Regularly and diligently

Some contracts require a contractor to proceed “regularly and diligently” or “with due diligence and expedition”. But what precisely do these phrases mean and how do contracting parties know if there has been a breach of these requirements?

The courts have struggled to provide a clear definition of the term regularly and diligently. In *GLC v Cleveland Bridge and Engineering* (1984) 34 BLR 50 the court noted that these terms meant nothing more than, effectively, “get on with it”. In *West Faulkner Associates v London Borough of Newham* (1994) 71 BLR 1 the court provided a little more guidance and held that the obligation to proceed regularly and diligently was essentially an obligation to proceed “continuously, industriously and efficiently with appropriate physical resources so as to progress the work steadily towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of work”.

However, how does a contractor or employer quantify these obligations and against what are the obligations measured? Does for instance a contractor have to comply with its own programme of works and does a subcontractor have to comply with or have regard to the main contractors’ programme of work?

The matter is far from clear. Indeed, the two leading construction law text books, Keating on Construction Contracts and Hudson’s Building and Engineering Contracts take diverse views on the issue. Keating notes that “Interim slowness not resulting in a failure to complete on time may not be a breach of contract at all.” However, Hudson notes that “intermediate delays…will be a breach of contract for which…damages …will be recoverable.”

In *GLC v Cleveland Bridge* the Court of Appeal held that “in the absence of any indication to the contrary, a contractor is entitled to plan and perform the work as he pleases, provided always that he finishes it by the time fixed in the contract.” The general position therefore seems to be that the contractor should be able to plan its work and execute that work in a manner and sequence that suits its own programme. The overriding obligation is to
complete all the works by the completion date rather than any obligation as to the manner in which those works are completed.

The position may of course be different if there are specific milestone dates or sectional completion dates in the contract.

Where the matter becomes slightly more complicated is where the contract contains a provision for termination in circumstances where the contractor, or sub-contractor, is failing to proceed “regularly and diligently”. If the obligation is simply to work “continuously, industriously and efficiently” and complete by the completion date then it is often difficult to determine whether the contractor, or sub-contractor, is in breach. This is, in part, why termination is such an uncertain and risky business.

These issues were recently considered by the courts in Leander Construction Limited v Mulalley and Company Limited [2011] EWHC 3449 (TCC). Leander was engaged by Mulalley to undertake ground works the progress of which was to be in accordance with an agreed Activity Schedule. Although the main contractor Mulalley agreed that the Activity Schedule did not set out dates or periods that were contractually binding, apart from the completion date, Mulalley argued that Leander had an implied obligation to proceed regularly and diligently with the works and that the Activity Schedule represented the best way to measure whether or not Leander had complied with that term. Leander argued that there was no implied obligation for them to proceed regularly and diligently with the works.

Mr Justice Coulson reviewed the authorities referred to above and concluded that the court should not imply such a term, even in circumstances where a failure to proceed regularly and diligently was an express ground for determination. Accordingly, there was no obligation on Leander to proceed regularly and diligently with the works.

The issue was relevant to the parties because Mulalley had issued a notice of withholding, pursuant to Section 111 of the Housing Grants, Construction and Regeneration Act 1996, for the withholding of unliquidated damages incurred by Mulalley and other sub-contractors on the site as a result of the alleged delays caused by Leander. Because there was no obligation on the sub-contractor to proceed regularly and diligently with the works, Leander was not liable for the delays on site and the main contractor Mulalley was not entitled to withhold unliquidated damages.

Michael Draper 7 February 2012