Time for Completion in Construction Contracts

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1. Overview

"Time is Money[1]" is an immemorial adage used to indicate that time is a very valuable commodity. Therefore, to be successful and competitive in any business venture, time needs to be managed efficiently. Construction, being a business very complex in nature and which employs multifarious trades and disciplines, requires more stringent time management techniques than other businesses to ensure that construction projects are completed within their prescribed times for completion.

In construction contracts, it is the contractor's obligation to 'complete' the works specified in the contract by the date for completion stated therein. Failure to comply with this obligation amounts to a breach of a condition or a warranty depending upon the construction of such terms[2]. If the obligation is a condition the innocent party can repudiate the contract[3]. Otherwise, that party has a remedy in damages — liquidated if so specified in the contract, or un-liquidated[4]. Therefore, it is important to investigate the precise meaning of 'completion'.

2. Meaning of Completion

Construction contracts, by their construction, can be divided into two categories:

- Entire contracts (frequently referred to as lump sum contracts), and
- Severable contracts[5].

The term 'completion' as used in construction contracts can have different meanings depending on to which category a particular contract falls and the judicial interpretation thereof.

As a general rule, in an entire (lump sum) contract, complete fulfilment of obligations of a party to a contract is a condition precedent to the other party exercising its obligations under the contract[6]. This means that failure by one party to complete its obligations entirely under the contract creates justifiable grounds for the other party to rescind the contract[7]. Further, it also means that failure to comply with the terms and conditions of the contract, despite the obligations under the contract being fully completed, but not in full compliance with the requirements of the contract, the defaulting party can recover nothing[8]. Thus, 'completion' under entire contracts implies 'absolute completion' of the obligations of the parties.

The harshness of this concept can be illustrated by the case of *Cutter v Powell*[9], where the widow of the deceased seaman was refused even part of the agreed payment, which was agreed to be paid ten days after the arrival at the port of destination, as the seaman could not complete the voyage.

From the judgements delivered by the courts on disputes as to the meaning of the term 'completion' in construction contracts, it can be seen that the courts have adopted a similar approach in interpreting the meaning of 'completion' under an entire contract.

In Appleby and *Another v Myers*[10], the plaintiff who agreed to erect machinery on the defendant's premises under an entire contract could not complete the works as the portion of the completed works together with the building was destroyed by an accidental fire. The court held that the plaintiff was not entitled to recover payment for the portion of the completed works. While delivering the judgment in Appleby Blackburn J said[11]:

> *"[t]here is nothing to render it either illegal or absurd in the workman to agree to complete the whole, and to be paid when the whole is complete, and not until then..."*

Further, in *Sumpter v Hedges*[12], where the plaintiff was contracted to construct a building under an entire contract, apart from the cost of materials left on site which had been used by the defendant to complete the works, the plaintiff could not recover any money from the defendant for the part of the works completed, either on proportional basis or on quantum meruit in the absence of any evidence of a "new contract" to pay such a sum, as the plaintiff abandoned the contract without completing it due to lack of funds.

Similar judgements have been delivered in the following old and contemporary cases akin to meaning of 'completion' under entire contracts:

- *Ellis v Hamlen*[13]
- *Jackson v Eastbourne Local Board* [14]
- *Lucas v Drummoyne Borough*[15]
- *Edward and Webster v Coley*[16]
- *Ibmac Ltd v Marshall (Homes) Ltd* [17]
- *Update Construction Pty Ltd v Rozelle Child Care Centre Ltd* [18]
- *Semour Segnit v Christopher Cotton*[19]
- *Morse Group Ltd v Cogniesis Ltd* [20]
- *Safe Safe Homes Ltd v Massingham*[21]

It is evident from the judgements of many of the above cases that the 'entire performance' rule conferred the owner an undeserved benefit at the expense of the contractor. The inequity of this system led to the emergence of the doctrine of 'substantial performance[23]. The inception of this doctrine is usually credited to the judgement promulgated in *Dakin & Co. v Lee*[24], albeit the courts have evolved this doctrine much earlier than Dakin[24].

Under this doctrine a contractor who achieves 'substantial completion' of its obligations under a contract — in contrast to 'absolute completion' — is eligible for payment. Some of the many cases in which this doctrine had been upheld in their judgements are as follows:

- *Cutler v Close*[25]
- *H Dakin & Co Ltd v Lee*[26]
- *Jacob and Banners v Kent*[27]
- *Hoenig v Isaacs*[28]
- *Kiely & Sons Ltd v Medcraft*[29]

The Law Commission — paragraph 2-11 of 19th Annual Report (1983-1984) — of England and Wales has recommended the removal of the 'entire performance' rule from contracts, subject to certain limitations, preferring that the party in breach of the contract should be entitled to the value of the works it has completed, up to the occurrence of the breach, if such completed works have bestowed a benefit to the other party[30].

Most of the present day construction contracts have adopted the 'substantial performance' doctrine instead of 'entire performance' rule by allowing owners to accept or take-over the works once they have achieved 'practical completion' or 'substantial completion' — terms used in JCT forms of contracts and ICE and FIDIC forms of contracts respectively.

Further, provision made in present day construction contracts for 'interim payments' to be paid to contractors as works progress, has alleviated cash flow problems akin to entire contracts. In the United Kingdom, legal assent to such interim payments is conferred by sections 109 and 110 of the Housing Grants, Construction and Regeneration Act[31], provided that the agreement is in writing.

Under UAE law, Article 247 of the Civil Code[32] provides for the performance of contracting parties' obligations. The Article stipulates:

> *In contracts binding upon both parties, if the mutual obligations are due for performance, each of the party may refuse to perform his obligation if the other contracting party does not perform that which he is obliged to do.*

Thus, if a contracting party does not perform its obligations under a contract, the other party **may** [emphasis added] refuse to perform its obligations under the contract. Although the provisions of this article, prima facie, indicate that the Civil Code[33] promulgates entire contracts, the word 'may' used in the wording makes such refusal an option. Further, Articles 258 and 265 of the Civil Code[34] provide that the intention of the parties is the main criterion when interpreting the wording of any contract and clauses thereof. As the bespoke forms

of contract used in Dubai provide for 'substantial completion' of the works, it is highly unlikely that the term 'completion' would be interpreted by the courts in the UAE in any other way than to mean 'substantial completion'.

The above proposition can be supported by the decision given by the Federal Supreme Court (Court of Cassation) of Abu Dhabi in a case[35] related to partial completion of a contract. There, the court held that if the contractor did not complete all the agreed work and only completed part of it, it should be entitled to payment in proportion to the work it had completed and the value of essential work required for the contract work. This means that, even if the contractor has not achieved 'substantial completion' of the works, it is entitled for payment provided the employer is benefited from the completed portion of the works.

In a typical construction contract, the term 'completion' may be used in at least four separate senses[36].

The first is 'practical' or 'substantial' completion. The second, which may be called 'works' completion, occurs when all the actual physical work has been finished; this may or may not coincide with 'practical' or 'substantial' completion. The third is 'defects' completion, which is achieved when all defects appearing during the Defects Liability Period have been made good. The fourth is 'legal' completion, which occurs when the contractor has provided all information necessary for the preparation of the final account and the employer has made his final payment, so that in legal sense the contract has been 'performed' on both sides[37].

Even though, the meaning of 'completion' akin to latter three scenarios can be comprehended, the meaning of 'practical' or 'substantial' completion is not apparent.

Although there is no judicial interpretation of the term 'completion' promulgated by the UAE courts, such term has been judicially interpreted in several occasions by the courts in the United Kingdom. From the interpretations given by the courts for 'practical completion', in the context of JCT standard form contracts, it is clear that once all the necessary construction works specified in the contract are performed the works can be considered to be 'practically completed' for the purposes of such provisions in the JCT form[38]. *In Westminster City Council v J Jarvis & Sons Ltd*[39], *Viscount* Dilhorne said:

> *"... a practical completion certificate can be issued when owing to latent defects, the works do not fulfil the contract requirements and that under the contract works can be completed despite the presence of such defects. Completion under the contract is not postponed until defects which became apparent only after the work had been finished have been remedied."*

Conversely, in *H W Neville (Sunblast) Ltd v William Press & Sons Ltd*[40], it was held that, if it was apparent that defects exist in the works, practical completion could not be said to have occurred unless those defects were so trifling as to be classified as 'de minimus'.

A more convincing analysis of the term 'practical completion' is given in Keating on Construction Contracts[41]:

Practical Completion is perhaps easier to recognise than to define … It is submitted that the following is the correct analysis:

(a) the Works can be practically complete notwithstanding that there are latent defects;
(b) a Certificate of Practical Completion may not be issued if there are patent defects. The Defects Liability Period is provided in order to enable defects not apparent at the date of Practical Completion to be remedied;
(c) Practical Completion means the completion of all the construction work that has to be done; and
(d) However, the Architect is given a discretion to certify Practical Completion where there are very minor items of work left incomplete, on "de minimis" principles.

The absence of a definition for 'substantial completion' is a conspicuous omission from the FIDIC Red Book[42], on which all of the bespoke forms[43] considered in this paper are modelled. It is opined that 'substantial completion' is generally taken to refer to a state of the works which would allow the employer to take beneficial use of such works[44].

Reference to 'substantial completion' is made in clauses 48.1 – Taking-Over Certificate, 48.2 – Taking-Over of Sections or Parts, 48.3 – Substantial Completion of Parts, and 49.1 – Defects Liability Period of the FIDIC Red Book and all of the bespoke forms.

Clauses 48.1 and 48.2 provide that when the whole of the Works, or sections or parts of the Works (if sectional or partial completions are allowed) are substantially completed the contractor has to notify the engineer of such completion with a written undertaking to finish any outstanding works during the defects liability period and request the engineer to issue a taking-over certificate thereof. Within 21[45] days of receiving such notification from the contractor, the engineer must, either issue a taking-over certificate for such works stating the date on which such works, in its opinion, are substantially completed to its satisfaction including passing of all the prescribed tests, or instruct the contractor specifying all the work, which in the engineer's opinion, is required to be completed before the issue of a taking-over certificate.

From the above provisions, it is evident that the state of 'substantial completion' of the works is solely a matter of interpretation of that state by the engineer by observing the state of the works and applying its professional judgment thereof[46]. It is important to note that as per the above provisions, it is mandatory for the engineer to arrive at its decision as to the state of the works and issue a certificate or notification to the contractor within the prescribed period. Failure to comply with that provision would amount to a breach of a warranty by the employer which may lead to claiming damages therefore by the contractor.

Out of the bespoke forms, DCA Standard Conditions of Contract[47] provides a definition for 'substantial completion'. In this form the term 'substantial completion' is defined as:

the stage when the Works are completed as evidenced by:

i. there not being any legal impediment (for which the Contractor is responsible) to the Employer's use or occupation of the Works and there are no defects or outstanding work or any matter which could prevent the Works from being used for their intended purpose;
ii. all tests required to be obtained by the Contractor in accordance with the Contract have been carried out and passed to the satisfaction of the Engineer;
iii. all documents and information required from the Contractor for the use, occupation and maintenance of the Works and as stated in the Contract, having been supplied to the Employer;
iv. all warranties, guarantees and service agreements required by the Contractor having been complied with, supplied and assigned to the Employer by the Contractor;
v. all services or facilities having been certified by the Engineer as having been correctly installed and/or having performed to specification; and
vi. the Works and Site being clean, free from refuse and rubbish.

From the wording of the above definition, it is arguable that the legal interpretation of the term 'substantial completion' as promulgated by the case authorities discussed above can be construed. The wording "... there are no defects or outstanding work or any matter which could prevent the Works from being used for their intended purpose" in paragraph i above, implies 'absolute completion' rather than 'substantial completion'. Further, paragraphs ii and v of this definition are redundant in the light of the provision for testing made in clause 48 and the wording of paragraph i, whereby the contractor is required to complete the works, which include the services referred to in paragraph v.

The meaning emanating from the above definition can be distinguished with the meaning ascribed to 'practical completion' — equivalent term for 'substantial completion' used in JCT forms — by clause 2.30 in JCT 2005[48]. Accordingly the 'practical completion' is said to have occurred when:

- in the opinion of the architect/contract administrator, practical completion — albeit, the term 'practical completion' is not defined — of the works is achieved;
- the contractor has complied sufficiently with clause 2.40 (supply of As-build drawings);
- the contractor has complied sufficiently with clause 3.25.3 (health and safety file).

From the above it can be seen that sufficient compliance with the above provisions of the contract by the contractor and architect's / contract administrator's unhindered opinion on the state of the works are the sole requirements necessary to issue a practical completion certificate.

The provisions of bespoke forms require the engineer or, in the case of Nakheel forms, the employer's representative

to consult the employer before issuing a taking-over certificate or a notification. Hence, it is clear that the employer's perception as to the state of the works will directly influence the interpretation of the engineer of such state. Further, apart from the DCA form of contract, all the other forms, by provisions of clause 2.1, have made it mandatory for the engineer to obtain specific approval of the employer to issue a taking-over certificate.

In the author's experience, such provisions in the bespoke forms have burdened the engineer's interpretation of 'substantial completion' and many a time delays have occurred in notifying the contractor of the engineer's opinion due to the time taken by the employer in granting approval for the engineer's requests.

Adverting to severable contracts, a severable contract is defined as a contract comprising two or more separately enforceable promises[49], which relieves the promisor of breach of the entire contract if it fails to complete any one of the promises . In some of the major building and engineering contracts provisions are made to complete the works in stages with payment made for each completed stage. Such a contract can be interpreted as a severable contract as the contractor is paid for each stage completed irrespective of whether the whole of the works is completed. An analogy for such an arrangement can be found in the case *Collin Bay Rafting and Forwarding Co v New York and Ottawa Railway Co*[50] . In this case the plaintiff was contracted to remove two spans from a wrecked bridge over a river for a contract price of $25,000 with a contractual arrangement of payment of $5,000 upon removal of one span, a further $5,000 upon it was placed ashore and the balance on completion. Only one span was removed and placed ashore by the plaintiff. The court held that the plaintiff could recover its entitlement of $10,000 for the completed stages from the defendant.

3. Completion within a Specified Time

Invariably, all modern construction contracts have a time for completion of the obligations of the parties and all the standard form contracts (JCT, ICE, NEC, FIDIC etc.) provide for the works to be completed within a prescribed time. Similarly, all bespoke forms of contract (DM, RTA, DP, and Nakheel forms) considered herein have such provision. Clause 43.1 – Time for Completion, stipulates that the whole of the Works or any part or section thereof, as the case may be, should be completed within the period stated in the Appendix to Tender subject to other provisions contain therein. Failure to complete the Works by the Time for Completion due to its own faults, the contractor would be liable to pay liquidated damages as per the stipulations of clause 47.1 – Liquidated Damages for Delay. In all of the bespoke forms, clause 47.1 is referred to as Penalty for Delay in line with the terminology used in the UAE Civil Code[51].

FIDIC Red book Clause 14.1 – Programme to be Submitted, provides for the contractor to submit a programme for the execution of the Works(rephrase/ repetition and unclear) — depicting the sequence, arrangements, and methods the contractor proposes to adopt — for the engineer's consent within the time specified in Part II conditions. Usually this programme is produced using an approved software package[52], which supports CPM analysis and it will be in a form and will contain such details as prescribed by the engineer.

Even though there is no explicit provision in FIDIC Red Book or in the bespoke forms that the contractor should proceed with the works as per the consented program, the obligations to proceed with the works with 'due care and diligence' (clause 8.1) and 'due expedition and without any delay' (clause 41.1) require the contractor to follow a properly formulated sequence as depicted in the consented programme in executing the works. This fact is corroborated in *West Faulkner Associates v London Borough of Newham*[53], where the court held, among other things, that the contractor had to "… progress the works steadily towards completing substantially in accordance with the contractual requirements as to time, sequence, and quality of works". A properly formulated programme is an invaluable tool to monitor the progress of the works and to evaluate delays to time for completion.

Clause 8.1 of all bespoke forms, inter alia, provides that:

> *The Contractor shall, with due care and diligence, ….., execute and complete the Works …. therein in accordance with the Contract …..*

Further, clause 41.1 provides that:

> *The Employer shall fix the date by which the Contractor is to commence execution of the Works on Site ……. Thereafter, the Contractor shall proceed with the Works with due expedition and without delay.*

It is clear from the above stipulations of the bespoke contracts that the contractor has two important responsibilities to carry out apart from completing the works within the time for completion. Accordingly the contractor is required to:

1. execute the Works diligently as per the contract — This means that the contractor has to carry out the works in a meticulous manner, thoroughly in accordance with the contract using specified material and adhering to specified execution procedures. Failure to comply with such requirements may render the completed works not substantially completed and the contractor may not be able to recover its entitlement. An analogy can be drawn from *Bolton v Mahadeva*[54], where, despite completing installation of the central heating system the plaintiff could not recover its entitlement as the appeal court held that the contract was not substantially performed due to major defects in the completed system.

2. proceed with the Works with due expedition and without any delay — Under this provision, the contractor is required to proceed with the works expeditiously mitigating any delay. Therefore, the contractor does not have any grounds to slow down the works anticipating catching up with the delayed work later. As reasoned earlier the contractor has to adhere to the consented programme of works to achieve such requirements. Clause 46.1 – Rate of Progress, provides for the engineer to notify the contractor if the rate of progress is too slow, in the engineer's opinion, to comply with the Time for Completion. Provisions are made in the bespoke forms[55] empowering the employer to terminate the contract when it is inevitable that the time for completion would be delayed due to the contractor's failure to proceed with the works expeditiously and diligently despite receiving notice for slow rate of progress from the employer. Such provisions override the common law inference that the contractor is entitled to proceed with the works at its own pace, provided the time fixed for completion in the contractor is met. This proposition was discussed in *West Faulkner*[56], where the court had to decide whether the contractor was required to 'proceed regularly and diligently' as per the terms of the contract. The court affirmed that the contractor was required to proceed so. In contrast, if such provision is not an expressed term of the contract, the contractor is required to complete the works within the time for completion at its own pace. The question of whether the term 'due diligence and expedition' could be implied into a contract, when it was not a requirement therein, was considered in *Greater London Council v Cleveland Bridge and Engineering Co Ltd* [57] . The court at first instance held that in the absence of expressed term in the contract, the contractor had the right to plan and execute the works as he/she wished, provided he/she finished the works by the time fixed in the contract.

The stipulations of Article 874 of the Civil Code[58] of the UAE make it mandatory to provide the particulars of the time for completion for a "muqawala" contract — "contract to make a thing or to perform a task"[59] . This Article, inter alia, states:

> *In a muqawala contract ... particulars must be given of ... the period over which it is to be performed ...*

Although the provisions of Article 874 do not provide explicitly for submission of a programme of works as stipulated in clause 14.1 or to adjust the completion period explicitly as in clause 43.1 — where it allows adjusting the time for completion with extensions thereof granted under clause 44 — or to proceed with the works 'diligently with due expedition and without delay', it can be said that such additional provisions will be implied into the provisions of Article 874 as the word 'particulars' therein is broad enough to encompass such provisions, as Article 877 provides that the contractor must complete the work in accordance with the conditions of the contract, and as the provisions of Articles 258 and 265 grant priority to the intention of the parties when interpreting the contract.

The issue of a taking-over certificate for the works triggers the following provisions of the contract, which relieve the contractor from some of its obligations:

On the date of issue of the taking-over certificate;

- care of the Works (clause 20.1) passes on to the employer,
- responsibility for insurance of the Works (clause 21.1) passes on to the employer,
- the contractor can remove the construction equipment from the site (clause 33.1), and

- the contractor is entitled to the first moiety of retention (clause 60.3).

On the 'substantial completion' date stated in the taking-over certificate;

- the contractor is relived from the imposition of liquidated damages/penalties for delay (clause 47.1), and
- the Defects Liability Period (clause 49.1) starts.

Therefore, the employer is required to arrange the necessary insurance to cover the completed works as the responsibility for care of the works passes on to the employer once the works are taken over by him/her.

According to the provisions of FIDIC Red Book and all of the bespoke forms, a contract cannot be treated as completed until a Defects Liability Certificate is issued to the contractor under the provisions of clause 62.1, which stipulates, inter alia, that:

> The Contract shall not be considered as completed until a Defects Liability Certificate shall have been signed the Engineer[60] and delivered to the Employer with a copy to the Contractor, stating the date on which the contractor shall have completed his obligations to execute and complete the Works and remedy any defects therein to the Engineer's[61] satisfaction ….

Accordingly, an issue of a Defects Liability Certificate indicates the 'full completion' of works under the contract and it is issued once the contractor completes whole of the works including remedying any defects found in the Defects Liability Period, which is normally one year.

However, according to the mandatory provisions of Article 880 of the Civil Code, both the designer (architect or engineer) and the contractor are jointly liable for a period of ten years, from the date of taking over the construction, to compensate the employer for any total or partial collapse of the construction they have constructed or installation they have erected, and for any defect which threatens the stability or safety of the construction. Therefore, despite the completion of the contract upon issue of a Defects Liability Certificate, the contractor will be liable to the employer for major defects discovered within the said period of ten years.

To deal with this issue, all of the bespoke forms contain a 'Decennial Liability' clause. Such liability of the consultants (architects/engineers) is covered in respective consultancy agreements.

It is noteworthy that such liability arises only in the event of total or partial collapse or discovering any defects that threatens the stability or safety of the construction due to acts or omissions of the designer and the contractor. In a case[62] heard at the Federal Supreme Court (Court of Cassation) of Abu Dhabi, it was held that both the engineer and the contractor were not liable for the defects discovered that affected the stability of the structure as such defects were linked to subsidence of the ground under the foundations occurred due to deep excavation carried out for a sewage pipeline construction in close proximity to the structure without proper earthwork supports.

4. Completion where Time is not Specified

Although the modern standard form contracts and bespoke form of contracts considered herein provide for time for completion, there are instances where contracts have been entered into without specifying a particular time to complete the works. The courts have generally ruled that in such instances works have to be completed within a reasonable time[63].

In Startup v Macdonald [64], the court decided that as the contract did not specify the time within which delivery of goods had to be completed, and agreement to complete such delivery within a reasonable time was implied and therefore, the delivery had to be completed within a reasonable time. As to the question of reasonableness of time, the court, in the case of *Hick v Raymond and Reid* [65], held that reasonable time for completion would be determined taking into consideration the circumstances existed at the time.

Further, there are instances where the specified time has become inapplicable due to an agreement between the parties to that effect, or a waiver, or the employer preventing the contractor from completing the works within the agreed time[66]. The courts, as in the above cases, have held that in such instances the works have to be completed within a reasonable time. In Bruno *Zornow (Builders) Ltd v Beechcroft Development Ltd* [67] the agreed preliminary works, which had a specific date to complete, were subsequently varied to include the remainder of the

works without agreeing a date for completion of such varied works. The court held that, for reasons of business efficacy, the parties must be presumed to have intended that the contract, as varied, would continue to have a fixed date for completion.

5. Completion when Time is of the Essence

Under normal circumstances, if the contractor fails to comply with the time provision in the contract, it is in breach of contract and is liable for damages under the terms of the contract[68]. However, if the terms of the contract as to time have made time is of the essence (unclear/ rephrase), then breach of that condition by one party will discharge the other party from its obligations under the contract[69]. This proposition was upheld by the court in the case of *United Scientific Holdings Ltd v Burnley Council*[70]. Further, in Lombard Plc v Butterworth , Mustill LJ said[71]:

"Where a breach goes to the root of the contract, the injured party may elect to put an end to the contract. Thereupon both sides are relieved from those obligations which remain unperformed ... A stipulation that time is of the essence, in relation to a particular contractual term, denotes that timely performance is a condition of the contract. The consequence is that delay in performance is treated as going to the root of the contract, without regard to the magnitude of the breach."

Generally, in construction contracts, time will not be of essence in the absence of expressed wording making it so. In *Lucas v Godwin*[72], referring to an obligation to complete building work by a specific date, Tindal CJ said:

"*It was not a condition, but a stipulation, for non-observance of which the defendant may be entitled to recover damages; but, even if a condition, it does not go to the essence of the contract, and is no answer to the plaintiff's claim for the work actually done. It never could have been the understanding of the parties, that if the house were not done by the precise day, the plaintiff would have no remuneration; at all events, if so unreasonable an engagement had been entered into, the parties should have expressed their meaning with precision which could not be mistaken*[73]."

It has been stated that the time will not be of the essence unless[74]:

1. the parties expressly stipulate that conditions as to time must be strictly complied with; or

2. the nature of the subject-matter of the contract or the surrounding circumstances show that time should be considered to be of the essence[75]; or

3. a party who has been subject to unreasonable delay give notice to the party in default making time of the essence[76].

As held in *Gibbs v Tomlinson*[77], a mere discussion between the employer and the contractor wherein the employer emphasises the importance of completion of the works by a particular date will not suffice to make time is of the essence (unclear/rephrase).

Further, as held in *Lowther v Heaver*[78], making time is of the essence of the contract; by the mere insertion of the words to that effect will not have any effect if they are inconsistent with the other terms of the contract.

It is said that in the presence of provisions for:

a) granting extension of time[79],
b) payment of Liquidated Damages[80], or
c) payment of bonus for expedition,

in a contract, time therein will not be treated as essence[81].

Thus in *Lamprell v Billericay Union*[82], Rolf B. said:

"Looking to the whole of the deed, we are of opinion that the time of completion was not an essential part of the contract; first, because there is an expressed provision made for a weekly sum to be paid for every week during which the work should be delayed after June 24, 1840; and secondly, because the deed clearly meant to exempt the plaintiff from the obligation as to the particular day in case he should be prevented by fire or other circumstances satisfactory to the architect; and here, in fact, it is expressly found by the arbitrator that delay was necessarily occasioned by the extra work."

To determine the status of time — whether it is of the essence or not — in a contract, it is important to scrutinize whether time provision in the contract can be categorised as; a condition — a mere breach of which entitle the innocent party to be excused from

all subsequent performance under the contract; or an innominate or intermediate term — a breach of which, depending on its extensiveness, allow the innocent party to claim damages if the consequences of the breach are less serious, or otherwise the innocent party has the same remedy as in the case of a breach of condition; or a warranty — a breach of which entitles the innocent party to claim damages[83].

In *Anglia Commercial Properties Ltd v North East Essex Building Co Ltd*[84], it was held that the failure of the defendant to develop the site of the plaintiff's company within the four year period as stipulated in the contract was a mere breach of warranty and the plaintiff was entitled only to recover damages for the contemplated cost of the delay.

In the standard form contracts[85] as well as in the bespoke forms, a delay in the time for completion is primarily remedied by a claim for liquidated damages or penalty[86]. Such provisions are underpinned by the elaborate provisions made in these forms for granting extensions to the time for completion[87].

As reasoned earlier, in the presence of the above provisions in standard and bespoke forms, the time in these forms will not be of essence. However, the notice issued to the contractor under the provisions of clause 46.1 – Rate of Progress, which empowers the engineer to notify the contractor that the progress of the works is too slow to comply with the time for completion, makes time is of essence. This allows the employer to terminate the contract under clause 63.1(b)ii, which stipulates that the employer may, after giving 14 days' notice to the contractor, terminate the contract, if the contractor without reasonable excuse has failed to proceed with the Works, or any section thereof, within 28 days after receiving notice pursuant Sub-Clause 46.1.

Reference

1 For the origin, refer to The Phrase Finder on http://www.phrases.org.uk/bulletin_board/10/messages/570.html.
2 Wallace, I.N. Duncan. (1970). Hudson's Building and Engineering Contracts – 10th Edition. Sweet & Maxwell. p604.
3 Ibid.
4 Capper, P. (1996). Emden's Construction Law - 8th Edition. Butterworth, p172.
5 Capper, P. op. cit. p138.
6 Ibid.
7 Ibid.
8 Capper, P. op. cit. p139.
9 (1795) 6 Tem Rep 320.
10 (1867) L.R. 2 C.P. 651.
11 Wallace, I.N. Duncan. op. cit. p246.
12 [1898] 1 QB 673, CA.
13 (1810) 3 Taunt 52.
14 (1886) 2 Hudson's BC (4th Edition) 81, HL.
15 (1895) 16 NSWLR 55.
16 (1954) 104 L.J. 844.
17 (1968) 208 Est. Gaz. 852.
18 (1990) 20 NSWLR 251.
19 1999 WLR 1111819.
20 [2003] EWCH 1076.
21 [2007] EWCH 2556.
22 Wilmot-Smith, R. (2006). Construction Contracts, Law & Practice. Oxford University Press, p216.
23 [1916] 1 K.B. 566.
24 Wallace, I.N. Duncan. op. cit. p245. See also Cutler v Close (1832) 5 C & P 337.
25 (1832) 5 C & P 337.
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86 Clause 47.1 of the bespoke contracts.
87 Clause 44.1 of the bespoke contracts.

Sauter Automation Ltd v Goodman (Mechanical Services) Ltd (1840)

A sub-contractor's quotation was expressed as 'subject to our standard terms and conditions' which included a retention of title clause. The main Contractor sent an order stating 'terms and conditions in accordance with the main contract'. The Sub-contractor, without further communication, delivered the goods.

Held that this amounted to an acceptance by them of the main Contractor's counter offer.