



## Where does an extension of time go? Is it added on to the current end date or is it free-standing?

### **Carillion Construction Ltd v Emcor Engineering Services Ltd & Anr [2017] EWCA Civ 65**

On the face of it, this may seem like a simple question to answer, however, this was exactly what was in dispute in a delay dispute between Carillion Construction Limited (Carillion) and a group of defendants including EMCOR and Aecom. Another issue was whether commercial common sense always prevails when interpreting contracts.

#### **The facts**

Carillion were the main contractors for the construction of the new court buildings (Rolls Building) where the TCC is based. As a result of delays to the completion of the construction, Carillion claimed liquidated damages levied under the main contract, along with their own costs from the delays, from Mechanical and Engineering Subcontractors (EMCOR and AECOM).

Under the Main Contract between Carillion and the developer ("Rolls"), the dates of completion were 1 September 2009 for Section 1 and 27 October 2009 for Section 2. On 16 July 2009 the main contract was amended to incorporate substantial fit out works, the completion dates of which were in March, September and December of 2010 for the four sections (A-D). In November 2010 a "Supplemental Agreement" was used to amend the contract to adjust the contract sum for the liquidated damages incurred. It also mentioned that the Contractor agreed not to be entitled to extensions of time and for there to be new completion dates for the sections. A similar further Supplemental Agreement was entered into towards the end of July 2011.

The sub-contract between Carillion and EMCOR was a DOM/2 1981 edition. Following the amendment of the Main Contract in July 2009, Carillion entered into an agreement on 23 September 2009 to amend the sub-contract with EMCOR to include fit out works for three of the sections. The period for completion of the sub-contract work was agreed to be varied and the dates for the fit out works were made the same as under the Main Contract.

In the original case before the first instance court, two preliminary issues were asked to be determined relating to the liability of EMCOR and AECOM:

1. Would any extension of time granted to EMCOR (assuming that they were entitled to one) be added contiguously onto the end of the current period (contractual date for completion), such that no liabilities would be owed until the expiry of the contractual completion date plus the full length of any extensions of time granted? Or would it not be added contiguously so that instead, the revised period reflects the period for which EMCOR has in fact been delayed?
2. Did the Supplemental Agreements have the effect of pushing back the contractual completion date, such that no damages could be levied against the sub-contractors in relation to any delays before the new, later completion date came and went?

To simplify the problem and to explain in commercial terms what the differences are between the two methods of adding the extension of time, an example was given during the hearing which was as follows.

**Example scenario:** The original period for completion of the sub-contract works is 100 days and by the end of this period, the sub-contract works are not complete. This delays the main contract works. The sub-contract works are still not complete by day 150. At this point, a major variation entitles the sub-contractor to an extension of time for 50 days.

**EMCOR's position on the example scenario:** 50 days is added contiguously to the original time for completion, therefore, EMCOR is not in breach by failing to complete until day 150 and will not be liable for the delay up to that point.

**Carillion's position on the example scenario:** The 50 day extension is added between day 150 and day 200 to complete its works, the sub-contractor would be liable for the delay from day 100 to day 150 and this would properly reflect the loss and expense which it has caused to the Main Contractor (including the liquidated damages).

The relevant clause for the extension of time is clause 11 of the DOM/2 1981 edition. Some relevant extracts of clause 11 include:

- Clause 11.3.2 uses the words “... *the completion of the Sub-Contract Works is likely to be delayed thereby beyond the period or periods stated in the Appendix...*”
- Clause 11.2.2.1 provides for the Sub-Contractor to give notice of the expected delay in the completion of Sub-Contract Works or any part thereof “*beyond the expiry of the period or periods stated in the Appendix part 4 or beyond the expiry of any extended period or periods previously fixed under clause 11...*”

## Decision

The first instance court decided that the wording, such as “beyond” and “extended”, in the sub-contract makes it clear that the natural meaning of the clauses relating to extension of time are to extend the completion date and the time should be added contiguously to the completion date. The Court of Appeal, who were only asked to decide on issue 1, agreed. Just because the result was an outcome that did not reflect commercial common sense was not a reason for departing from the clear wording of the contract.

## Key advice

When interpreting a contract one should start with the natural meaning of the words instead of trying to interpret the clauses so that the natural meaning is departed from to make the clause more consistent with commercial common sense. One should be careful that entering into a supplemental agreement or deed of variation does not have unintended consequences, as in this case.

This all underlines the need to read a contract carefully without making broad assumptions. One should not assume that what was intended to be agreed will be how the contract will be interpreted by the courts.

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