Chapter 1
Introduction

1.1 General overview

There is an old saying that time is money. It certainly is in the world of business and no more so than when a construction contract overruns its allotted time for completion. When that happens, both parties can expect to suffer. This book is essentially about how contracts deal with the financial consequences of late completion and how, within the scope of the law and the scope of the contractual provisions, the parties endeavour to protect their respective interests.

To those not deeply involved with such matters it might seem extraordinary that it requires a book of some magnitude to explore the full complexities of the subject. To explain this conundrum this first section of the book provides a general overview of the law relating to liquidated damages and extensions of time. This review was, for the most part, the opening chapter of previous editions of the book.

Breaches of contract

Every breach of contract carries with it the potential for dispute. There may be those who thrive on dispute but they rarely include the parties to the contract. Not surprisingly it has long been accepted as good commercial practice for the parties to include in their contracts provisions for dealing with the most likely breaches. This is how standard forms of contract and the use of liquidated damages began to develop.

In the construction industry, breaches of contract are commonplace to the point of being routine. Did any employer ever wholly avoid impeding the contractor in the performance of his obligations and did any contractor ever wholly fulfil his obligations without fault? Not often. This is reflected in the standard forms and most contain clauses detailing the procedures to be applied and the recovery permitted in the event of those specified breaches identified and described with the benefit of centuries of experience.

When the employer is in breach by way of interference or prevention arising from late supply of information, failure to give full possession of the site and the like, the result for the contractor is delay, disruption and involvement in loss and expense or extra cost. The contractual remedy gives the contractor recovery of his provable loss and expense or extra cost and, in appropriate circumstances, an extension of time for completion. In some

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contracts certain breaches by the employer, such as failure to make payment on an interim certificate, entitle the contractor to determine his employment under the contract but such remedies are few and as a general rule the contractor's remedy for employer's breach is the recovery of general or unliquidated damages. That is to say, damages which are assessed after the breach.

The contractor's breaches of contract are most commonly failure to proceed with due diligence, failure to meet specified standards and failure to complete on time. Only in respect of the last does the employer have a solely financial contractual remedy. For other breaches he may have the right to terminate the contractor's employment or order reconstruction but he will rarely have an entitlement to deduct moneys from sums due to the contractor. The employer may, of course, sue for latent or patent damage but this is a common law remedy rather than a contractual one.

The employer's position is, therefore, significantly different from the contractor's. Whereas the contractor has a financial remedy for numerous and various breaches, the employer has his for only one breach of common occurrence – failure by the contractor to complete on time. And whereas the financial effects of the employer's breach on the contractor can rarely be estimated in advance of the breach, not least because of the involvement of sub-contractors, the financial effects of the contractor's late completion can usually be estimated with some certainty.

Consequently most standard forms of construction contract are drafted to permit the parties to fix in advance the damages payable for late completion. When these damages are a genuine pre-estimate of the loss likely to be suffered or a lesser sum they can rightly be termed liquidated damages.

In short, liquidated damages are fixed in advance of the breach, whereas general or unliquidated damages are proven damages assessed after the breach.

The practice of liquidating damages is by no means of recent origin. The *Shorter Oxford English Dictionary* gives 1574 as the earliest known date for 'ascertained and fixed in amount' as the meaning of the word 'liquidated'. And from the courts there are numerous law reports dating back to the early 19th century of cases concerned with liquidated damages in construction contracts.

Indeed this is a subject on which Kipling's famous lines seem to be particularly relevant:

> 'How very little since things were made
> Things have altered in the building trade.'

Hudson's Building and Engineering Contracts gives the 1838 case of *Holme* v. *Guppy* in which carpentry contractors at a brewery finished late and sought relief from deduction of liquidated damages from the contract price on the grounds that the employer had prevented them from finishing on time by delay in giving possession of the site and by delays on the part of his own workmen. A familiar story which could have come from any modern day contract. And, as it happened, nearly a century and a half later, Lord

Justice Salmon referred to *Holme* v. *Guppy* in his judgment in *Peak* v. *McKinney* (1970) when saying:

> 'I cannot see how, in the ordinary course, the employer can insist on compliance with a condition if it is partly his own fault that it cannot be fulfilled.'

Peak v. *McKinney* is the modern authority on prevention – a subject to be considered in some detail in later chapters.

Liquidated damages and penalties

The association between liquidated damages and penalties lies in the nature of the remedy – an agreed price to be paid for breach or non-performance. The parties may agree any price they wish; they are not bound by any rules and if the price they agree is clearly intended to penalise the defaulting party rather than to compensate and restore the position of the innocent party, that is a matter for the parties. When Antonio in Shakespeare's *The Merchant of Venice* agreed to give a pound of his flesh if he defaulted on his bond he did so willingly – albeit in the mistaken belief that his default would never occur.

The question which is of prime importance to the parties in agreeing their price is, will the courts assist them in enforcing payment? In *The Merchant of Venice* Portia could find nothing in Venetian law to prevent the application of the penalty and Antonio was saved only by the impossible precision of the penalty – a pound of flesh, no more nor less; and not a drop of blood to be included.

In fact many legal systems do allow the recovery of penalties and it is something of a peculiarity of English law that the courts will look at the price irrespective of whether it is called liquidated damages or a penalty, and, if it is found to be a penalty, will limit damages to the amount flowing from the breach.

The origin of this lies in the branch of justice named equity, which traditionally relieved against penalties but for the last two centuries the doctrine has been taken up and applied by the common law. The logic of the position seems to be that since a penalty is designed to secure performance, the promisee is sufficiently compensated by recovery of his actual loss and he is not entitled to demand a sum which although fixed by agreement is disproportionate to the actual loss suffered.

An early example of the thinking of the courts is *Kemble* v. *Farren* (1829) where it was held that a sum of £1000 to be paid for any breach, and said by the parties to be liquidated and ascertained damages and not a penalty, was held nonetheless by the court to be a penalty.

However, the courts show a sensible reluctance to go too far in interfering in the commercial bargains struck by the parties. In the case of *Elsley* v. *J.G. Collins Insurance Agencies* (1978) Judge Dickson, delivering the judgment of the Supreme Court of Canada, said:

> 'It is now evident that the power to strike down a penalty clause is blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression.'

Later thinking of the courts was given by Lord Roskill in the case of *Export Credits Guarantee Dept* v. *Universal Oil Products Company* (1983), where he said:

> 'My Lords, one purpose, perhaps the main purpose, of the law relating to penalty clauses is to prevent a plaintiff recovering a sum of money in respect of a breach of contract committed by a defendant which bears little or no relationship to the loss actually suffered by the plaintiff as a result of the breach by the defendant. But it is not and never has been for the courts to relieve a party from the consequences of what may in the event prove to be an onerous or possibly even a commercially imprudent bargain.'

And in *The Angelic Star* (1987) Lord Justice Gibson said that the doctrine of penalties was not a rule of illegality. It was a rule of public policy by which the courts refused to sanction legal proceedings for recovery of a penalty. The rule was not designed to strike down any more of a lawful contract than was necessary to apply public policy. It should interfere as little as possible with proper enforcement of a lawful contract.

The case of *Kemble* v. *Farren* was one of many considered by Lord Dunedin in his judgment in *Dunlop Pneumatic Tyre Company Ltd* v. *New Garage* (1915) which stands to this day as providing the principal tests for distinguishing liquidated damages from penalties.

Because of its continuing importance the case is examined in detail in Chapter 4 but the following short extract from Lord Dunedin's judgment is given here to sum up the point:

> 'The essence of a penalty is a payment of money stipulated as "in terrorem" of the offending party: the essence of liquidated damages is a genuine covenanted pre-estimate of damage.'

Contentions that liquidated damages are, in law, penalties rank highly amongst the defences put up to avoid payment of liquidated damages. This is not so much that the stipulated sums are patently extravagant and evidently intended as threats but more because of the ingenuity of lawyers in making arguable cases from discrepancies and oddities in contract documents.

The subject is undoubtedly complex and it offers an excuse perhaps for the common misconception that damage must be suffered before liquidated damages become payable. Usually this line of thought applies to public sector projects or non-commercial buildings such as churches. However, those who harbour such thoughts, mostly contractors it must be said, eventually learn to their dismay that the test for enforcement of liquidated damages is: were they a genuine pre-estimate of loss at the time the contract was made? If it is not, can loss be proved after the breach? Indeed as later chapters will reveal, providing the liquidated damages are a genuine pre-

estimate or a lesser sum, not only need there be no proof of loss, there need be no loss at all for the damages to become enforceable.

Since the first edition of this book was published in 1992 the law on liquidated damages and penalties has been examined and clarified by the English and Commonwealth courts in a surprising number of cases. The more noteworthy are considered in later chapters.

Amongst the most important of these cases is that of *Philips Hong Kong Ltd* v. *Attorney General of Hong Kong* which travelled through three tiers of the courts in 1990, 1991 and 1993. The concluding decision of the Judicial Committee of the Privy Council given in 1993 provides the basis of the current approach of the courts on the question of when in law liquidated damages are to be regarded as penalties.

The decision of the Privy Council restated the principles that the courts should not adopt an approach to provisions for liquidated damages which could defeat their purpose and that the test for determining whether a provision for liquidated damages is a penalty is whether or not it is a genuine pre-estimate of loss.

Genuine pre-estimate of loss

The relationship between a pre-estimate of loss and liquidated damages raises some difficult questions, not least how can there be a genuine pre-estimate of loss for a non-commercial project? This was an argument put forward by the shipbuilders in *Clydebank Engineering Co.* v. *Yzquierdo y Castaneda* (1905) where the contract for the building of four warships provided that 'the penalty for late delivery shall be at the rate of £500 per week'. It was said by Clydebank in opposing an action to enforce the penalty clause that there can be no genuine pre-estimate of loss as a warship does not earn money. But Lord Halsbury refuted the argument and held the stated sum to be liquidated damages, establishing that difficulty in ascertainment is no barrier to an estimate being made.

The ruling has been followed by the courts on many occasions and not infrequently the point has been made that the very difficulty in ascertaining damages for late completion is a good reason why such damages should be liquidated. For example, Lord Dunedin in his judgment in the *Dunlop* case restated the point made by Lord Halsbury in the *Clydebank* case that:

> 'It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.'

There is no bar therefore to a genuine pre-estimate of loss in non-commercial projects and various methods and formulae have been devised for application in the construction industry which meet satisfactorily the test of a genuine pre-estimate.

If one party wishes to challenge the sum so calculated and stated in the contract as liquidated damages, the best time to do so is before the contract is signed. Post contract challenges to liquidated damages on the grounds that they are not a genuine pre-estimate of loss have had a poor record of success in the courts in the past and are likely to have even less in the future.

Agreed nature of damages

There is a view that too much attention is sometimes given to the 'pre-estimate' aspect of liquidated damages and not enough to the agreed nature of such damages. This is not a plea for the enforcement of penalties but a plea for greater recognition of the fact that liquidated damages are frequently not a genuine pre-estimate of loss but are simply a sum agreed by the parties as part of their commercial bargain. In short, the parties, using their commercial judgments, agree a sum which serves as compensation for the employer and limitation of liability for the contractor. Where that sum is less than a genuine pre-estimate it will not be in law a penalty – although that has not always been without doubt – but this does raise the question, who can say whether or not a sum is more or less than a genuine pre-estimate if there was no pre-estimate to start with? The implications of this are considered later.

Exhaustive remedy

There is sometimes the question of whether or not liquidated damages provide an exhaustive and exclusive remedy.

At first sight there would seem to be no doubt whatsoever on this. Why introduce liquidated damages into a contract to give both parties the benefit of certainty of knowledge of the consequences of the relevant breach if the liquidated damages clause can be avoided and general or unliquidated damages can be claimed?

The Court of Appeal in the case of *Temloc Ltd* v. *Errill Properties Ltd* (1987), where liquidated damages had been stated as £nil, firmly supported the exhaustive remedy principle. Lord Justice Nourse said in the course of his judgment:

> 'I think it clear, both as a matter of construction and as one of common sense, that if . . . the parties complete the relevant parts of the appendix, . . . then that constitutes an exhaustive agreement as to the damages which are . . . payable by the contractor in the event of his failure to complete the works on time.'

Why, then, should there be a question of whether or not liquidated damages provide an exhaustive and exclusive remedy? Firstly because it is not uncommon for employers who find their actual losses to be greater than their liquidated damages to argue that they have retained, and are entitled to

pursue, their common law rights to sue for the damages they can prove to have been incurred. And secondly because both Lord Justice Bingham and Lord Justice Parker in the Court of Appeal in *E. Turner & Sons* v. *Mathind Ltd* (1986) expressed forceful views, albeit obiter and therefore not binding authority, to the effect that the employer could have both liquidated damages for failure to complete the whole works on time and unliquidated damages for failure to meet phased handover dates. Furthermore a New Zealand Court in the case of *Baese* v. *Bracken* (1989) declined to follow the ruling in *Temloc* v. *Errill* on 'nil' damages and advanced an interesting argument on why, given certain forms of wording, a liquidated damages clause is an alternative to unliquidated damages. More will be said on both cases later but it will be a bad day for the construction industry if the certainty brought to contracts by liquidated damages is ever lost.

Extensions of time

Just as there are many misunderstandings on the purpose and principles of liquidated damages, there are many on extensions of time.

It is a common belief that liquidated damage provisions are solely for the benefit of the employer and extensions of time provisions solely for the benefit of the contractor. Both views are not only wrong but almost the reverse of true intentions. Liquidated damages provisions are beneficial to contractors for they not only limit the contractor's liability for late completion to the sums stipulated, but they also indicate to the contractor at the time of his tender the extent of his risk.

Thus, if a contractor believes that he cannot complete within the time allowed he can always build into his tender price his estimated liability for liquidated damages.

All that the employer gets out of liquidated damages is relief from the burden of proving his loss and usually, in construction contracts, the right to deduct liquidated damages from sums due to the contractor. To the extent that the employer's true losses may be greater than the stipulated level of liquidated damages he is disadvantaged by agreeing to a restrictive remedy. Indeed during the property booms of the 1980s many employer / developers preferred to enter contracts without liquidated damages because rental values were rising so quickly that liquidated damages would almost invariably understate true losses. But not surprisingly few contractors were prepared to operate under such terms since their liability for late completion was not only uncertain but potentially crippling.

Similarly with extensions of time provisions, the fact that the contractor is the obvious recipient of benefit in gaining relief from liquidated damages obscures the primary purpose of such provisions. That is, they preserve the contractor's obligation to complete within a specified time and in doing so they preserve the employer's right to liquidated damages when, by prevention, he has delayed the contractor and is responsible in part for late completion. That was the point at issue in *Holme* v. *Guppy* (1838) and *Peak* v. *McKinney* (1970) mentioned earlier.

The amount of detail in standard forms of contract on procedural rules for making extensions of time varies enormously. Building contracts tend to have elaborate schemes whereas process and plant contracts say very little. Much of the case law relating to the procedures for extending time concerns the alleged non-observance of particular rules and is of only limited assistance in setting general guidelines. That may account for the fact that there is a great deal of variability and unpredictability in awards of extensions of time. In later chapters of this book an attempt is made to derive from case law the basic rules which should be followed. Of particular note are a clutch of recent cases reported since the first edition of this book was published.

John Barker Construction Ltd v. *London Portman Hotel Ltd* (1996) is important because it emphasises the need for an analytical approach to the investigation of delay and the corresponding extension due. *Balfour Beatty Civil Engineering Ltd* v. *Docklands Light Railway Ltd* (1996) confirms the need for discretion to be exercised with fairness when extensions are being considered. And, *Balfour Beatty Building Ltd* v. *Chestermount Properties Ltd* (1993) confirms that extensions granted for entitlements to extensions arising after the completion date has passed should be on a 'nett' rather than a 'gross' basis.

Prevention

If the extension of time clause fails to cover the employer's fault then usually the right to liquidated damages is lost; the liquidated damage clause fails; and the employer is left to sue for general damages which must be proved. Lord Salmon in *Peak* made the following statement:

> 'If the failure to complete on time is due to the fault of both the employer and the contractor, in my view, the clause does not bite.'

Consequently, extension of time clauses are drafted to include the likely range of events for which the employer is responsible, although as will be seen later, not all are successful and there remain some remarkable gaps in well used building and civil engineering forms.

Most standard forms do, of course, also provide for extensions of time for a range of neutral events associated with bad weather, industrial disputes and the like and it is understandable that in respect of these matters the benefit should seem to be wholly for the contractor. On a narrow view it is, but on a broader view the inclusion of neutral events for extensions of time is part of the give and take of the consultative drafting process and the establishment of an acceptable balance of risk between the parties.

Relationship to claims

The purpose of extension of time provisions is further complicated and widely confused by the linkage in the industry of extensions of time and

claims for loss and expense or extra cost. This is not a legal link, nor is it in most standard forms a contractual link, since the extension of time clauses and the financial claim clauses usually stand alone. But what has happened over the years is that contractors have developed the maxim: get time first and the money will follow, and contract administrators have also found extensions of time a useful peg on which to hang claims when justification for approval of payment has to be made to the employer or his auditors.

From this has grown the operational practice of separating extensions of time and events giving rise thereto into 'reimbursable' and 'non-reimbursable' categories; the first set covering employer's fault and the second set covering neutral events. 'Operational' is used in the sense that those seeking and those granting extensions of time play their cards to suit the circumstances of their situation, and though there may be no distinctions in the contract between reimbursable and non-reimbursable extensions and probably none in the correspondence exchanged on the applications, both parties are aware of the other's intentions.

The court in *Fairweather & Co. Ltd* v. *London Borough of Wandsworth* (1987) took a practical view of the relationship between claims and extensions of time when considering the problem of concurrent delays, notwithstanding the well established dominant event approach which takes a detached view of the relationship.

Although this book is not about claims, the importance of extensions of time in claim submissions has to be recognised and consequently attention is given to the subject in later chapters. In connection with claims the phrase 'loss and expense or extra cost' is used. This is not a new form of contractual entitlement. It is simply that this book is intended to cover both building and civil engineering contracts and it so happens that building contracts usually refer to 'loss and expense' and civil engineering contracts to 'extra cost'.

Additional time for the employer

Because the obligation to complete the works of a contract on time rests with the contractor and because the essential purpose of an extension of time clause is to maintain a fixed time for completion it is understandable that most extension of time clauses are drafted so as to be applicable only to extending the time for the contractor's obligations. To the extent that extensions of time are available for delays for which the employer is responsible, it could not be otherwise. However, it is a fact that most extension of time clauses permit extensions for delays caused by events beyond the control of the contractor as well as for acts of prevention by the employer. The effect of this, as a judge once put it, is that the loss lies where it falls. The contractor obtains relief from his liability for damages but has no claim for delay, whilst the employer by losing his right to damages for delays stands his own costs of the delay. This is generally taken to be a fair and reasonable approach to the problem of delays caused by neutral events.

However, what of the position where the employer is delayed by circumstances beyond his control in the performance of his obligations to the contractor? What relief, if any, is to be afforded to the employer against claims for delay by the contractor? In construction contracts the answer is usually none – unless there is exceptionally a force majeure clause which expressly applies to both parties. However, in process and plant contracts such a clause is normal and the IChemE Red Book even goes so far as to formalise the procedure for granting extensions of time to the employer.

Liquidated damages other than for delay

It is not intended in this book to examine in any detail the provisions which appear in some forms of contract for liquidated damages for breaches other than delay in completion. The most common are, of course, liquidated damages for low performance. These are standard in process and plant contracts.

However, the point is worth making that liquidated damages, whether for delay or for some other default in the contractor's performance, are, as is stated often in this book, an exhaustive and exclusive remedy for the particular breach. It is usually not too difficult for an employer to see that by opting for liquidated damages for delay he is forgoing his right to have his damages assessed under his common law remedy. However, when liquidated damages are applied to other matters such as low performance it is easier to make the mistake of thinking that the liquidated damages give an additional remedy and there is a danger of failing to recognise the exclusive and exhaustive nature of such damages.

Caution does need to be exercised, therefore, in adding into contracts liquidated damages clauses for matters other than delay.

1.2 Legal developments

As is evident from the large number of new cases considered in this third edition, the courts remain busy with matters concerning liquidated damages and extensions of time. It is difficult to confirm whether or not the number of judgments released in the last ten years on such matters exceeds the number in any previous ten-year period but it seems to be a possibility.

Some of the new cases have been generated by adjudications and many of the judgments on these relate to procedural and / or jurisdictional disputes which do little to advance the law on substantive matters. These are not covered in this book except to the extent that they concern rights on the deduction of liquidated damages.

Most of the new cases of interest can be categorised as relating to:

- penalty clauses
- prevention / conditions precedent / time at large

- causation and / or concurrency
- apportionment / global claims
- delay analysis.

An interesting aspect of the judgments in some of these cases is their length – with a few running into hundreds of pages. The amount of detail covered would, by past standards, be considered extraordinary. It suggests that a preference for litigation over arbitration may be developing.

Penalty clauses

It is not stating anything new to say that present law on penalties clauses is less than satisfactory. The English Law Commission published a working paper on the subject in 1975. The Scottish Law Commission produced a report and a draft Bill in 1999. They both address the underlying issue of whether the courts should have any powers to strike down as penalties certain types of commercial agreements such as liquidated damages. They both look in detail at the problems created by the legal distinction between penalties for breach and penalties for exercising contractual rights and at the problems caused by the 'genuine pre-estimate of loss' rule for liquidated damages.

The recommendations of the Scottish report make interesting reading:

'1. (1) There should continue to be judicial control over contractual penalties.
(2) The criterion for the exercise of that control should be whether the penalty is "manifestly excessive".
(3) Penalties which are not manifestly excessive should be enforceable even if they cannot be regarded as based on a genuine pre-estimate of loss.

2. Judicial control over contractual penalties should not be confined to cases where the penalty is due when the promisor is in breach of contract. It should extend to cases where the penalty is due if the promisor fails to perform, or to perform in a particular way, under a contract or when there is an early termination of a contract.

3. (1) Judicial control over contractual penalties should apply whatever form the penalty takes. It should, in particular, apply whether the penalty takes the form of a payment of money, a forfeiture of money, a transfer of property, or a forfeiture of property.
(2) Without prejudice to the possibility of a systematic review of the law on irritancies of leases of land, the recommended judicial control over contractual penalties should not apply to such irritancies.

4. In deciding whether a clause comes within the scope of the new law on penalty clauses regard should be had to the substance of the clause rather than to its form.

5. The enforceability of a penalty should be judged according to all the circumstances, including circumstances arising since the contract was entered into.
6. A court, or a tribunal or arbiter adjudicating on a penalty clause, should have power to modify a manifestly excessive penalty so as to make it enforceable – by for example, reducing its amount or attaching conditions to the exercise of the relevant right.
7. In any new law on penalty clauses it should be made clear that parties cannot contract out of the application of that law.
8. The onus of showing that a penalty is unenforceable should lie on the party so contending.
9. The proposed rules on penalty clauses should apply to penalty clauses in bonds and other unilateral voluntary obligations in the same way as to penalty clauses in contracts.
10. Any new legislation should apply only to penalty clauses agreed after it comes into force.'

And it will certainly be interesting if the Scottish draft Bill incorporating the above recommendations comes into force – thereby moving Scots law closer to continental law but creating a significant legal gulf between Scotland and the rest of the United Kingdom.

Most of the new cases on penalty clauses covered in this book show the difficulties of the courts in maintaining compliance with the genuine pre-estimate of loss rule and in using the *Dunlop Tyre* case criteria to distinguish between liquidated damages and penalties. Some of the cases, *Cine, Jeancharm*, and *Leisureplay* have Court of Appeal rulings but perhaps the most influential judgment is that of Mr Justice Coleman in *Lordsvale Finance*. He addressed head-on the difficulties of applying old English rules on penalties in a modern financial world and in doing so illuminated a path for others to follow.

Prevention / conditions precedent / time at large

A debate has been going on for some years as to how to reconcile the principle of prevention with conditions precedent to entitlement to extension of time such as notice requirements and time-bars. The key issue is to what extent the legal rule that a party cannot benefit from its own breach operates in circumstances where the employer has prevented completion on time but the contractor has not complied with the contractual requirements for obtaining extension of time. From that comes the questions – can the employer claim liquidated damages for a delay he has caused or is time put at large by lack of entitlement to an extension?

One aspect of the debate is whether the principle of prevention is a rule of law or a rule of construction. Another is whether a distinction should be made when considering the effects of conditions precedent between preventive acts which amount to breach of contract and preventive acts such as the ordering of extra works which are permitted by the contract.

Until recently there was little guidance from the courts on these matters save for a batch of conflicting decisions from the Australian and United States courts. We now have judgments in the Scottish case of *City Inn* v. *Shepherd*, the English case of *Multiplex* v. *Honeywell*, and other following cases. All incline towards upholding the operation of conditions precedent and rejecting time at large claims.

However, it is unlikely that the debate is concluded. The contractual provisions in *City Inn* were somewhat unusual and *Multiplex* provides observations rather than final decisions.

Causation and / or concurrency

Disputes on construction contracts, particularly those relating to claims for delay, extensions of time and liquidated damages are frequently beset by arguments on what events have caused delays and on how the concurrency of their effects should be treated. Such are the complications that it seems to be recognised by the courts and legal authorities that there is no single approach which fits all situations. This leads *Keating* to suggest a number of propositions which might apply: the *Devlin* approach, the dominant cause approach, the burden of proof approach, and the tortious solution.

As might be expected therefore the guidance to be derived from recent construction industry cases is of limited general effect. Nevertheless some useful pointers to the current thinking of the courts on particular situations can be gained from cases such as *Plant Construction* (2000), *John Doyle* (2004), *Great Eastern Hotel* (2005), *City Inn* (2007) and others.

Apportionment / global claims

Ever since the 1967 judgment in the *Crosby* v. *Portland* case contractors have endeavoured to extend the permissible boundaries of global claims. Generally such claims are for money but in complex delay situations they are sometimes made for extensions of time.

One of the difficulties faced by contractors making global claims is that until recently such claims, under English law, only stood if it was possible to exclude the effects of causes other than those relied on for entitlement. Apportionment was not permitted. Understandably therefore the judgment in the Scottish case of *John Doyle* v. *Laing* (2004) created some excitement. In that case the judges of the Inner House (equivalent to the English Court of Appeal), having reviewed decisions in overseas cases, concluded that the facility to undertake apportionment exercises as carried out in the United States should be available under Scots law.

Approval to that approach has since been given in a number of English cases. However, as to whether that approval extends to time claims as well as to money claims remains in some doubt.

Delay analysis

Until comparatively recently the process of calculating amounts due to contractors and to sub-contractors as extensions of time was not regarded as an exact science. Providing that a fair and reasonable award of extension was given there was no great concern as to the method of calculation. The courts were rarely troubled with the details of calculations – that burden fell upon arbitrators.

But with the advent of computers and sophisticated logic-linked programs there came increased interest in the techniques of delay analysis. Even so it came as something of a shock when in 1996 the judge in *John Barker* v. *London Portman Hotel* rejected an architect's assessment on grounds that it was impressionistic rather than calculated and that there was no logical analysis. That was a wake-up call to many architects and engineers.

Since the *John Barker* case the courts have become increasingly involved in the details of delay analysis. See, for example:

- *Ascon* v. *McAlpine* (1999)
- *Royal Brompton Hospital* v. *Hammond* (2002)
- *Great Eastern Hotel* v. *Laing* (2005)
- *Skanska* v. *Egger* (2004)
- *Mirant* v. *Ove Arup* (2007)
- *London Underground* v. *Citylink* (2007)
- *City Inn* v. *Shepherd* (2007).

If any common message can be taken from these cases it is that some form of methodical delay analysis is essential but over-elaboration is no substitute for common sense.

In an attempt to improve understanding of delay analysis and to establish a measure of conformity in its practice the Society of Construction Law published in 2002 its 'Delay and Disruption Protocol'. It was hoped that its recommendations would be adopted in standard forms of contract but as yet there is little evidence of that happening.

1.3 Contractual developments

In 1964 the government-sponsored Banwell Report 'The placing and management of contracts for building and civil engineering works' recommended the joint production of a single form of contract for the construction industry. That never happened. Instead of combining their efforts, the various professional and other bodies producing standard forms expanded their outputs into families of forms thereby largely dashing hopes that the construction industry would move towards rationalisation of its conditions of contract. With that went hope of industry-wide standard provisions for extensions of time and liquidated damages.

The 1994 government sponsored Latham Report 'Constructing the Team', without going so far as to recommend integration of building and civil engineering forms, did recommend that public and private sector clients should begin to use the New Engineering Contract. This did happen but there is still a long way to go before it can be said to be the construction industry's standard form.

However, if the New Engineering Contract ever does achieve that role there will be, so far as provisions for extension of time and liquidated damages are concerned, a measure of irony in the situation. As things presently stand there is a degree of uniformity between the main body of building and civil engineering forms on such provisions despite the variety of their titles. In contrast the provisions in the New Engineering Contract are not only significantly different to those in common use but also they have not been tested in the courts.