

# Disputes with completion dates



As mentioned in the introduction, disputes associated with completion dates often become complicated due to association with different legal concepts. To fully comprehend the research subject matter, it is important to give a brief overview of such principles, as detailed further below.

Most commonly the Contractor's obligations in respect of time for completion of the works are expressly defined within the terms of contract, it is yet not uncommon for the extent of such obligations to be described less definitively.

While the time for completion will be expressly defined as a fixed date or a fixed period and can be easily identified, it is also essential to for the contract to provide for the mechanism of establishing completion: e. g. commencement date where completion is determined by a 'fixed period'.

Where the time for completion is ill-defined to such extent that the contracting parties' intentions cannot be established or are non-existent, then the law considers time to be 'at large' and implies a requirement to complete the works within 'reasonable time'.

The principle of 'reasonable time' under English Law goes back to 19<sup>th</sup> century[1], where it was established that for if a delay is not attributed to causes within a party's control, nor such party acted negligently, it will be considered that obligations are duly fulfilled.

'Reasonableness' cannot be given a strict definition and is assessed on a case-by-case basis, taking into consideration circumstances prevailing during the period of performance[2].

Some authors on the subject view that both ‘ordinary’ (e. g. site access, government permits, resource availability, etc.) and ‘extraordinary’ circumstances (e. g. strikes, client variations, etc) should be taken into consideration when establishing ‘reasonable time’[3].

Occasionally, some bespoke contracts may contain ‘time is of the essence’ terms. In contractual context, it has stricter meaning than its everyday application: i. e. ‘if something isn’t done swiftly, it will be too late’[OV4].[4]

Inclusion of such terms in a contract significantly elevates the rights and obligations to the contract, whereby failure to meet the completion date will be treated as a fundamental breach of the contract[5].

While the contract may be found repudiated, the existence of a ‘time is of the essence’ provision alone may not be sufficient and qualifying rules should be applied in such circumstances[6].

Another area of significant importance in establishing whether completion date has been adhered to, is the meaning of ‘completion’ itself.

Ordinary meaning of ‘completion[OV5]’ requires fulfilment of all obligations, which when applied in the context of ‘entire contracts’[OV6], may result in harsh consequences. It is extremely rare for construction contracts to be considered in the same manner and courts will generally take a practical view as to what constitutes ‘completion’ within construction industry[7].

To reflect that position, standard construction contracts have developed various definitions for use in the industry, such as: ‘practical’[8] or ‘substantial’[9][OV7] completion, which irrespective of the words used to

describe it, are intended to reflect the court's position as summarised by Judge Newey QC[OV8]:[10]

*'In my opinion there is no room for 'completion' as distinct to 'practical completion'. Because a building can seldom if ever be built precisely as required by drawings and specification, the contract realistically refers to 'practical completion' and not 'completion' but they mean the same.'*

Eminent legal writers on this subject[11]concur with this view:

*'Usually it will mean bona fide completion free of known or patent defects so as to enable the owner to enter into occupation. The words 'practical' or 'substantial' in the English standard forms do no more than indicate that trivial defects not affecting beneficial occupancy will not prevent completion (the more so, of course, if the contract provides for a maintenance or defects liability period)' [12]*

Irrespective of exact term used, 'completion' can be summarised as a significant gateway, which signifies:

- the transfer of risk for the care of the works from the Contractor to the Employer
- repossession of the site by the Employer
- the start of the period during which the Contractor will be liable for defects in the works
- the end of the Contractor's liability for late completion
- release of retention monies from the Employer to the Contractor
- the end of Contractor's obligation to insure the works

Understanding of the above has a clear importance in resolving any disputes arising out of delay, extension of time and other ‘time’ related matters.

In addition to an obligation to complete the works by a specific date or within a specific time period, most contracts make specific provision for the contractor to proceed with the work and make progress with ‘due diligence’.

Understanding of this term may, in first instance, appear to have only a remote connection to the subject matter. However, as shown in the next chapters, it is of significant importance when it comes to establishing the contractor’s responsibility when the time of completion is set ‘at large’.

The courts have held that the assessment of what constitutes ‘diligence’ must be based on the surrounding circumstances of each case. For example, per Lord Justice Parker[13]’ *what is due diligence and expedition depends, of course, on the object which is sought to be achieved*’, who went on to explain the relation between diligence and specific contract object, time scales, complexities, etc.

Similarly, in the separate Court of Appeal case of *West Faulkener Associates v London Borough of Newham* (1994)[14]the court found that literal interpretation, commercial logic and common sense required the contractor to proceed both regularly and diligently.[15]

In the absence of an explicit ‘due diligence’ obligation within a contract, some authors consider that common law implies such a term on the grounds of business efficacy[16].

[1] Lord Watson in *Hick v Raymond and Reid* [1893] AC 22

[2] *British Steel Corporation v Cleveland Bridge and Engineering Co. Ltd*  
[1984] 1 All ER

[3] I. N. Duncan-Wallace in '*Hudson's Building and Engineering Contracts*',  
11<sup>th</sup> Edn., 1995, Sweet & Maxwell Ltd, p. 119

[4] 'Oxford Dictionary of English' 2<sup>nd</sup> edn., 2008, Oxford University Press

[5] *Carr v J. A. Berriman Pty. Ltd.* [1953] ALJ 273 High Court of Australia

[6] *United Scientific Holdings Ltd. v Burnley Council* [1977] 2 WLR 806

[7] *Emson Eastern Ltd v EME Developments Ltd* [1991] 55BLR 114

[8] JCT

[9] ICE

[10] *Emson Eastern Ltd v EME Developments Ltd* [1991] 55BLR 114

[11] For example B. Eggleston in '*Liquidated Damages and Extensions of Time*', 3<sup>rd</sup> edition, 2009, Wiley-Blackwell, and I. N. Duncan-Wallace in '*Hudson's Building and Engineering Contracts*', 11<sup>th</sup> edn., 1995, Sweet & Maxwell Ltd.

[12] I. N. Duncan-Wallace in '*Hudson's Building and Engineering Contracts*',  
11<sup>th</sup> edn., 1995, Sweet & Maxwell Ltd. p1109

[13] *Greater London Council v The Cleveland Bridge & Engineering Co. Ltd*

[1986] 34 BLR 50

[14] *West Faulkener Associates v London Borough of Newham* [1994] 71 BLR

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[15] B. Eggleston in '*Liquidated Damages and Extensions of Time*', 3<sup>rd</sup> edition, 2009, Wiley-Blackwell, p 24

[16] I. N. Duncan-Wallace in '*Hudson's Building and Engineering Contracts*',

11<sup>th</sup> edn., 1995, Sweet & Maxwell Ltd., p1125

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[OV1] Insert ref. to one of the standard contracts

[OV2] Insert ref.

[OV3] Could expand slightly to beef up

[OV4] Check later ed. Of the dictionary. Also check single or double parentheses throughout

[OV5] Insert ref

[OV6] Ref.

[OV7] Full ref.

[OV8] Pp location

[OV9] Link to the next chapter?