# Extensions of Time

Both of the following reports have been included in ACLN because of their different and interesting treatments of this important decision.

## 1. A Victory For Common Sense

*State of Queensland v Multiplex Constructions Pty Ltd,* unreported, Court of Appeal, Queensland, 19 December 1997.

After the "*prevention principle*" was at last put to rest in two New South Wales Supreme Court decisions[1] where it was established that, when a contract includes an appropriate extension of time clause, delay by the principal does not set time at large, and the absence of a claim for an extension of time within the prescribed period was held to be a bar to an entitlement to an extension of time[2], it seemed that at last the courts would interpret the extension of time clause as it was always intended.

However, Williams J in the Supreme Court of Queensland[3] upset all that when he held that the 28 days for making a claim for an extension of time runs from when the delay finishes, not when it commences. He was interpreting the following clause which appears in AS2124-1986, AS2124-1992, AS4300-1995 and numerous other contracts:

> "*If the Contractor is or will be delayed in reaching Practical Completion by a cause described in the next paragraph and within 28 days after the delay occurs the Contractor gives the Superintendent a written claim for an extension of time for Practical completion setting out the facts on which the claim is based, the Contractor shall be entitled to an extension of time for Practical completion.*"

Fortunately, the State of Queensland took this decision on appeal to the Court of Appeal of Queensland[4]. The three judges on the Court of Appeal were unanimous in reversing the decision of Williams J. They held:

> "*... unlike the learned primary Judge, we think that a natural meaning of the phrase 'after the delay occurs' is after a time at which the contractor can say that it has been delayed notwithstanding that delay may be continuing.*"

The consequence is that when a contractor is delayed, the contractor must make a claim for an extension of time within the prescribed period running from but not including the first day on which the contractor claims to have been delayed. Put another way; when the superintendent under AS2124 (or contracts with the same provision) receives a claim for an extension of time, the superintendent can disregard delays incurred by the contractor earlier than the 28 day prior to the superintendent receiving notice of the claim.

It is interesting to speculate on how many disputes may have been incorrectly decided or generated in the 11 months between the time of the primary Judge's decision and the time when it was reversed.

### Footnotes

1. *Turner Corporation Limited v Austotel Pty Ltd* [1997] 13 BCL 378 (Cole J, 2 June 1994) and *Turner Corporation Limited v Co-Ordinated Industries Pty Ltd* [1995] 11 BCL 202 (Rolfe J, 26 August 1994).
2. *Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Ltd* [1996] 12 BCL 317 (NSW Supreme Court, Giles J, 30 January 1996).
3. *Multiplex Constructions Pty Ltd v The State of Queensland*, unreported, Supreme Court of Queensland, 31 January 1997. A case note appears in (1997) #54 Australian Construction Law Newsletter p55.
4. *State of Queensland v Multiplex Constructions Pty Ltd*, unreported, 19 December 1997.

- **Philip Davenport, Lecturer, School of Building, University of NSW.**

## 2. Notification Under Clause 35.5 of AS2124-1992

*State of Queensland v Multiplex Constructions Pty Ltd,*
unreported, Court of Appeal, Queensland, 19 December 1997.

In Issue #54 of the Australian Construction Law Newsletter, the decision of His Honour Mr Justice Williams in *Multiplex Constructions Pty Limited v State of Queensland* was discussed.

Since that time the decision has gone to appeal and the decision of the Judge at first instance has been overturned.

### The Facts

The case concerned an appeal from the decision of Williams J in the Supreme Court of Queensland involving the interpretation of clause 35.5 of AS2124-1992 which states (in part):

> "*When it becomes evident to the contractor that anything, including an act or omission of the principal, the superintendent or the principal's employees, consultants, other contractors or agent, may delay the work under the contract, the contractor shall promptly notify the superintendent in writing with details of the possible delay and the cause.*
>
> *If the contractor is or will be delayed in reaching practical completion by a cause described in the next paragraph* ***and within 28 days after the delay occurs****, the contractor gives the superintendent a written claim for an extension of time for practical completion setting out the facts on which the claim was based, the contractor shall be entitled to an extension of time for practical completion.*" (Emphasis added.)

The facts are that the Contractor submitted an extension of time claim on either 17 June or 17 July 1996, claiming that it was delayed for a period of 166 days. The delay by the Principal was said to have been from 5 October 1995 to 20 June 1996 in supplying a PABX telephone system for installation by the Contractor.

The trial Judge held that the 28 day period for making the written claim began to run when the delay had ceased. In answering the question of "*does the 28 day period for the making of the written claim referred to in that paragraph run from the commencement of the delay (that is, from when the delay first occurred) or from the cessation of the delay*" the Judge held that:

> "*To my mind, such an expression ('after the delay occurs') is hardly consistent with a situation where the delay is still continuing; if the delay is continuing there is delay, but it cannot accurately be said the delay has occurred. Looked at in context the words would appear to be referring to the period during which the contractor is delayed; when the delay has occurred (that is the period of delay can be identified as having a beginning and an end) then the claim must be made within 28 days.*"

On this construction, the Contractor had submitted its extension of time claim in time and was entitled to have the Superintendent properly and fairly determine the claim. In reaching this conclusion, his Honour assumed that the Contractor had complied with the first notice requirement of clause 35.5, that is having given written notice to the Superintendent of the possible delay and the cause of the delay when it became evident that there would be a delay to the work under the contract. This would mean that the Superintendent would have some notice that a delay was occurring and of its possible consequences.

### The Court of Appeal

The Court of Appeal understood that the trial judge had interpreted the phrase "*after the delay occurs*" as meaning "*after the whole of the delay had occurred*". However, the Court of Appeal said there was nothing in the language of the clause itself which gave any convincing support to that construction. It went further to state that the meaning of the relevant phrase in the clause was by no means clear and that it was surprising to see the terms of a contract of the size and importance of AS2124-1992 so badly drawn.

The Court of Appeal felt that both opposing contentions had merit, but that the question was to be determined by having regard to the purpose of the clause in the context of the contract as a whole and the practical consequences of the competing views.

First, the Court of Appeal held that a natural meaning of "*after the delay occurs*" is:

> "*after a time at which the contractor can say that it has been delayed notwithstanding the delay may be continuing.*"

Secondly, it was held that the construction advanced by the Contractor may lead to inconvenient and unfair results, particularly in the circumstances where the delay was substantial, if the Contractor was entitled to wait until the delay had finished before giving its notice.

The Court distinguished between the "*general warning*" of the first paragraph and the "*notice provision*" of the third paragraph holding that the third paragraph was to alert the Superintendent or Principal to the need for the investigation of the facts on which the claim was based in order to determine whether they justified an extension of time to the Date for Practical Completion.

The Court of Appeal said that the later any such notice is given, after the commencement of the delay, the later the Superintendent may appreciate the need for investigation and the more difficult it may be for him to verify whether there has been delay, and if so, its cause.

In fact, where the delay and its cause continue for a long period without any such notice, the Principal and Superintendent may be misled as to the likelihood of the Contractor reaching Practical Completion by the due date. The Court also held that it was equally important for the Contractor to know at an early stage, after the delay has commenced, whether it will be entitled to an extension of time or whether it must commit additional resources or incur additional costs to accelerate the works to meet the Date for Practical Completion.

## Summary

In considering the terms of Clause 35.5 of AS2124-1992, the Court of Appeal said that:

1. The sub-clause as quoted was by no means clear.
2. Its construction was to be determined having regard to the purpose of the clause in the context of the contract as a whole.
3. The practical consequences of the competing views for the administration of the contract could not be overlooked.
4. Early notification of the claim would alert the Superintendent or the Principal to the need for the investigation of the facts on which the claim was based to determine whether they justified an extension of time.
5. It was equally important to the Contractor to know at an early stage, after the delay had commenced, whether it would be entitled to an extension of time or whether it was necessary to accelerate the works to meet the Date for Practical Completion.
6. "*After the delay occurs*" is soon after it commences - when the contractor can say it has been delayed, even if the delay is continuing.

- **David Goldstein, Minter Ellison, Sydney and John Gallagher, Minter Ellison, Melbourne.**