Introduction

Delay is the time during which some part of the construction project has been extended or not performed due to an unanticipated circumstance (Bramble, 1989). The contractor is obliged to "continuously use his best endeavours to prevent or mitigate delay to the progress of the Works", and to prevent the completion of the works being further delayed. Failure to mitigate the cause of delayed event prevents remedies of extension of time (EOT) and associated losses and may make him liable in damages (Atkinson 2002). Hence, interpretation of the phrase must be clear, to obtain a successful claim of EOT.

Upon awarding EOT to the contractor, it is subject to how the contract administrator interprets the contractor’s effort. If the contract administrator is in the decision that the contractor has not constantly used his best endeavours; the contractor’s only recourse is to challenge that decision in arbitration. The contractor shall do all that may reasonably be required to the satisfaction of the architect to proceed with the works. Stated by Vincent, P.S (1983) that this is the contractor’s obligation in any case, but in our view the architect has no power to order that acceleration measures to be taken (either under this provision or any other provision in the contract).


‘The proviso is an important qualification to the right to an extension of time. Thus, for example, in some cases it might be the contractor’s duty to re-programme the works either to prevent or reduce delay. How far the contractor must take other steps depends upon the circumstances of each case, but it is thought that the proviso does not contemplate the expenditure of substantial sums of money.’

Upon the interpretation of the proviso, the extent of mitigation effort measurement is still not explained thoroughly. Two key words can be abstracted from the comment. The key words are act of re-programming the works to prevent delay and actions that does not involve expenditure of substantial sums of money. This means that by reprogramming the works and taking up actions that does not involve expenditure of substantial sums of money is by way a general overview to show effort in performing the obligation. However, the commentary given by Mr Donald Keating is still at most unclear without supporting cases to support it.

It was noted in the book of Construction Law in Singapore and Malaysia (Robinson et al. 1996) that the contractor’s duty to mitigate the effect of a delaying event is as far as he reasonably can with his intended level of resources. The principle adopted was that the delay in one trade does not necessarily affect the others, and delay in one section or phase may be overcome by rescheduling or temporarily transferring production resources to another.

The interpretation of the proviso given is very brief and there was different explanation given on the extent of effort to mitigate the delay. The duty to mitigate is emphasized clearly in most of the books; however the question of the extent of it remains uncertain.
From the literature review, it is clearly stated that the proviso ‘contractor to take all reasonable steps or best endeavour to mitigate delay’ is highly essential as a failure to perform the obligation may deprive his rights to a remedy. However the extent of effort to mitigate is not explained clearly. From definitions given in dictionary, the interpretation of the proviso given is very brief and there was no explanation given on the effects of failure to mitigate the delay. The question of extent shall be further explained in the following section.

Therefore, the effort acquired by the contractor is hard to distinguish because the contractual term ‘reasonable’ and ‘best endeavour’ attracts many queries as to its accuracy and therefore is debatable depending on one’s standpoint. However, it is still compulsory under the contractor’s obligation to mitigate delay.

Theme

2.0 RESEARCH METHODOLOGY

Analysis of seven cases is done in order to achieve the objective of this paper which is to identify the extent of effort in which the contractor is obliged to mitigate delay. The extent of the contractor’s obligation can be outlined by analyzing few cases in relation to “best endeavour” phrase. Data collected were sourced from All England Reports, Malayan Law Journals, Building Law Reports, Construction Law Reports, etc. This section enlightens the reader with previous court cases concerning a breach of contract due to misinterpretations of the terms ‘best endeavour’ and ‘reasonable endeavour’. It analyses a sample of court cases in which derives the court’s judgment of the terms ‘best endeavour’ and ‘reasonable endeavour’. The uncertainty of the phrase ‘best endeavour’ to mitigate or prevent delay can be reduced by looking at similar judgments of the court on the interpretation of the phrase ‘best endeavour’.

3.0 ANALYSIS AND DISCUSSION

From the literature review, the proviso to prevent delay is clearly seen as an important aspect in claiming a remedy. However, the extent of effort required is not certain. The wording “best” and “reasonable” endeavour is used in contract to scale the effort of mitigation. This effort of mitigation is seen from the analysis of the term ‘best endeavour’ in the selected cases.

Argument 1: The obliged party is not required to spend a substantial amount of money

In the case of IBM UK Ltd v Rock ware Glass, the expected extent of endeavour alleged to the contractor involved a substantial cost of $6,250,000. This is unacceptable as it overrules the true meaning of ‘best endeavour’ that only requires one to act within what is deemed sensible.

In Phillips Petroleum Co UK Ltd v Enron Europe Limited, the case scenario was that the aggrieved party wanted to defer the agreed Commission Date because the market sale at the time would cause substantial loss to the buyer. It was decided that this contractual arrangement did not deny the right of the buyer to refuse to protect his self interest.

In Midland Land Reclamation Ltd v Warren Energy Ltd, the ‘best endeavours’ on the council’s part did not include endeavours that required the council to spend a substantial cost of $10,000 to meet the
buyer’s needs.

**Conclusion:** Each of the cases showed that the obliged party were not required to sacrifice their commercial interest. Commercial interest can be in the form whereby he has to spend a substantial amount of money and not getting his profit (depending on the true intention of the party in the contract). In mitigation of delay, often a cost will incur, the cost to mitigate shall not be a substantial amount of money.

**Argument 2: Positive Action purports the obligation to make endeavours in light of mitigating a problem or fulfilling a duty.**

In *Terrell v Mabie Todd and Co*, the contractual obligation was to use best endeavours to promote sales of fountain pens and ink bottles, but does not imply a guarantee that the fountain pens and ink bottles are sold. It does not imply a guarantee but positive action to show effort must be shown.

In *Rhodia International Holdings Ltd v Huntsman International LLC*, the offer of a ‘direct covenant’ to Cogen resembles positive action by Huntsman.

**Conclusion:** An indication that the obliged party showed positive action to fulfil the obligation. The principle is, effort must be shown even though the objective is not achieved. Hence, objective to mitigate delay is by no means a guarantee by the contractor. Rescheduling program is by means an effort to show positive action.

**Argument 3: The concerned party must perform work regularly and diligently so as to show he is not negligent of his responsibilities**

In the case of *Yewbelle v London Green Developments*, Yewbelle was obliged to use all reasonable endeavours to the point when all reasonable endeavours were exhausted.

In the case of *Steria Ltd v Sigma Wireless Communications Ltd*, Steria was expected to mitigate potential delay with due diligence.

**Conclusion:** Both of the cases showed that failure of the party to perform his obligation which is to diligently proceed with the work deprives the parties’ right to his remedy. The closet case that can be related to construction contract is in the case of Steria v Sigma. This is because the allegation of failure to proceed work with diligence was used to deprive the parties’ right to a full claim of Extension of Time. Hence, it is important for the contractors to continuously execute his works with regular and diligently even upon faced with delay.

**4.0 Findings**

In summary, a total of 7 cases were analysed to achieve the objective of this paper which is to identify the extent of effort required for the contractor in which they are obliged to mitigate. The similar circumstances of the case scenarios were analysed in order to derive common principals of mitigation effort. This effort of mitigation is then adopted in the obligation to prevent delay.

The wording reasonable and best endeavour limits the concerned party to perform his obligations. Without the usage of the term, the obligation would be bias to the advantage of one party. The true intention of a formation of contract is not to jeopardize another party. Hence, the obligation to mitigate
is limited to the standard of reasonableness. After analyzing the cases, 3 principals are achieved based on the common arguments made. The cases are categorized according to these circumstances. The categories derived are:

1. Sacrifice Interest
2. Positive Action
3. Diligence Performance

The first category i.e. Sacrifice Interest imply the situation when a party’s self interest is at risk if that party is to perform certain endeavours. The second category i.e. Positive Action purports the obligation to make endeavours in light of mitigating a problem or fulfilling a duty. The third category i.e. Diligence denotes the contractual obligation for the party to perform works regularly and diligently.

These principles can be used to scale the effort of the contractor to mitigate delay as the term used in the contract is ‘to use best endeavour to mitigate delay’ and ‘to take all reasonable steps to mitigate delay’. Hence, these principles provide a guideline for the contractor to perform his obligations in mitigating delay. In order to avoid from disputes concerning best endeavour to mitigate delay, it is recommended to specify the actions in which falls under the principles of best endeavour.

4.1 Sacrifice Interest

The nature of mitigating delay, often involves some form of acceleration. Acceleration activity often results in additional costs. By applying the first principle, i.e. to not spend a substantial amount of money (sacrifice interest), the cost is limited to the extent that the contractor does not need to sacrifice his commercial interest. From the analysis of the cases, commercial interest can be in a form of revenue or cost. In which ever form used, it shall not be to the extent whereby he must sacrifice his interest. In other words in a position that suffers loss.

The actions that can be specified, are examples such as cost incurred to extend working hours, increase manpower, and provide additional plant, are all confined to the limit of not exceeding a substantial cost.

4.2 Positive Action

As aforementioned in the literature review, positive action can be displayed through re-programming the works and actions that do not involve expenditure of substantial amounts of money. It was also noted that the extent is confined to the contractors intended level of resources. Examples of efforts to mitigate damages on construction projects include protection of uncompleted work, as well as timely and reasonable reassignment of work crews. Under certain circumstances, the injured party may have to undertake expensive mitigation precautions including reshoring, constructing drainage ditches, and accepting expenses of cancelled orders. This means that the contractor is obliged to perform his obligation to mitigate delay is limited within the capacity of the contractor’s resources.

4.3 Diligence Performance

It is expressly stated in most of the standard forms of contract that the contractor is obliged to execute the works in a regular and diligent manner. As had been defined extensively on the interpretation of the phrase ‘regularly and diligently’, the term implies a show of steady operations. Although there is delay, the contractor is expected to continue with the works regularly and diligently. This is considered as one of the ways to show best endeavour to mitigate delay. An act of suspending work when faced upon delay is by means a breach of contract, since the obligation to proceed work in a regular and diligent
manner is expressly stated in the conditions of contract. Failure of compliance to the obligation may lead to further serious consequences to the contractor such as termination. However, in the context of mitigating delay the consequence is that the contractor’s right to Extension of Time may not be granted and hence, Liquidated Ascertained Damages is imposed.

5.0 Conclusion

In conclusion, the analysis resulted to principles of best endeavour that can be adopted to scale the extent of effort in which the contractor is obliged to mitigate delay. The principles were then interpolated with the actions to mitigate delay so as to find possible solutions within the outline of best endeavour as discussed earlier. The concept of ‘best endeavour’ basically outlines the extent of efforts considered reasonable are only those that do not deprive the commercial interest of either party. Reasonable endeavours are described as positive actions performed regularly and diligently. These three key points define the meaning of reasonable endeavour which outline the extent of mitigation under this perspective. Hence, with a clear picture of the mitigation effort, the effort to mitigate delay can be concluded to be limited within the three key point conditions of mitigation. This is in line with the objective of this paper that aims to identify the extent of effort in which the contractor is obliged to perform to mitigate delay.

References

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