

# Quantex Quarterly

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## Determined...to pay, or not to pay?

Every good school boy knows that the Housing Grants Construction and Regeneration Act 1996 came into force on 1 May 1998. Well, almost on its 9th birthday, "the Act" had a first outing to the House of Lords, in **Melville Dundas Ltd v George Wimpey UK Ltd**.

Melville Dundas (the Contractor) was employed by Wimpey on a Scottish housing development. The 16 May 2003 was the final date for payment for an interim payment of around £400,000, no withholding notice was served. The payment didn't arrive, and on 22 May the Contractor was forced to call in administrative receivers. Wimpey determined Melville Dundas' employment on 30 May and refused to pay the outstanding interim payment in accordance with the insolvency provision in the contract.

Insolvency provisions are common-place in standard forms of construction contract and generally provide that sums that become due and are payable under the Act are not payable if the contractor has gone into receivership, thus allowing the employer opportunity to set off his losses arising from the insolvency against any sums otherwise due.

The administrator (acting for the Contractor) argued that the insolvency clause was contrary to Section 111 of the Act as any amount that has become due can only be withheld if a valid withholding notice has been served. The employer argued that it had only found out about the contractor's pre-

**Jason Tudor reports on the big fight at the House of Lords. In the blue corner is the HGCRA "Cashflow King" Act 1996, and in the red is where you find the insolvent contractor...**

carious financial position after the time for serving the withholding notice had expired.

In court, the decision went for the employer, with the judge holding that Section 111 was no longer applicable once the contract had been properly determined. The Act was predominantly concerned with cash flow during an on-going contract.

### Appeal

The Scottish appeal court overturned the decision, holding:

- The Act must apply as it was only the contractor's employment which had come to an end and not the contract itself;
- The insolvency provision in the contract only allowed the employer to withhold sums which were otherwise due for payment, provided s109 and s111 of the Act were complied with.

The employer took the case to the House of Lords, where it was unanimously decided that the purpose of the clause was to limit the employer's duty to make further payment, whether accrued or not. In a split decision, the Lords also held that it had been impossible for the employer to comply with serving a withholding notice within the statutory time-

frame, as no grounds for such action existed at that time. They felt that it could not have been Parliament's intention to use the Act to outlaw insolvency provisions, so there was no alternative but to hold that the Act could not apply in this particular instance.

### Time to Act?

Does this decision undermine the Construction Act? There are some that think it does, arguing that withholding in fear of the other party going bust removes a valuable lifeline for the struggling company. After all, the Act is all about improving and maintaining cash flow, right?

Others say that there's no hope of recovering monies paid to an insolvent party and that the payer will be left with an even more expensive job to complete. Surely the Act should give the (non) payer some protection?

The DTi published its 2nd Consultation Paper on proposed amendments to the Act, on 20 June 2007, and this judgement is considered. The consultation asks respondents to consider whether s111 should apply for all payments, with an express exception for when the payee is insolvent "or leave this exception to be decided by the courts".

The timing of the insolvency and the individual circumstances of each case may be crucial, so perhaps the court's discretion is to be preferred.

If anything is certain, it is that we are still not certain!

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## Quantex Consulting - For a Life in the Fast Lane...

Those that know us will be aware of our passion for motorsport. We hold a suite at Donington Park and you will often find directors, staff, clients and guests enjoying either the motorcycle or car racing at the weekend. However, the pinnacle for most bike enthusiasts are the Isle Of Man TT Races, and Quantex Consulting was there for the Centenary celebrations.

Of primary interest was the "blue riband" event, the Senior TT on Friday 8 June 2007, with high expectations that star rider and TT legend John McGuinness, riding a Honda Fireblade and sporting Quantex Consulting's logo, would become the first man to break the magic 130mph average lap speed barrier.



Record breaker John McGuinness celebrating with Quantex Consulting Directors Zach Law and Tony Brayford

John smashed his own existing record on his first lap from a standing start, clocking an average of 129.883mph. But then on lap 4, and despite slowing down to pit at the end of the lap, he achieved an incredible average of 130.354mph, before going on to win the race comfortably by over 32 seconds.

Quantex Executive Directors Zach Law and Tony Brayford were only too keen to share the victory champagne with John during the celebrations that followed!

Congratulations to John, and to the HM Plant Honda Team, from all at Quantex. We are very proud to have been associated with this moment of motorsport history.

# What is “Time at Large” and is it Useful?

## Regional Director David Simons considers the pros and cons of “Time At Large” claims

It is not uncommon for delay and disruption claims from contractors and subcontractors to be accompanied by an argument that “time is at large”. The argument suggests that due to an event and/or some defect in the contract, there is no completion date; it is aimed at relieving the claimant from a calculated liability for delays and associated counterclaims, including liquidated damages.

The general rule from the old case of *Holme -v- Guppy* [1838] is that an employer cannot hold a contractor to an agreed contract completion date, if the employer has by an act or omission, prevented the contractor from completing by that date. Unless the contract contains a mechanism for recognising the delay consequences of the act of prevention by extending the completion date, time becomes at large and the date is replaced by an implied obligation to complete within a reasonable time. The rule applies to main contracts and sub-contracts, but to avoid confusion, I will refer to main contracting parties only.

Time at large arguments are usually based upon the following situations:

1. There is no completion date. This could arise because there is no contract, or there is no agreement as to the time for performance in the contract.
2. The contract contains an appropriate mechanism to extend the completion date, but the power to extend time has been wrongly exercised; (e.g. see *Rapid Building Group Ltd -v- Ealing Family Housing Association Ltd* [1984] 29 BLR 10).
3. The contract contains a mechanism to extend the completion date, but the provision does not cater for the act of prevention that has delayed completion; (see *Peak Construction (Liverpool) Ltd -v- McKinney Foundations Ltd* [1970] 1 BLR 111).
4. The extension of time provision is dependant for its operation upon a notice or some other specified action on the part of the contractor, the absence of which prevents execution of the power to extend time; (e.g. see the Australian case of *Gaymark Investments Pty Ltd -v- Walter Construction Group Ltd* [1999] 16 BCL 449).

### A Reasonable Time

Where the parties do not address the time for completion in an (otherwise) valid agreement as (1) above, an implied obligation to complete within a reasonable time clearly applies, in accordance with Section 14 of the Supply of Goods and Services Act 1982. However, these occurrences are unusual. What is a reasonable time depends upon the facts and circumstances in each case; it can be very difficult to prove compliance where the parties did not have comparable perceptions of the time for performance.

Considering (2) above, there has been a statutory right to refer disputes under construction contracts to adjudication since 1998 and dispute resolution tribunals are empowered to open-up, review and revise extension of time (“EOT”) decisions under most standard forms. Unless the agreement (unusually) provides that EOT decisions are final and conclusive, situation (2) will not normally result in a time at large situation.

There is a common misconception that where the contract administrator (“CA”) under JCT contracts fails to deal with a final review of EOT within the stipulated period after practical completion, then time is set ‘at large’. The courts have ruled that these review periods, (e.g. 12 weeks in Clause 25.3.3 of JCT SF’98) are ‘directory only’ and do not prevent the CA from making further EOT decisions prior to issuing the final certificate. This was confirmed in *Temloc -v- Errill Properties* [1988] 39 BLR 30.

Situation (3) is always a ‘time at large’ risk where the parties

opt for poorly drafted bespoke terms (as in *Peak -v- McKinney*) instead of relying upon a standard form. Most standard EOT clauses now completely cater for all delaying events arising from employer acts of prevention. In this context it is notable that in 2002, a further ‘catch all’ Relevant Event to cover “any impediment, prevention or default” on the part of the Employer, was added to JCT SF’98 as Clause 25.4.19 and EOT clauses in current JCT 2005 contracts are equally comprehensive.

Unfortunately however, custom amendments to standard EOT clauses are not uncommon and typically, delaying events are deleted in the belief that delay risk is thereby transferred to the contractor. Whilst this tactic might work for ‘neutral’ events such as adverse weather conditions and strikes, deletion of events covering employer acts of prevention will clearly result in a time at large situation, if a deleted event occurs in practice. An EOT provision is fundamentally intended to preserve the completion date and not to address contractors’ claims; Quantex does not therefore recommend the editing of standard EOT clauses, save where the standard form permits a choice of options.

In reviewing situation (4), it is clearly desirable for the contractor to give timely delay notices, particularly where progress is affected by variations. Where variations are permitted by the contract they are not employer’s breaches *per se*, but may nonetheless prevent completion by the agreed date. Thus an early notice from the contractor can assist delay avoidance or mitigation, where the variation instruction can be withdrawn or modified.

### Notices

A difficulty arises however, where the contract requires a delay notice from the contractor as a *condition precedent* to the operation of the EOT clause. In *Gaymark*, an Australian court decided that the prevention principle applied, barring the recovery of liquidated damages where the employer had contributed to delays and the contractor had failed to give the delay notices required to ‘trigger’ an EOT award. The difficulty here is that the decision encourages a contractor to deliberately ignore the notice requirements, thereby preventing any counterclaim for liquidated damages and benefiting from his own breach. The contractor could at his option, set time at large and the correctness of the *Gaymark* decision has therefore been a matter of some debate.

In the recent T.C.C. case of *Multiplex Constructions (UK) Ltd -v- Honeywell Control Systems Ltd* [2007], Mr Justice Jackson decided that a failure by the Defendant to comply with strict requirements for notices and other operational requirements as a pre-condition, did not set time at large: “...If the facts are that it was possible to comply with [the requirements] but Honeywell simply failed to do so (whether or not deliberately), then those facts do not set time at large...”. It is notable that the subcontract in this case retained a post-completion EOT review clause derived from standard form DOM/2.

From this brief analysis, it can be seen that for a great majority of present-day construction contracts, completion dates are not easily set aside. Where a time at large situation does occur, the consequences may be only superficially attractive because the contractor, having avoided a claim for liquidated damages, must then prove his actual construction duration as ‘reasonable’, which could be a difficult task. He might still face a claim from the employer in un-liquidated damages.

In conclusion, time in construction contracts may be set ‘at large’ in the circumstances described above but this can also result in uncertain and unhelpful consequences.

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