



Technical

Proceeding Regularly and Diligently – what does this mean?

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Background

1. The term “*regularly and diligently*” has appeared in JCT contracts for many years. Other contracts use wording such as “*with due expedition and without delay*” or other similar phrases. When a construction project is in delay, employers, main contractors and subcontractors are often faced with the question “*is the contractor/subcontractor proceeding regularly and diligently?*” What does this mean and if there is a failure to proceed regularly and diligently, what can be done?

What does Regularly and Diligently Mean?

2. One of the sanctions included in many forms of contract is that it may be possible to terminate a contract if a party does not proceed “*regularly and diligently*” with the works. There is some authority on what this term means.
3. In *GLC v Cleveland Bridge and Engineering [1984]*, the court noted that these terms meant nothing more than, effectively, “*get on with it*”, because it was difficult to see how any specified obligation could be spelt out.
4. In *West Faulkner Associates v London Borough of Newham [1994]*, the court provided more guidance as follows:

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“Taken together the obligation upon the contractor is essentially 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. Beyond that I think it impossible to give useful guidance. These are after all plain English words and in reality the failure of which clause 25 (1) (b) speaks, is, like the elephant, far easier to recognise than to describe.”

5. There is some truth in the sentiment expressed by the judge in this case. We have all seen situations where a contractor or subcontractor is, on a common-sense view, not proceeding industriously and efficiently towards completion, but while our common sense and industry experience may bring us to that conclusion, much more needs to be done to establish that a contractor is not fulfilling such obligations. This often involves a detailed factual and/or time analysis of what has happened on the site.
6. Being able to interpret what the term means can be crucial, particularly when a contract enables a party to terminate for the other party not proceeding regularly and diligently.

Recent Cases

7. From the cases mentioned above, it can be seen that the courts have been very reluctant to imply additional terms as to the timing or regularity of the contractor's performance prior to the contract completion date.
8. From the recent case of *Sabic UK Petrochemicals Limited v Punj Lloyd Limited* [2013], it can be said that delay alone does not provide conclusive proof of a lack of due diligence.
9. In *Vivergo Fuels Limited v Redhall Engineering Solutions Limited* [2013], it was held that while the failure to produce a proper programme on which to plan the work and monitor and manage the work is not conclusive, it may suggest and evidence a lack of due diligence.
10. From these more recent cases, it can be said that failing to achieve the programmed productivity because of inadequate resourcing will usually evidence a failure to proceed regularly and diligently (Vivergo). However, it can also be said that poor labour management and inadequate supervision does not necessarily establish (on its own) that a contractor is not proceeding regularly and diligently.

11. What happens if the completion date can no longer be achieved, where perhaps the employer is responsible for delay. The fact that a contractual obligation (that is, achieving the completion date) has become impossible does not render the separate obligation of due diligence irrelevant or less onerous. The diligence obligation survives (Sabic) and instead attaches to the nearest possible approximation to proper contractual performance.

What if a Contractor Goes Slow but Completes on Time?

12. Is it acceptable for a contractor to take his time for the first six months and then catch up in the remaining two months, as long as he completes by the date for Practical Completion? This is an important issue. All parties to a contract will keep a close eye on performance and cost and are often quick to allege delay.
13. In *GLC v Cleveland Bridge and Engineering [1984]*, 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.”

14. In *Leander Construction Limited –v- Mulalley and Company Limited [2011]*, there was an express term to terminate if the subcontractor did not proceed regularly and diligently with the works. It was, however, found that this did not mean there was an implied term to proceed regularly and diligently and therefore there was no breach of contract. The judge (Coulson J) decided that the subcontractor did not have to proceed regularly and diligently, provided that it finished by the time fixed in the contract. This may seem counter-intuitive to many, but this case followed earlier decisions dealing with this issue.
15. In the absence of any implied obligation, the general position seems to be that a contractor or subcontractor 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.

Summary

16. It can easily be seen how arguments over whether or not a contractor or subcontractor is proceeding regularly and diligently can arise. It is also clear to see how difficult it can be to prove that the other party is not proceeding in such a manner.
17. The JCT contracts which include this obligation allow an employer to terminate the contract if the contractor does not proceed regularly and diligently. Without this termination clause it would be difficult for the employer to do anything about a slow-performing contractor until the date of practical completion passes.
18. Terminating a contract for not proceeding regularly and diligently can be fraught with difficulties. There is always the danger that a party terminates and then it is later found that there was no breach of contract. In this case the termination itself may be an act of repudiation that can be accepted by the other party and form the basis of a claim for damages.

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