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Construction Contracts - The "old chestnuts" of EOTs and Costs of Delays. They look so easy. But what about the "Prevention Principle"?

Almost every construction contract, and many other types of contracts, will contain:

1. A pre-agreed date, or a fixed period of time, for the completion of the work at hand (the **Date for Completion**);

2. A clause describing the circumstances in which the contractor will be entitled to an extension of time (an **EOT**) to the Date for Completion; and

3. A clause stating that, if the contractor fails to meet the Date for Completion (after accounting for all proper EOTs), then the contractor must pay or allow liquidated damages (LDs) to the principal. These LDs are usually given as a dollar figure per day in the contract and they should represent a genuine pre-estimate of the principal's loss flowing from a delay.

These clauses have obvious importance for funding arrangements (including draw down timeframes), setting critical paths for works, sequencing works and for giving some certainty as to when a project can be operational and occupied/ used. The costs (monetary and to reputation) of failing to meet a Date for Completion can be significant to both the principal and the contractor. In construction and property development, the old saying that "time is money" almost invariably rings true for all concerned.

As a case for discussion/ consideration in your quieter moments – Notwithstanding it is so important to get the Date for Completion right, do some contractors put forward unrealistically short Dates for Completion with an aim to "win them the job" or "keep the principal happy"? Is this just false hope by a contractor, or do contractors think they can just fix it with an EOT claim (usually combined with some variations claims) down the track?

As for EOTs, the general rule is - If works are delayed by a cause for which the principal is responsible, the contractor will usually be entitled to an equivalent additional period of time to complete the works/ extension to the Date for Completion. As Lord Denning mused, a principal "cannot insist on a condition if it is his own fault that the condition has not been fulfilled".

This all seems fair enough. But what if, quite aside from a delay caused by the principal, the contractor also causes or contributes concurrently to the delay?

The general rule here is – If delays are caused concurrently by the principal and the contractor, the contractor will normally be entitled to an EOT regardless of a concurrent delay for which the contractor might be responsible. *"[The] rule… is that not only must the contractor complete within a reasonable time but also the contractor must have a reasonable time within which to complete. It therefore does not matter if the contractor would have been unable to complete by the contractual completion date if there had been no breaches of contract by the [principal] (or other events which entitled the contractor to an extension of time), because he is entitled to have the time within which to complete which the contract allows or which the [principal's] conduct has made reasonably necessary."*

The above two general rules represent the two limbs of what is known as the **"prevention principle"**.

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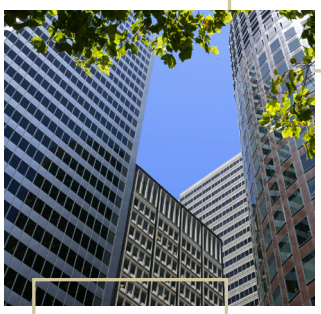

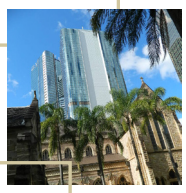

The “prevention principle”, as a matter of law, applies only to entitlements for EOTs and Dates for Completion. It is not per se a rule regulating LDs. However, if there is a proper entitlement to an EOT, then it naturally flows that a principal cannot claim LDs for the extended period. The “prevention principle” may thereby operate to render void a contractual entitlement to LDs for delay.

The above is a very brief introduction to the concept of the “prevention principle”. Its application to EOT claims and/or LD claims is affected by other legal principles and the terms of specific contracts. As such, it must be considered on a case-by-case basis.

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