

Extensions of time during periods of contractor culpable delay

**Carillion Construction Ltd v EMCOR Engineering Services Ltd and another
[2017] EWCA Civ 65**

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When granting an extension of time under building contracts it is the usual practise to fix a new date for completion by adding that further time “contiguously” to the time originally provided for completion.

However, in this case Carillion sought to argue that this might not necessarily be the case where the delay arose after the original date for practical completion had passed. In these circumstances, consideration would have to be given to the effect of the matter relied on at the time it occurred, and this could result in a discontinuous extension of time being granted in order to properly reflect the sub-contractors responsibility for the delay.

However, the Court of Appeal (“CA”) has recently upheld the decision by the Technology and Construction Court (“TCC”) that confirms the orthodox position that extensions of time in sub-contracts should run contiguously from the existing date for completion. In reaching its decision the court rejected the contended claim by Carillion that it should be entitled to award an extension that would give the sub-contractor various separate periods, to complete its works, which would not necessarily have to run contiguously from the existing date for completion. The result of the courts imposing a contiguous extension of time may be situations where during a period of contractor culpable delay, either party to the contract may receive a windfall. For example, this could create situations in which a sub-contractor is exempt from liability during a period of culpable delay, yet liable for periods when the sub-contractor was not actually in culpable delay.

The case arose after Carillion entered into a building contract for the construction of the Rolls Building in London, which is coincidentally the present home of the TCC. The conditions of contract were the JCT Standard Building Contract with Contractors Design 1998 with amendments. Carillion then engaged EMCOR as the sub-contractor under the terms of the JCT DOM/2 sub-contract 1981 with amendments. The project became considerably delayed and Carillion commenced proceedings against EMCOR claiming damages as a result of delays caused by EMCOR in carrying out the sub-Contract.

In the first instance the TCC were asked to decide, amongst other things, whether or not any extension which EMCOR may be granted should run contiguously from the existing date for completion or the contended approach put forward by Carillion.

In order to reach its decision one of the main issues the TCC had to consider was how the wording of clause 11.3 of the Sub-Contract should be interpreted with regard to the award of any extension of time.

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EMCOR argued that were a reasonable person to interpret this clause, then they would find that any extension of time should be added contiguously from the existing date for completion. EMCOR's argument focused in particular around the use of the wording:

"fixing such period or further revised period... as the Contractor then estimates to be reasonable"

Carillion's contended that the meaning would allow for additional extensions of time to be granted under the Sub-Contract but that these could be awarded in separate periods, which would not necessarily have to run contiguously from the existing date for completion.

In its argument Carillion gave an example of a hypothetical situation in which if a court were to impose a contiguous extension of time for a sub-contractor this would actually exempt the sub-contractor from liability during a period of delay for which it was in fact culpable.

Carillion's hypothetical example was such that a sub-contract completion period could be 100 days. Then after 150 days with the works still not complete, there is an employer variation. This variation would entitle the subcontractor to an extension of time of 50 days delay for which the sub-contractor had in fact been culpable.

In the first instance the TCC made it very clear that a contract must be interpreted at the point it was entered into and not in hindsight with the aim of correcting a perceived injustice on behalf of one of the parties. The CA agreed with the TCC on this point despite agreeing with Carillion that imposing a contiguous extension of time in the hypothetical example could in fact give the sub-contractor a windfall, but said that such scenarios, could not displace the natural meaning of clause 11.3.

In reaching its decision the CA held that the wording from clause 11.3 and other parts of the sub-contract highlighted that extension was simply increasing the period of time which was allowed for the works. Thus the generally accepted position in the industry was upheld.

This may lead to perceived injustice, in situations such as those posed by Carillion's hypothetical example and go against the argument of "commercial common sense" which was endorsed by Lord Clarke in *Rainy Sky v Kookmin Bank* (2011). Yet, as was commented by the TCC in the first instance:

"these are only potential factual scenarios that may arise particularly on a contract where there is more than one sub-contractor. They will not necessarily arise and it follows that the extent to which they can influence the interpretation of the clause must be limited"

In reaching its decision the CA has confirmed that in a post [Arnold v Britton](#) landscape "commercial common sense" need not prevail. In *Arnold v Britton* the Supreme Court decided that contractual interpretation must be literal, even if this would be to the potential detriment of a party to that contract, which in this instance were individual tenants who were a party to the contract in question.

Therefore following this case the CA has confirmed that it will not intervene when the natural meaning of the words in question is clear, even when this may be to the unfair detriment of either of the parties.

Contractors are therefore left with the option of amending contracts to give them the power to impose non-contiguous extensions of time. However is it really worth them doing so? Especially given that it would not necessarily always benefit the contractor and the increase in legal fees that would result from further amending contracts.

Instead, it is therefore far more likely that contiguous extensions of time will continue to be the norm even if as indicated by this case, it may produce a few strange situations for both contractors and sub-contractors.



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