# CONSTRUCTION LAW PERIODICAL

**Editorial Committee's Note**

*The Construction Law Periodical provides all members of the CBA with a regular summation of judgments and dispute resolution decisions drawn from Ireland and other common law and model law jurisdictions that touch upon and/or are relevant to matters of construction law and/or the resolution of construction disputes in this jurisdiction.*

*The next edition of the Construction Law Periodical is due for release in July 2019. Please contact a member of the editorial team if you would like to submit a case note or article for consideration.*

***Claire Cummins BL, John McDonagh SC and Barra McCabe BL***

***Bresco Electrical Services Limited (in liquidation) v Michael J Lonsdale (Electrical) Limited; & Canon Corporate Limited v Primus Build Limited.* [2019] EWCA Civ 27 (Court of Appeal (Civil Division) on Appeal from the Queen's Bench Division (Technology and Construction Court) 24 January 2019).**

*Adjudication - Jurisdiction - Reservation of rights - Waiver - Requirement for objecting party to make specific and clear objection to jurisdiction of the adjudicator.*

These were conjoined appeals which raised issues as to the interplay between the construction adjudication process and the insolvency regime. This is an issue of immense practical importance and in due course will be the subject matter of a separate paper in this periodical from Claire Cummins BL, who has a particular expertise in the area of insolvency.

In broad outline, the Bresco appeal raised the issue of whether an adjudicator can ever have the jurisdiction to deal with a claim by a company in insolvent liquidation, while the Canon appeal raised the issue as to whether an adjudicator would have jurisdiction in a situation where the claimant was in a Company Voluntary Arrangement, which is the rough equivalent of examinership in this jurisdiction.

This case note focuses solely on the issues of reservation of rights and waiver, which according to Coulson LJ at [82], arise much more often in adjudication than they should.

This issue as to when jurisdictional objections can and should be raised arose in the Canon appeal. The jurisdiction issue raised in the Bresco appeal by Lonsdale had been raised early on by it in the course of the adjudication, but it had not been raised by Canon either before the adjudicator or in the Technology and Construction Court in the course of Primus' subsequent application for enforcement/summary judgement. Primus submitted that it was not thereafter open to Canon to argue the point before the Court of Appeal as by not arguing it before the adjudicator it had waived any right to raise the jurisdictional challenge. It is in these circumstances that the separate issue in the Canon appeal as to waiver and what is sometimes referred to as general reservation of position presented itself.
At [84] Coulson LJ pointed out that the law in relation to general reservations of position had proved controversial, particularly in adjudication, because of the short time frames involved, and the policy behind the 1996 UK Adjudication Act, as a result of which the importance of obtaining the right answer had been subordinated to the need to have an answer quickly. The courts had been anxious to ensure that the purpose of the 1996 Act was not defeated by the use of general reservations of position on jurisdiction as a means of allowing novel jurisdiction points to be taken by the losing party at the enforcement stage.

At [85] to [90] he reviewed a number of previous TCC decisions which involved reservations of rights and waiver. Having done so he stated his view at [91] that the purpose of the 1996 Act would be substantially defeated if a responding party could, as a matter of course, reserve its position on jurisdiction in general terms at the start of an adjudication, thereby avoiding any ruling by the adjudicator or the taking of any remedial steps by the referring party; participate fully in it, either without raising any detailed jurisdiction points, or raising only specific points which were subsequently rejected by the adjudicator, and then, having lost the adjudication raise, at enforcement stage, a jurisdictional point which had not been previously made.

Having reviewed the previous decisions and taking into account his view as expressed above, at [92] he usefully sets out what he considers to be the applicable principles on waiver and general reservations in the adjudication context as follows:

(i) If the responding party wishes to challenge the jurisdiction of the adjudicator then it must do so in a clear manner.

(ii) If it does not reserve its position effectively and participates in the adjudication it will be taken to have waived any jurisdictional objection and will be unable to avoid enforcement on jurisdictional grounds.

(iii) It will always be better for a party to reserve its position

based on a specific objection or objections.

(iv) If the specific jurisdictional objections are rejected by the adjudicator (and the court, if the objections are renewed on enforcement), then the objector will be subsequently precluded from raising other jurisdictional grounds which might otherwise have been available to it.

(v) A general reservation of position on jurisdiction is undesirable but may be effective. Much will turn on the wording of the reservation in each case. However in general it may not be effective if a) at the time it was provided the objector knew or ought to have known of specific grounds for a jurisdictional objection but failed to articulate them, and b) the court concludes that it was worded in that way simply to try and ensure that all options could be kept open.

In the Canon case its solicitors in an e-mail to the adjudicator stated that Canon *"reserves its right to raise any jurisdictional and/or other issues, in due course, whether previously raised or not and whether within the forum of adjudication or other proceedings"*. [93] Coulson LJ stated that as far as he was concerned that reservation of position was so vague as to be ineffective. [94]

At no point during the adjudication had Canon raised the argument that the adjudicator did not have jurisdiction because Primus was the subject of a Company Voluntary Agreement, nor was it raised in the TCC on the enforcement application. Coulson LJ's view, with which the other two members of the Court of Appeal agreed, was that Canon could not be permitted to rely on its original general reservation of position in order to be able to raise a specific jurisdiction point for the first time on appeal. The general reservation was too vague to be effective, and in addition it could not be said that Canon did not know or could not have known about the argument that that an adjudicator might not have the necessary jurisdiction to decide a claim by an insolvent company, given that there was a 2010 TCC decision to that effect.

Canon were accordingly taken to have waived any jurisdictional objection to that effect.

**John McDonagh SC**

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***Power & Anor v Creed* [2018] IEHC 688 (High Court, Baker J., on 17 December 2018)**

*Professional negligence – Order 36 r. 12 (b) Rules of the Superior Courts – Application to strike out on grounds of inordinate and inexcusable delay – Application to dismiss proceedings for want of prosecution – principles of assessment of such applications based on Rainsford v Limerick Corporation* and *Primor Plc. (Under Administration) v. Stokes Kennedy Crowley – prejudice to plaintiff of having proceedings dismissed balanced against constitutional fairness and alleged prejudice to defendant – impact of passage of time on claims in relation to oral representations and expert evidence.*

**Facts:** The plaintiffs retained the defendant engineer in connection with the construction of a house in June 2005. The house was completed in August 2007 and the plaintiffs moved into the house in March 2008. Defects became apparent in the structure, damp proofing and insultation of the house. The plaintiffs issued proceedings against the engineer for professional negligence in February 2010 and a defence was delivered in April 2011. The matter was set down for trial in February 2012, but thereafter the proceeding stalled for a long period until a notice of intention to proceed was served by the plaintiffs in September 2017.

The defendant sought to have the proceedings struck out on the basis of inordinate and inexcusable delay, stating that almost ten years had passed since the end of their involvement in the project, and that it would be difficult to establish the causes of the alleged defects after such a long lapse of time. The plaintiff provided a number of reasons for the delay, including a change of solicitor, delay in receipt of advice from senior counsel, and further delays in receiving a report from the plaintiff's expert.

**Held:** Baker J. cited the decisions in *Rainsford v Limerick Corporation* [1995] 2 ILRM 561 and *Primor Plc. (Under Administration) v. Stokes Kennedy Crowley* [1996] 2 IR 459 for the principles governing applications to dismiss on these grounds.

On the first criterion, whether the delay was inordinate, the Court had no difficulty in concluding that a five-year delay between the strike-out of the notice of trial and the motion to dismiss the proceedings was indeed inordinate.

The second limb of the test is whether the delay was inexcusable; the Court considered in this regard the explanation offered by the plaintiffs, which included a change of personnel in the firm of the plaintiff's solicitors, but found that the 'apparent difficulties in the office of their solicitors' could explain but not excuse the delay, and was critical of the solicitors waiting a year and a half for advice on proofs from Counsel.

The final element of the *Primor* principles was whether the balance of justice was in favour of or against the proceeding of the case. The court cited the criteria to be taken into account in applying this principle from the decision of the Court of Appeal in *Collins v Minister for Justice Equality and Law Reform* [2015] IECA 27.

The relevant considerations set out in that decision include:

- The constitutional principles of fairness of procedures;
- Whether the delay and consequent prejudice to the defendant would make it unfair to proceed;
- Whether the defendant was responsible for delay and/or acquiescence in the plaintiff's delay; and
- Whether the delay puts at risk the possibility of a fair trial or causes serious prejudice to the defendant, including damage to the defendant's reputation and business.

On that basis, therefore, while the court accepted that the plaintiff might have expected the defendant to issue a motion to advance the proceeding, the court took the view that the defendant should not be penalised for not having done so. In addition, the court noted that actual prejudice need not be proved, and that even "moderate" prejudice to a defendant might 'tip the balance of justice towards dismissal'.

The court examined the proceedings and the contentions in some detail in deciding whether the grant the application, and dismissed those

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elements of the claim involving verbal representations and assurances by the defendant with regard to the suitability of the builder and the alleged failure of the defendant to advise the plaintiffs that the builder did not carry adequate insurance cover. In respect of these claims, the court was satisfied that they would require the defendants to recall conversations that had happened ten years previously, and were of such a vintage that the defendant could not be asked to defend those elements of the claim.

The court also rejected the claim that the defendant was having difficulty in arranging professional indemnity insurance in the absence of any evidence to that effect from the defendant, distinguishing the case from the decision of the Court of Appeal in *Farrell v Arborlane* [2016] IECA 224 in which such evidence of such difficulties had been before the court.

The court, therefore, refused to dismiss the entire claim, preserving the claim for breach of the contract of retainer, including the elements for which expert evidence would not have degraded due to the passage of time, and dismissing only the elements based on alleged assurances oral representations and conversations.

**Deirdre Ní Fhloinn BL**

***Holohan v An Bord Pleanála* C-461/17 (The Court of Justice of the European Union (Second Chamber) delivered on 7 November 2018)**

*Habitats Directive – planning permission - precautionary principle – whether details of construction phase may be agreed post consent.*

**Facts:** The applicants challenged a decision of An Bord Pleanála to grant permission for a proposed road development. The proposed development cut across a number of protected sites.

The Habitats Directive refers to protected sites and provides at Article 6(3), in mandatory terms, that a competent national authority shall grant consent for a plan or project *only* after ascertaining, by way of appropriate assessment, "*that it will not adversely affect the integrity of the site concerned.*" This is an expression of the precautionary principle in environmental law.

The applicants challenged the planning decision on numerous grounds and several questions were referred to the Court of Justice.

One of the questions referred was whether Article 6(3) of the Habitats Directive permitted the grant of development consent (i.e. planning permission) while leaving over for a later decision, certain parameters relating to the *construction* phase of the development. In particular, the details which were left over for a later decision concerned the location of the construction compound and haul routes.

**Held:** In relation to the question whether it is permissible to leave issues and details around the construction phase to the post consent period, the CJEU held as follows.

First, the Court stated that the obligations in Article 6(3) are directed towards the planning authority or Board, not the developer.

Second, the Court noted that all aspects of a development which *might* affect the site must be assessed by the planning authority or Board *before consent is granted.*

Third, the Court ruled that there are limited circumstances only in which it is permissible to leave over details concerning the *construction* phase of the development to be agreed or determined in the post consent phase of the development. Accordingly, it ruled (with emphasis added):

> *"Article 6(3) of the Habitats Directive must be interpreted as meaning that the competent authority is permitted to grant to a plan or project development consent which leaves the developer free to determine later certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site."*

**Comment:** In the context of development occurring near European sites, it is no longer permissible, as a matter of EU law, to grant permission for development which permits the developer to stipulate or change parameters concerning the construction phase of the development at a later date, unless conditions are attached to ensure no adverse effects on the integrity of the site will eventuate. Accordingly, developers seeking permission to develop in the vicinity of European sites can expect greater scrutiny from planning authorities or An Bord Pleanála relating to the *construction* phase of the development. Furthermore, developers are likely to receive less lee-way to agree or determine details of the construction phase with local authorities in the post-consent period. Consequently, it is likely that planning authorities will increasingly impose conditions which regulate construction details in the vicinity of protected sites.

**James Kane BL**

***Vastint Leeds B.V. (a company incorporated under the laws of the Netherlands) v Persons Unknown Entering or Remaining Without the Consent of the Claimant on Land and Buildings Comprising Part of a Development Site Known as the Former Tetley Brewery Site, Leeds* [2018] EWHC 2456 (Ch) (The High Court of Justice (The Honourable Mr Justice Marcus Smith) on 24 September 2018).**

*Breach of claimants rights threatened but cause of action not complete - Quia timet injunctions – prohibitive versus mandatory injunctions - strict application of two stage test for granting final injunctions – interim injunction plus damages adequate remedy - prevention from access or remaining on development site – wording of proposed orders - trespass – nuisance - caravans, illegal raves, fly tipping.*

**Comment:** The recent High Court decision in *Vastint Leeds BV v Persons Unknown Entering or Remaining Without the Consent of the Claimant on Land and Buildings Comprising Part of a Development Site Known as the Former Tetley Brewery Site, Leeds* [2018] EWHC 2456 (Ch) demonstrates the strict application of the two-stage test for granting final injunctions and highlights the importance of properly drafting the wording of orders to ensure they are no wider than necessary.

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**Facts:** The case concerned the application for a final injunction against persons unknown, preventing them from accessing or remaining on the claimant's development site. Much of the site was unoccupied and some of the buildings were unsafe and structurally unstable, and there were hazardous materials and substances such as asbestos on site.

The claimant had already undertaken various measures to secure the site and had health and safety concerns regarding unlawful access to the site throughout various stages of development. However, they were unable to eliminate entirely the risk of further trespass to the site despite the security measures that had been put in place. There had been four incidents of trespass, primarily involving caravans including, but not solely, in relation to the Site in 2011, 2016, 2017 and 2018. More recently, persons unknown had triggered alarms at the site, which had been sufficient to warn off these persons, but these were further cases of trespass or (at least) attempted trespass. There were also concerns about actual or attempted illegal raves, following a similar occurrence at a different site owned by a sister company of the claimant. The claimant also had concerns of large fly-tipping (illegal dumping) operations inferred from incidents on other non-related sites. Interim relief had already been obtained, but the claimant sought a final injunction against the continued risk of caravans, raves and fly-tipping.

In relation to the framing of an Order against a non-party Smith J cited the Vice-Chancellor in *Hampshire Waste Services Ltd v. Intending Trespassers Upon Chineham Incinerator Site [2003] EWHC 1738 (Ch)*, who gave the following advice:

(1) First, that the description of the defendant should not involve a legal conclusion, such as is implicit in the use of the word trespass.

(2) Secondly, that it is undesirable to use a description such as intending to trespass, because that depends on the subjective intention of the individual which is not necessarily known to the outside world, and in particular the claimant, and is susceptible of change.

From English case law on the subject of injunctions at paragraph 31 Smith J derived the following propositions:

(1) A distinction is drawn between final mandatory and final prohibitory *quia timet* injunctions. Because the former oblige the defendant to do something, whilst the latter merely oblige the defendant not to interfere with the claimant's rights, it is harder to persuade a court to grant a mandatory than a prohibitory injunction. That said, the approach to the granting of a *quia timet* injunction, whether mandatory or prohibitory, is essentially the same.

(2) *Quia timet* injunctions are granted where the breach of a claimant's rights is threatened, but where (for some reason) the claimant's cause of action is not complete. This may be for a number of reasons. The threatened wrong may, as here, be entirely anticipatory. On the other hand, as in *Hopper v. Rogers* [1975] 1 Ch 43, the cause of action may be substantially complete. In *Hopper v. Rogers*, an act constituting nuisance or an unlawful interference with the claimant's land had been committed, but damage not yet sustained by the claimant but was only in prospect for the future.

(3) When considering whether to grant a *quia timet* injunction, the court follows a two-stage test:

(a) First, is there a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights?

(b) Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of actual infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?

(4) There will be multiple factors relevant to an assessment of each of these two stages, and there is some overlap between what is material to each. Beginning with the first stage the strong possibility that there will be an infringement of the claimant's rights and without seeking to be comprehensive, the following factors are relevant:

(a) If the anticipated infringement of the claimant's rights is entirely anticipatory – as here – it will be relevant to ask what other steps the claimant might take to ensure that the infringement does not occur. Here, for example, Vastint has taken considerable steps to prevent trespass; and yet, still, the threat exists.

(b) The attitude of the defendant or anticipated defendant in the case of an anticipated infringement is significant. As Spry notes one of the most important indications of the defendant's intentions is ordinarily found in his own statements and actions.

(c) Of course, where acts that may lead to an infringement have already been committed, it may be that the defendant's intentions are less significant than the natural and probable consequences of his or her act.

(d) The time-frame between the application for relief and the threatened infringement may be relevant. The courts often use the language of imminence, meaning that the remedy sought must not be premature.

(5) Turning to the second stage, it is necessary to ask the counterfactual question: assuming no *quia timet* injunction, but an infringement of the claimant's rights, how effective will a more-or-less immediate interim injunction plus damages in due course be as a remedy for that infringement?

Essentially, the question is how easily the harm of the infringement can be undone by an *ex post* rather than an *ex ante* intervention, but the following other factors are material:

(a) The gravity of the anticipated harm. It seems to me that if the some of the consequences of an infringement are potentially very serious and incapable of *ex post* remedy, albeit only one of many types of harm capable of occurring, the seriousness of these irremediable harms is a factor that must be borne in mind.

(b) The distinction between mandatory and prohibitory injunctions.

**Held:** Mr. Justice Marcus Smith found that the claimant could apply for a final injunction against "persons unknown" where no one was actually party to the proceedings until an act of infringement occurred. Similarly, the claimant was held to have correctly followed previous guidance in not referring to "trespassers", nor subjectively assuming the defendants' intentions in the wording of the proposed order.

In discussing the granting of the injunction, the court employed the well-known two-stage test:

1. Was there a strong probability that the anticipated defendant would act in breach of the claimant's rights unless restrained?

2. Would the harm caused by such a breach be so grave that damages would be an inadequate remedy?

The first stage was satisfied in relation to the caravans as, despite the claimant's use of preventative steps to secure the site, there had previously been actual entry. The evidence of other sites owned by a sister company being used by rave organisers, coupled with the fact the site in question was an attractive spot for ravers, was enough to satisfy the probability of a future breach in relation to illegal raves. However, the limited evidence in relation to fly-tipping elsewhere did not amount to a substantial risk of infringement on the claimant's site. Therefore, only the caravans and ravers could be restrained under stage one of the test. In relation to the second stage, the court held that there were serious health and safety risks to the life and limb of trespassers, staff and contractors. Moreover, whilst the significant costs incurred for removing trespassers is eligible for compensation in theory, the court held that, in reality, such costs were unlikely to be recovered and damages would be an inadequate remedy.

Finally, the High Court held that the claimant's wording of the order extended to any person entering the site without its written consent and was, therefore, not workable in practice. As a result, the draft order needed to be explicitly confined to the two classes of unknown defendants, which satisfied the first arm of the usual test, and the order's proposed recital "carving out" application to emergency services should be removed. The High Court refused to grant the final injunction in its current form and instead only extended interim relief on this basis.

**Barra McCabe BL**

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***North Midland Building Limited v Cyden Homes Limited* [2018] EWCA Civ 1744 (Court of Appeal, Sir Terence Etherton, Sir Ernest Ryder and Coulson LJ, 30 July 2018)**

*Concurrent delay – extension of time – liquidated damages -- the prevention principle – allocation of risk in the contract – freedom to agree such terms as the parties see fit to agree.*

The judgment in this appeal from the TCC to the Court of Appeal usefully deals with a number of issues which frequently arise. The principle issue concerns the validity of a clause in a building contract which provided that where there was a delay caused by an event for which the contractor was responsible, and that delay was concurrent with a delay for which the employer was responsible, such concurrent delay would not be taken into account when calculating any extension of time to the contract completion date.

**Facts:** The contract in this case incorporated the JCT Design and Build 2005 Standard Terms and Conditions. Clause 2.25.1 set out what the employer was to do if it received a notice from the contractor that the works were going to be delayed. To properly understand the decision, it helps to set it out the relevant clause verbatim, and to bear in mind that 2.25.1.3 was a bespoke amendment.

"2.25.1 If on receiving a notice and particulars under clause 2.24:

*1. any of the events which are stated to be a cause of delay is a Relevant Event (i.e. a delay event which would require the employer to grant an extension of time); and*

*2. completion of the works or any section has been or is likely to be delayed thereby beyond the relevant completion date; and*

*3. provided that*

*the contractor has made reasonable and proper efforts to mitigate such delay; and*

*any delay caused by a Relevant Event which is concurrent with another delay for which the contractor is responsible shall not be taken into account (bespoke amendment)*

*then, save where these conditions expressly provide otherwise, the employer shall give an extension of time …… ."*

The works were delayed, and a dispute arose between the parties as to the proper extension of time due to the contractor.

**Held:** At section 3 of his judgment, Coulson LJ helpfully deals with the history of the development of the legal principles relating to the prevention principle, extensions of time and liquidated damages clauses where at least part of a delay was caused by the employer.

At [16], [17] and [18] he refers to the issue of concurrent delay and the prevention principle and to a number of decisions in which opposing judicial views have been taken of seemingly similar issues. He points out that these authorities are relevant as regards the possibility that a contractor may be entitled to an extension of time for the whole period of concurrent delay, (even where the work could not have been completed any earlier than it actually was because of the contractor's default), which has led employers to introduce the sort of bespoke amendment which features in this case.

At section 4 he deals with the judgment of the TCC.

At paragraph [18] Fraser J held that the amendment at 2.25.1.3.(b) was "crystal clear". The parties agreed that if the

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contractor was responsible for a delaying event which caused delay at the same time as, or during, that caused by a Relevant Event, then the delay caused by the Relevant Event would not be taken into account when assessing the extension of time. It was a clear agreement …….", and at [19] Fraser J stated that "the parties are free to agree whatever terms they wish to agree, with the obvious exceptions such as illegality".

At section 5, as regards how the relevant clause was to be interpreted, Coulson LJ states that the clause was unambiguous and crystal clear. It plainly sought to allocate the risk of concurrent delay to the contractor. The consequences of the clear provision were that the parties had agreed that where a delay was due to the contractor, even if there was an equally effective cause of that delay which was the responsibility of the employer, liability for the concurrent delay rested with the contractor, so that it would not be taken into account in the calculation of any extension of time.

At [24], in relation to the issue as to whether there was anything which might render that clause ineffective, he states that the only circumstances in which this might happen would be if the contractor could identify either another term in the contract, or some overarching principle of law or legal policy, which would render the clause inoperable.

No express terms of the contract were identified which assisted the contractor in that regard, nor was there any implied term which might assist it.

The prevention principle is basically to the effect that a party cannot insist on the performance of a contractual obligation by the other if it is itself the cause of the non-performance.

In this case the contractor submitted that the prevention principle was a matter of legal policy which operated to rescue it from the effect of clause 2.25.1.3(b) which Coulson LJ quite pointedly states "it had freely agreed".

Coulson LJ rejected that submission for five reasons which he sets out at paragraphs 30 to 38 of the judgement, stating at paragraph 36 "*the final reason ……. perhaps the most important of all ……. Clause 2.25.1.3(b) was an agreed term. There is no suggestion in the authorities noted above that the parties cannot contract out of some or all of the effects of the prevention principle; indeed, the contrary is plain*". The parties could have drafted an extension of time provision which would have operated in the contractor's favour but had not.

At [38] he makes some general observations which can usefully be retained in mind. A building contract is a detailed allocation of risk and reward. If the parties do not stipulate in the contract that a particular event of prevention triggers an entitlement to an extension of time there will be no implied term to assist the employer, and the application of the prevention principle would mean that on the happening of that event time was set at large. But it is a completely different thing if the parties negotiate and agree an express provision which states that on the happening of a particular type of prevention the risk and responsibility rests with the contractor.

As regards liquidated damages, Coulson LJ states at [44] to [47] that extension of time provisions are inextricably linked to those relating to such damages.

The primary purpose of an EOT provision is to give the contractor relief against the levying of liquidated damages for delays which are not his responsibility under the contract. Given that close linkage, if there is a right to an EOT the ability to levy liquidated damages only operates in respect of any delay after the extended date. If the right to an EOT is expressly negated in the contract there is no reason why liquidated damages should not apply to the delay beyond the contractual completion date.

**John McDonagh SC**

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