Retrospective Time Extensions in Building Contracts

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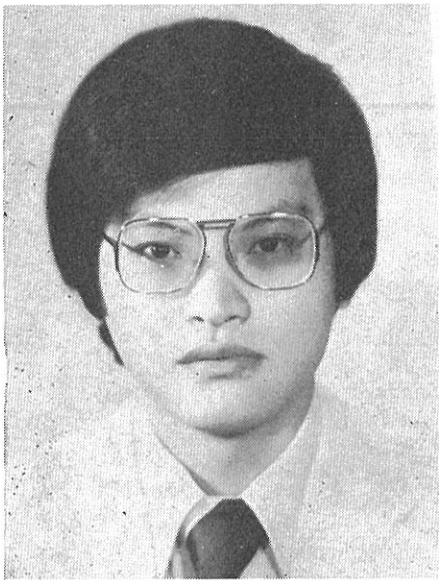
Recently, on two separate occasions, the New Zealand Supreme Court had to consider the validity of time extensions in building contracts which have been granted retrospectively. In both *New Zealand Structures and Investments Ltd* v. *McKenzie*[1] and *Fernbrook Trading Co Ltd* v. *Taggart*[2], the court held that a retrospective extension of time—i.e. extension of time granted after the expiry of the date for completion originally stipulated in the contract or after the expiry of a validly granted extension of that period—need not be necessarily invalid, and that consequently time for the completion of a building contract does not become "at large" merely because an architect or engineer certifies time extensions after the works have been handed over. The judgments delivered in the two cases constitute a useful review of the earlier authorities on the subject such as *Anderson* v. *Tuapeka County Council*[3], decided at the beginning of this century before the New Zealand Court of Appeal, and the two, apparently, irreconcilable English decisions of *Miller* v. *London County Council*[4] and *Amalgamated Building Contractors Ltd* v. *Waltham Holy Cross Urban District Council*[5].

The principles emanating from the authorities seems to be that where there is a power to extend the time for completion as a result of delays attributable to the building employer, and such delays have in fact occurred but the power to grant extension of time has not been exercised due to a failure to consider the matter within the period expressly or implicitly limited by the contract, the building employer may lose the benefit of the time extension clause. In such a situation, the contract time would cease to apply because of the employer's default and since there is no date from which liquidated damages can run because the purported extension of time was granted too late, no liquidated damages may be recovered. This result turns upon the construction that an extension of time clause although inserted for the benefit of the contractor is, tacitly, also regarded as being inserted for the benefit of the employer. In the event of the employer's default an extension of time clause plays the role of keeping alive a liquidated damages provision in the contract which would otherwise become unenforceable[6].

The early decisions on the subject maintained that the period for the exercise of the power to grant extensions of time cannot be legitimately taken to extend beyond the actual date of completion, given that it must have been the presumed intention of the parties that any extensions granted should be such that the contractor may have a specific date to work to and this can only be achieved



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if such extended date or dates are made known to the contractor before actual completion[7]. In *Anderson* v. *Tuapeka County Council*[8], a contract for the construction of a bridge provided that "in the event of any alterations, deviations, additions or extra work being required", the Engineer should allow "such an extension of time as he shall think adequate". Extra works were ordered on two occasions, one after the contract completion date, but on neither occasion was reference made to an extension of time beyond the completion date originally stipulated in the contract. In June, some months after the time fixed by the contract for completion, the Engineer purported to deduct penalties indicating that the time for completion had been extended from 15th November to a date in April. Stout, C. J. and Williams, J. held that the time for the completion of the works was set at large (and the Engineer was not therefore entitled to deduct the said penalties) because, *inter alia*, the Engineer could not fix as an extension of time a date which had already passed. In his judgment, Stout, C. J. remarked[9]:

> "... (The Engineer) has a function to perform—namely, to grant such an extension of time as he shall think adequate, if 'alterations, deviations or extra works' are ordered ... The words 'as he shall think adequate' seem to me to imply that the moment to fix the extended time is when the extra works have not been done but have to be done, and that therefore it was before the contractors began to execute the extra works that the time had to be fixed".

Williams, J. asked[10]:

> "If no date is specified within which the works are to be completed, how is it possible for the contractor to complete the works by a specified date?"

He then proceeded to state the principle that a contractual provision intended to preserve to the employer the right to recover penalties in an event which, had it not been for such a provision, would have deprived him of that right, should be expressed in clear and unambiguous terms. If it had been intended to allow the engineer to decide *ex post facto* whether there was a breach of contract to complete, the contractor never having been made aware of the date by which he was to complete the works, it should have been very clearly stated. The language of the provision before him was, in his opinion, "altogether unadapted to carry such an intention"[11].

Anderson's case was quoted with approval by du Parcq, J. in the English case of *Miller* v. *London County Council*[12]. In that case, a contract stipulated that certain works were to be completed by 15th November 1931. The eventual completion date was in July 1932, but it was not until November 1932 that the engineer granted an extension of time so as to purportedly extend the date for completion from 15th November 1931 to 7th February 1932. The contract contained a provision empowering the engineer to grant extensions of time for completion of the work in the following terms[13]:

> "(If) by reason of additional work ... or for any other just cause ... the contractor shall, in the opinion of the engineer, have been unduly delayed or impeded in the completion of the work or by part of it, it shall be lawful for the engineer, if he shall think fit, to grant from time to time, and at any time or times by writing under his hand such extension of time for completion of the work, and that either prospectively or retrospectively, and to assign such other time or times for completion as to him may seem reasonable ..."

It appears that in *Miller* the delay in completion arose from the ordering of extra work by the Engineer; a point to which Roper, J. attached considerable significance in his judgment in *Fernbrook's* case[14]. In a somewhat curious construction, du Parcq, J. held that the words "either prospectively or retrospectively, and to assign such other time or times for completion as to him may seem reasonable" were not apt to refer to the fixing of a new date for completion *ex post facto*. He considered that these words merely empowered the Engineer to wait till the cause of delay had ceased to operate, and then

"retrospectively" with regard to the cause of delay to assign to the contractor a new date to work to[15]. In the result, the extension of time was held to be invalid since it was granted too late in time and accordingly no liquidated damages could be recovered by the employer.

In 1952, the case of *Amalgamated Building Contractors Ltd* v. *Waltham Holy Cross Urban District Council*[16] was argued before the English Court of Appeal where, aside from the question of construction of the relevant time extension clause, it was also necessary to consider the applicability of the principles arising from the decisions in *Anderson* and *Miller* to situations where the cause of delay is not attributable to the employer. In *Amalgamated Building*, the contract in question was fashioned after the then standard RIBA form which contained the following time extension provision[17]:

> "If in the opinion of the architect the works be delayed (i) by force majeure, or (ii) by reason of any exceptionally inclement weather . . . or (ix) by reason of labour and material not being available as required . . . then in any such case the architect shall make a fair and reasonable extension of time for completion of the works."

The date for completion as originally stipulated in the contract was 7th February 1949. On two occasions in January 1949 the contractors made applications for an extension of time based on non-availability of labour and materials which applications the architect merely acknowledged. The works were eventually completed on 28th August 1950 and on 20th December 1950 the architect wrote extending the time for completion to 23rd May 1949. The building owners claimed for liquidated damages for the period between 23rd May 1949 and 28th August 1950. Denning, L. J. observed that the cause of delay under consideration was one of a continuous nature which operated partially but not wholly, every day, until the end of the works[18]. It must follow that the architect could only determine the period of time for which extension ought to be granted after the completion of the works, and the parties must therefore have intended that the architect should be empowered, in the circumstances, to grant extensions of time retrospectively[19]. His lordship noted[20]:

> "It is only necessary to take a few practical illustrations to see that the architect, as a matter of business, must be able to give an extension even though it is retrospective. Take a simple case where the contractors, near the end of the work, have overrun the contract time for six months without legitimate excuse. They cannot get an extension for that period. Now suppose that the works are still uncompleted and a strike occurs and lasts a month. The contractors can get an extension for that month. The architect can clearly issue a certificate which will operate retrospectively. He extends the time by one month from the original completion date, and the extended time will obviously be a date which is already past'.
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> It is respectfully suggested that this illustration might not appear as appropriate as it seems at first instance. There would seem to be little reason why extension of time should be given to reduce the period of delay for the computation of liquidated damages merely because the delay was prolonged as a result of an intervening event which occurred during the period of delay itself. Clearly in the situation posed by Denning, L. J., the effect of the strike would not have been felt if it was not for the contractor's delay in the first place. In the tenth edition of *Hudson's Building and Engineering Contracts* the position was stated in the following terms[21]:
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> > "Once a stage has been reached when, allowing for all extensions of time then justified, the works should have been completed, liquidated damages commence to run and will continue to do so till completion, and later events which otherwise would have justified an extension of time can no longer be relied on by the builder to reduce his liability."

Denning, L. J. distinguished *Miller's* case on the construction of the special wording used in that case and agreed with du Parcq, J. that the material wording in *Miller* was "not apt to refer to fixing of a new date for completion *ex post facto*"[22]. In addition, and on a somewhat more uncertain footing, his lordship considered that there is a distinction in principle between cases where the cause of delay is due to some act or default of the building owner, such as not giving possession of site in due time, or ordering extras or something of that nature[23], a proposition which he considered was supported by the decision in *Roberts* v. *Bury Improvement Commissioners*[24]. With respect, it is difficult to follow, on his lordship's reasoning, that in such a situation a retrospective extension of time would be invalid. One would imagine that causes of delay attributable to the acts or defaults of the building owner may also operate concurrently and that they may frequently only lend themselves to precise ascertainment after the physical completion of the works. The reference to *Roberts* v. *Bury Improvement Commissioners* is not easily understood: that case seems to centre on the bearing of an architect's decision on a contractor's position under a forfeiture clause and its relevance to the situation in *Amalgamated Building* would appear to be doubtful.

In the supplement to the tenth edition of Hudson's, the editor of that work sought to reconcile the *Miller* and *Amalgamated Building* decisions on the premise that in the latter case, Denning, L. J. contemplated that the arbitration clause in the contract before him, with its "open up review and revise" power would enable the arbitrator to review the matter of time extension in any event[25]. The learned editor noted[26]:

> "The existence of an arbitration clause (in *Amalgamated Building*) wide enough to enable the certifier's decision to be reviewed on the merits at the suit of either party will mean that there is little point in having a contractual time limit on the certifier's power to extend time, and this may well have influenced the Court on the question of interpretation more than is included in the judgments. In *Miller* v. *London County Council* on the other hand, there is no evidence of there having been an arbitration clause and in any event the engineer's certification of both extension of time . . . and liquidated damages . . . was to be final."

While this seems to be an ingenious attempt at patching up what that editor had earlier referred to as an "unduly complicated" state of affairs, it is difficult to read into the judgments delivered by both du Parcq, J. and Denning, L. J. the slightest shade of indication that the results in each case was attributed in any way to either the presence or the construction of the arbitration provision in the respective contract. One might go as far as observing that nowhere in the judgments was any reference made to the arbitration proceedings, the attention of the court in each case have centred primarily on the construction of time extension clause and, in du Parcq, J.'s judgment, the purported necessity for granting the contractor a date to work to.

These difficulties notwithstanding, the result in *Amalgamated Building* was a welcome mitigation of the strict ruling laid down in both the *Anderson* and *Miller* decisions. It must have become readily apparent that the foundation on which the earlier decisions rested—i.e. that an extension of time serves to specify a date for the contractor to work to—was fast being eroded by changes in the nature of building practice dictated by new conditions in the industry. This was recognised in the two recent New Zealand decisions of *New Zealand Structures and Investments Ltd* v. *McKenzie*[27] and *Fernbrook Trading Co Ltd.* v. *Taggart*[28].

In *McKenzie*'s case, a building contract for the construction of an office block provided for the works to be completed by a date in July 1975. The extension of time clause reads as follows[29]:

> "Should the amount of extra or additional work of any kind or other special circumstances of any kind whatsoever which may occur be such as fairly to entitle the Contractor to an extension of time for the completion of the work the Engineer shall determine the amount of such extension . . ."

The works were completed on 7th December 1976. On 1st March 1977, the Engineer certified extension of time to 30th April 1976 to cover *inter alia*, delays resulting from late grant of possession of site to the contractors and the ordering of additional works. Casey, J. rejected the argument that the Engineer in the case before him had no power to extend the time after the completion time under the contract had expired. Instead, he held that the Engineer may grant the extension at any time up to the stage when he becomes *functus officio* and that this power is not limited by the completion date[30]. His honour observed that in modern building practice, an extension of time clause serves principally to enable a date to be fixed for the calculation of liquidated damages and, on account of the frequently encountered review and arbitration procedures, a decision on the period of

time to be extended may even be reached only after the date of the issue of the final certificate[31]. Furthermore, in a major contract these days it is virtually impossible to gauge the effect of any one cause of delay while it is still proceeding, let alone assess the consequences of overlapping causes[32].

It is interesting to note that in *McKenzie* Casey, J. was not troubled by whether the causes of delay in question were attributable to the acts or defaults of the employer—and on the facts as reported it would clearly seem that the delays in that case were so attributable. This is a major deviation from the position taken by Denning, L. J. in *Amalgamated Building* and, of course, an even greater departure from the *Miller* and *Anderson* decisions. It would appear therefore that if the English Courts were to adopt Casey, J.'s reasoning, the law would be that it matters little whether the cause of delay in a given case is attributable to the employer or otherwise (a distinction emphasised by Denning, L. J. in *Amalgamated Building*) and instead, emphasis should be placed on the construction of the extension of time clause under consideration. After all, it is the extension of time clause which determines what causes of delay—whether these be attributable to the employer or not—are permissible excuses for extending the completion date of the contract. A formulation of the law along these lines would, it is suggested, prove to be more consonant with present day expectations of the parties to a building contract: indeed it is difficult to see any real advantage which would accrue to a contractor arising from an early certification of time extension when this may very often mean that the full effect of all the operational causes may not have been completely felt.

McKenzie's case was cited before Roper, J. in *Fernbrook Trading Co Ltd* v. *Taggart*[33], but unfortunately the significance of Casey J.'s judgment in relation to the *Anderson*, *Miller* and *Amalgamated Building* cases was not fully appreciated. In *Fernbrook*, a contract for the construction of certain road works provided for the works to be completed within 15 weeks, in effect by 30th December 1975. The contractor applied for an extension of time on 18th November 1975 because, as well as being required to carry out the additional work, there were delays by other direct contractors on site. He received no acknowledgment until 2nd March 1976 when the Engineer granted an extension to 24th March 1976. On 29th April 1976, the Engineer granted a further extension to 1st June 1976. Although in the result it was held that the owner's breach of contract in failing to make progress payments set the completion date at large with the effect that the contractor was not liable to pay liquidated damages, Roper, J. was clearly of the opinion that the Engineer's discretion to extend time after the completion date was reasonable in the circumstances and would have kept alive the liquidated damages clause if not for the owner's breach[34].

Roper, J. appeared content to let his judgment rest on the premises established by the trilogy of *Anderson*, *Miller* and *Amalgamated Building*. Like Denning, L. J. he was impressed with the distinction between cases where the cause of delay is due to the employer's acts such as ordering extra work and cases where "the delays did not rest with the employer". He noted[35]:

> "I think it must be implicit in the normal extension clause that the contractor is to be informed of his new completion date as soon as is reasonably practicable. If the sole cause is the ordering of extra work then in the normal course the extension should be given at the time of ordering so that the contractor has a target to which to aim. Where the cause of delay lies beyond the employer and particularly where its duration is uncertain then the extension order may be delayed, although even there it would be a reasonable inference to draw from the ordinary extension clause that the extension should be given a reasonable time after the factors which will govern the Engineer's discretion have been established. Where there are multiple causes of delay there may be no alternative but to leave the final decisions until just before the issue of the final certificate."

Roper, J. was thus of the opinion that a retrospective extension of time is only permissible in two situations: firstly where the causes of delay are not attributable to the employer and secondly where the delay has been brought about by "multiple causes". With respect it is suggested that this formulation appears to have been reached only because the role played by the extension of time clause in present day building practice and, in particular, Casey, J.'s remarks on the subject in *McKenzie*'s case was not fully considered. If, as Casey, J. had noted, the significance of an extension of time clause in a building contract lies only in its bearing on the computation of liquidated damages, it is difficult to see how the interest of justice may be breached merely because an extension of time is granted after the physical completion of the works, for whatever reason[36]

Admittedly, Roper, J. did venture slightly further than Denning, L. J. did in *Amalgamated Building* in that Roper, J. formally ruled in his judgment that where the delay is attributable to multiple causes, an extension granted after completion may be valid[37]. Nonetheless, one must regret that the opportunity was not seized to review the cumbersome and somewhat delicate stance maintained by the English courts in Miller and *Amalgamated Building*, and to devise a formulation, the seeds of which were already sown in *McKenzie*, that is more compatible with current practice in the industry. It would appear unlikely that in the present circumstances the liberal formulation of Casey, J. in *McKenzie* will prevail against the likes of *Anderson*, *Miller*, *Amalgamated Building* and *Fernbrook* and as it stands therefore, the current state of the law must remain largely that as set out in the excerpt of Roper, J.'s judgment cited earlier[38]. It is to be hoped that the day will not be far away when such an opportunity will present itself again and at that time conceivably the sheer force of logic and the effect of further experience with time extension clauses may persuade the courts to adopt unequivocally the premise advocated by Casey, J. in the *McKenzie* decision.

Footnotes

1. [1979] 1 N.Z.L.R. 515, before the New Zealand Supreme Court at Christchurch.
2. [1979] 1 N.Z.L.R. 556, before the New Zealand Supreme Court at Christchurch.
3. (1900) 19 N.Z.L.R. 1, New Zealand Court of Appeal consisting of Stout, C. J., Williams, J. and Edward, J.
4. (1934) 50 T.L.R. 479; 151 L.T. 425, King's Bench Division.
5. [1952] W.N. 400; [1952] 2 T.L.R. 269; 96 S.J. 530; [1952] 2 All E.R. 452; 50 L.G.R. 667, before the Court of Appeal consisting of Denning, L. J., Singleton L. J. and Romer, L. J.
6. *Hudson's Building and Engineering Contracts* 10th ed. at p. 638. See also *Miller* v. *London County Council* (1934) 50 T.L.R. 479 at 482.
7. *Hudson's*, 10th ed. at p. 645, suggested that there are three possible constructions of extension of time clauses in so far as the time for the exercise of the power is concerned but considered that since the decision of *Amalgamated Building Contractors v. Waltham Holy Cross Urban District Council*, *infra*, the prevailing construction would be that the contract may contemplate the exercise of the power at any time before the issue of the final certificate.
8. (1900) 19 N.Z.L.R. 1.
9. (1900) 19 N.Z.L.R. 1 at p. 8, 9.
10. *ibid.* at 13.
11. *ibid.*
12. (1934) 50 T.L.R. 479; 151 L.T. 425. Cited with approval by Burt, J. in *McMahon Construction Pty Ltd* v. *Crestwood Estates* [1971] W.A.R. 162. *Miller*'s case was also cited by the Court of Appeal in *Peak Construction Ltd* v. *McKinney Foundations Ltd* (1971) 69 L.G. 1, but it is suggested that *Peak Construction* was not concerned in any way with retrospective time extensions and clearly this was not an issue requiring the decision of the Court of Appeal in that case.
13. (1934) 50 T.L.R. 479; at 480.
14. [1979] 1 N.Z.L.R. 556, *infra*.
15. (1934) 50 T.L.R. 479; at 482.
16. [1952] 2 All E.R. 452.
17. [1952] 2 All E.R. 452; at 453.
18. *ibid.* at 454, 455.
19. *ibid.* at 455. Denning, L. J. in his judgment cited with approval *Sattin* v. *Poole* (1901) 2 Hudson's B.C. 4th ed. 306; 7 Digest 344, 55. His lordship considered that the building contract in that case contained two clauses which are indistinguishable from those before him and that it must have been assumed by the Divisional Court in that case that a certificate granting an extension of time could be granted after the works were completed.

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