time provision which duly covers the causes of delays by the employer. Contractors are fascinated by the principle of prevention and put up a defense against the recovery of liquidated damages in case of a delay as a result that the time was set at large. The paper analysis the circumstances in which the time of completion can be set at large with the current state in which the common Law has developed in this field.

Keywords: Principle of prevention, contracts, time

Received: October 6, 2019

Accepted: November 2, 2019

* *B.E (Civil), MciArb, Member of SCL, nghcakhtar@gmail.com

¹ See *Holme v Guppy*, (1838) [1838] 150 ER 1195; *Dodd v Churton* [1897] 1 QB 562.

Time At Large: Concept And How It Applies

1. The Principle of Prevention

The principle of prevention is a long standing principle first enunciated under the English in *Holmes v Guppy*² by Parke B. The principle as stated by Black J in *Roberts v Bury Commissioners*³ at para 36 is “a principle very well established at common law that no person can take advantage of the non-fulfillment of a condition the performance of which has been hindered by himself”. The prevention principle is based on the notion, that a promisee cannot insist upon performance of an obligation which it has prevented the promisor from performing,⁴ and in situations where one contracting party has hindered or prevented the other party to perform. The history of this principle lies in the case of *Holmes v Guppy* wherein Parke B said “*if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable for the default (1 Roll; Abr.543; Comm Dig. Condition, L.(6)). It is clear, therefore that the plaintiffs were excused from performing the agreement contained in the original contract; and there is nothing to shew that they entered into a new contract by which to perform the work in four months and a half, ending at a later period. The plaintiffs were therefore left at large; and consequently they are not to forfeit anything for the delay.*”⁵ The Comyns’ Digest under “condition” at rule L(6) provides.

“So the performance of a condition shall be excused by the obstruction of the obligee: as if a condition be to build a house; and he, or another by his orders, hinders his coming upon the land. Or says that it shall not be built. Or interrupts the performance.....”

The delays of the employer, where the contract contains a clause which allows the employer to deduct a certain amount of pre-agreed sum in the form of damages for the breach of the contractor, if not accounted for in favor of the contractor, by giving him sufficient compensation as a fair extension of time to complete his obligations, will be regarded as acts of prevention of the employer and the time will

² [1838] 150 ER 1195.

³ [1870] LR 5 CP 310.

⁴ *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd*, [2007] EWHC 447 (TCC) per Jackson J at [47-49].

⁵ Parke B in *Holmes v Guppy* [1838] 150 ER 1195 at [1196].

be set at large. The precise meaning of this term is, that the contractor is no longer obliged to complete the works within the contractual time of completion but will be obliged to complete the works within a reasonable time. The determination of what reasonable time amounts to, depends upon all the relevant circumstances and not only on the time required to complete the balance works.⁶ Further no delay damages can be deducted and the employer can claim only general damages as per the terms of the contract. However there is no case law which suggests that whether general damages can be capped to the amount of the delay damages agreed or whether they can exceed that amount, there is a strong suggestion that this may be possible.

2. When Time Can Become at Large

The concept of time at large is a defense to the claim of liquidated damages from the Employer. The time of completion can be set at large in namely four circumstances;

- 1- When there is no contract.
- 2- When there is a contract but no completion has been agreed.
- 3- When the contract does not provide for an extension of time for employer delays.
- 4- When the power to extend time is inoperable.

The above circumstances and their applicability are discussed below:

3. Where There Is No Contract:

Where there is no contract the time of completion will be set at large since it will be impossible to find a fixed date of completion by which the contractor is bound to perform. Also in circumstances where parties confidently expect a formal contract to eventuate, one party may commence work on the request of the other to expedite works, and these works will be considered to having been performed under the contract

⁶ *Pentland Hick v Raymond and Reid* [1893] AC 22; *Shawton Engineering Ltd v D.G.P. International Ltd*, [2005] EWCA Civ 1359 (CA) per May LJ at [69–72]. Note see also the analysis of HH Judge Seymour QC in the IT case of *Asteq Ltd v Time Group Ltd*, [2003] All ER 212 (TCC) at [158]–[162] as to the need for expert evidence in relation to this matter.

Time At Large: Concept And How It Applies

once the contract is signed. However if the works are carried out but no contract was entered into, “*then the performance of the works is not referable to any contract the terms of which can be ascertained*,”⁷ and the time of completion will be at large.

On the other hand in works being carried out under a contract, circumstances may arise in which it will not be possible to fix the date of completion, this may be as a result of an effective contract being abandoned whilst the parties continue to perform as though there was an existing contract. Notwithstanding that the parties are under a contract agreement and had agreed a contract completion date by calculation or formulation, circumstances may arise during the execution of the contract that render the completion date unenforceable. In *Shawton Engineering Ltd v DGP International Ltd*⁸, the contract did not contain provisions for variations nor for any extension of time, but nevertheless Shawton ordered for variations both during and after the completion date and DGP put them into effect. Over 12 months after the original completion date Shawton purported to repudiate the contract on DGP’s failure to perform. The Court of Appeal held that, by the time Shawton took any action, the original completion periods had ceased to be of any relevance and May L.J said “*Shawton werenot insisting on the stipulations as to time, nor were they insisting on any times or periods of completion..... In the strange circumstances of this case, a reasonable time for completion was literally at large, in the sense of being undefined.*”⁹

4. Where There Is A Contract But No Completion Date Has Been Agreed

In such cases where no completion date has been agreed in a contract, the employer cannot enforce a completion date of his choice and force the contractor to complete the works on a completion date which may not have been agreed or expressly mentioned in the contract, in such cases the time of completion will be rendered at large and the contractor will be required to complete the works in a reasonable time.

⁷ Goff J in *British Steel Corp v Cleveland Bridge and Engineering Company Ltd* [1981] 24 BLR 94 at [121].

⁸ [2005] EWCA Civ 1359.

⁹ *Shawton Engineering Ltd v DGP International Ltd*, [2005] EWCA Civ 1359, at [71]; see also *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725 (TCC).

However in the current times it is unlikely that contracts are entered into in such manner and almost always parties tend to use standard forms of contracts such as FIDC, NEC, JCT. The specification of time to complete is dealt in two different ways, one is by tending to invite a fixed possession calendar date for the handover of possession of the site to the contractor, coupled with a fixed completion date by which the contractor has to complete the works. The second is by stipulation of the number of calendar days or weeks from the notice to proceed. Once the notice to proceed is given the contract period commences and the date of completion can be calculated.

Here notwithstanding that the contract is enforceable and contains provisions for extension of time on the occurrence of the employer related risk events, time may become at large simply because the draftsman may have failed to specify the contract completion date, or the time of performance under the contract.

5. Where The Contract Does Not Provide For The Extension Of Time For Employer Related Delays

In contracts where no power to extend time of completion for the employer related delays is provided the time of completion will be rendered at large.¹⁰ However, circumstances can also arise such as in the case of *Peak Constructions (Liverpool) Ltd v Mckinney Foundation Ltd*¹¹ it was held by Salmon J¹² that the liquidated damages could not be recovered by the employer in absence of an extension of time for the occurrence of the employer's delays, which in this case was the delayed approval of the subcontractor repair process, and where there was a failure from both the contractor and the employer the extension of time clause did not bite. Hence where in a contract the power to extend time is provided but where the wordings of the clause are not wide enough to include the specific delay, then the time of completion will be set at large.¹³

However the current standard forms of contracts provide with the power to extend time of completion for employer related time risk

¹⁰ *Holme v Guppy* (1838) [1838] 150 ER 1195; *Dodd v Churton* [1897] 1 QB 562.

¹¹ [1970] 1 BLR 111.

¹² *Peak Constructions (Liverpool) Ltd v Mckinney Foundation Ltd* [1970] 1 BLR 111 at [121-122].

¹³ See also *Rapid Building v Ealing Family Housing*, [1984] 29 BLR 10 (CA).

Time At Large: Concept And How It Applies

events more widely such as delays which are usually encountered in a construction project are covered by the clause. As a result of this it is very unlikely that the time of completion will be set at large, except in the case of non-standard or bespoke contracts which may contain no provision to excuse the delays related to the employer.

6. When The Power To Extend Time Is Inoperable

In cases in which the contract provides that the determination of the extension of time is open to review and is not to be final and binding, or given under collusion or outside the provisions of the contract then the courts are reluctant to set the time at large where the contract provides for an effective mechanism for extension of time for the employer related delays, since the decision can be corrected by the competent tribunal under the contract.¹⁴Nearly all of the standard forms provide for disputes to be resolved by a competent tribunal. A mere fact that the Contract Administrator has awarded an extension of time less than the wishes of the contractor or not awarded any extension of time at all, cannot render the time of completion at large since the tribunal can restore the parties under the contract to the true positions. In Bernhard Humphrey Landscapes Ltd v Stockley Park Consortium Ltd¹⁵HH Humphrey LLoyd QC said “*If the true position is, or can be established by other contractual means then the breakdown is likely to be immaterial even where the result of the breakdown is that one party does not obtain the contractual right, or benefit which would, or might otherwise have been established by the machinery e.g the issue of a certificate, provided that the true position can be restored by the operation of other contractual machinery.*”¹⁶

However in cases where in spite of the contract provisions being present the circumstances are that they have not been followed and are outside the administrative process contemplated by the contract the extension of time clause will be rendered inoperable. For example where the decision is taken by a party which is not specified by the

¹⁴ Bernhard Humphrey Landscapes Ltd v Stockley Park Consortium Ltd ,[1998] AII ER 249.

¹⁵ [1998] AII ER 249.

¹⁶ HH Humphrey Lloyd QC in Bernhard Humphrey Landscapes Ltd v Stockley Park Consortium Ltd ,[1998] AII ER 249 in the decision on issue 6.

contract. Such decisions will be a nullity.¹⁷ Also in cases where the decision of extension of time has been made, beyond the time stipulated in the provisions of the contract the decision will be a nullity. In the Canadian case of *Hawl-Mac Construction Ltd v Campbell River*¹⁸ the engineer despite receiving a timely extension of time claim did not award the extension of time until after the completion date had long passed and the employer had deducted the delay damages. The Court took the position that the contractor was entitled to know under the contract whether the extension of time has been granted by the engineer before the completion date, and since this was not the case there was no specified time within which the contract was to be completed or from which penalties could be imposed.¹⁹

In cases where the contracting parties have agreed that the decision of the architect or contract administrator will be final and binding, in absence of fraud or collusion, they will not be allowed to go against such a decision merely because one of the parties is unsatisfied with such a decision. However where a contract provides that the architect's decision should be fair, honest, and impartial and when awarding such decisions if the architect fails to act in accordance with the duty to act fairly, honestly, independently and impartially, the architect will be disqualified as a decision maker and his decisions will be a nullity,²⁰ and the decision of the architect will be disregarded and the time of completion will be set at large.

Notwithstanding the above situations when architect becomes so much influenced by one of the parties that they fail to be independent their decision, the decision or certificate will be disqualified,²¹ and will render time of completion at large. It was held in *Hickman v Roberts*²² that the architects had become so much under the influence of the employer that they had lost their independence, and had not recovered it at the time of giving their decision, and therefore the final certificate

¹⁷ *Bernhard Humphrey Landscapes Ltd v Stockley Park Consortium Ltd*, [1998] All ER 249.

¹⁸ 60 BLCR 57 [1984-5].

¹⁹ See also *SMK Cabinets v Hilli Modern Electrics PTY Ltd*, [1984] VR 391.

²⁰ See *Hickman v Roberts* [1913] AC 229 HL; see also *Frederick Leyland & Co Ltd v Cia Panamena Europea Navigacion Ltda*, (1943) 76 Ll L Rep 113.

²¹ *Hickman v Roberts*, [1913] AC 229; *Panamena v Frederick Leyland & Co*, [1947] AC 428.

²² [1913] AC 229

Time At Large: Concept And How It Applies

was set aside. Apart from this the architect may also be disqualified when he conceals some unusual interest which might influence their mind as a certifier, such as a promise as opposed to a mere estimate to the employer that the cost of the project should not exceed a certain figure.²³

Courts earlier were skeptical about clauses requiring the payment of damages in case of delays of a contractor and regarded these as favoring the employers and construed these clauses against the party seeking the award of Liquidated damages.²⁴ Cases like *Holmes v Guppy*,²⁵ *Thornhill v Neats*²⁶, *Russel v Viscount Sa Da Bandiera*,²⁷ show the general inclination of courts towards application of the prevention principle and thereby holding the time of completion at large. However in modern times due to the advent and extensive use of sophisticated standard forms of contracts which contain adequate clauses to deal with employer related delays, the principle has become less relevant. Despite this fact time at large is a preferred defense of contractors in delay who argue that the contractual machinery for awarding extension of time has broken down or is inoperable. Modern judicial thinking is more inclined to giving effect to the contractual provisions and an argument of time becoming at large as a defense to delay damages may not survive in normal circumstances.²⁸

Although the concept of time at large may be said to be a concept of some antiquity, but in circumstances where the employer may not require a project in time, and instead it would be economically feasible for him to delay the works, like in projects of real estate developments where as a result of an economic slowdown the demand of the property slows down as well. The employer may not take over the project alleging minor defects in workmanship,²⁹ in order that the

²³ *Kimberley v Dick* (1871) LR 13 Eq1; *Kemp v Rose*, (1858) 1 Giff 258.

²⁴ See *Peak v McKinney* [1970] 1 BLR 11 at [121]

²⁵ [1838] 150 ER 1195

²⁶ [1860] 141 ER 1392

²⁷ [1862] 143 ER 59

²⁸ See *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd*, [2007] EWHC 447 (TCC); *Steria Ltd v Sigma Wireless Communications Ltd*, [2008] BLR 79

²⁹ Minor defects which may be insignificant to the performance of the project and may be result of human workmanship, which can be accepted generally.

maintenance and care taking of the completed project remain with the contractor. The employer may further attempt to recover the liquidated damages as per the contractual provisions due to the purported delay, in collusion with the consulting firms (contract administrators) who also would be under enormous pressure to keep afloat their business, and tendering a decision against a large client may be suicidal for their future business prospective, especially where considerable sums are involved. In such complicated scenarios the contractor may not have a remedy except to claim that time has become at large.

Time At Large: Concept And How It Applies

References

Case Law:

Astea Ltd v Time Group Ltd ,[2003] All ER 212 (TCC).

Bernhard Humphrey Landscapes Ltd v Stockley Park Consortium Ltd, [1998] All ER 249.

British Steel Corp v Cleveland Bridge and Engineering Company Ltd ,[1981] 24 BLR 94.

Dodd v Churton ,[1897] 1 QB 562

Frederick Leyland & Co Ltd v Cia Panamena Europea Navigacion Ltda ,(1943) 76 LI L Rep 113.

Hickman v Roberts ,[1913] AC 229.

Holme v Guppy ,(1838) [1838] 150 ER 1195.

Kemp v Rose ,(1858) 1 Giff 258.

Kimberley v Dick ,(1871) LR 13 Eq1.

Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd ,[2007] EWHC 447 (TCC).

Pentland Hick v Raymond and Reid ,[1893] AC 22.

Peak Constructions (Liverpool) Ltd v Mckinney Foundation Ltd ,[1970] 1 BLR 111.

Rapid Building v Ealing Family Housing ,[1984] 29 BLR 10 (CA).

SMK Cabinets v Hilli Modern Electrics PTY Ltd ,[1984] VR 391.

Shawton Engineering Ltd v D.G.P.International Ltd ,[2005] EWCA Civ 1359.

Steria Ltd v Sigma Wireless Communications Ltd ,[2008] BLR 79.

Books:-

Chappel D, *The JCT Standard Buidling Contract 2011* (Wiley Blackwell,1st edn, 2014).

Chappel D, *Understanding JCT Standard Building Contract* (Taylor and Francis, 7th edn, 2007).

Chern C, *The Law of Construction Disputes* (Routledge, 1st edn, 2010).

C Robert Barrister, D Nicolas QC, *Hudson on Engineering Contracts* (Sweet & Maxwell, 13th edn, 2017).

Hughes, C. *Construction Contracts* (Routledge 2015).

The Hon Sir Ramsey v, F Stephen *Keating on buidling Contracts* (Sweet & Maxwell, 10th edn, 2018).

Klee L. *International Construction Contract Law* (1st Wiley Blackwell 2015).

Uff J. *Constructiton Law*. (12th Sweet & Maxwell 2017).

Pickavence K, *Delay and Disruption in Construction Contracts* (Sweet & Maxwell, 4th edn, 2010).

Journals:-

Batty, “The Concept of Time at Large”. (2012)*Construction Law (Journal)*, 4.

David T. “Wembley Stadium Extra Time but Not Time at Large”.(2007) *Construction Law Intl*, 18.

Lal H. “The Rise and Rise of Time Bar Clauses. The Real Issue for Construction Arbitrators”. *Society of Construction Law*. [2017]

Lyden. “The Law and Practice of Extension of Time”. (1993) *Construction Law Journal*, 16.