

Extensions of Time:

When does an extension of time not run contiguously from the existing date for completion, with reference to the situation of sub-contractors?

David Pliener

December 2017

Carillion Construction v Emcor*:

Is there something new I need to know about EOTs? (please, please let the answer be ‘No’)

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[2017] EWCA Civ 65;

[2016] EWHC 905 (TCC)

Familiar contractual scheme

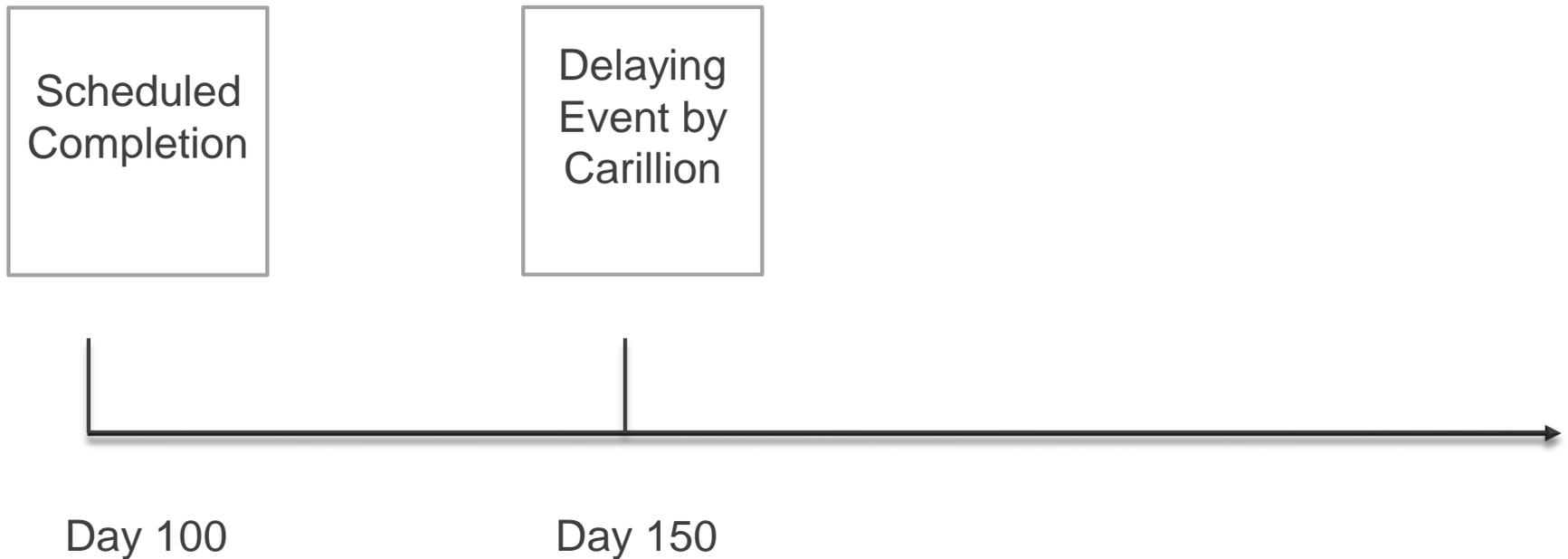
- ▶ **Main Contract:** JCT Standard Form With Contractor's Design 1998, amendments 1, 2 and 4 and bespoke.
 - LADs for Sections B/C from 28 Jan/25 Feb 2011 at £86k/£18k per week.
 - In fact, PC on 29 July 2011.

- ▶ **M&E Sub-contract:** DOM/2, 1981
 - To complete work in 46 weeks from commencement on site (extended).
 - EOT provisions at clause 11.
 - Clause 12: Emcor to *“pay any direct loss and/or expense suffered or incurred by Carillion and caused by the failure [to complete in time]”*.

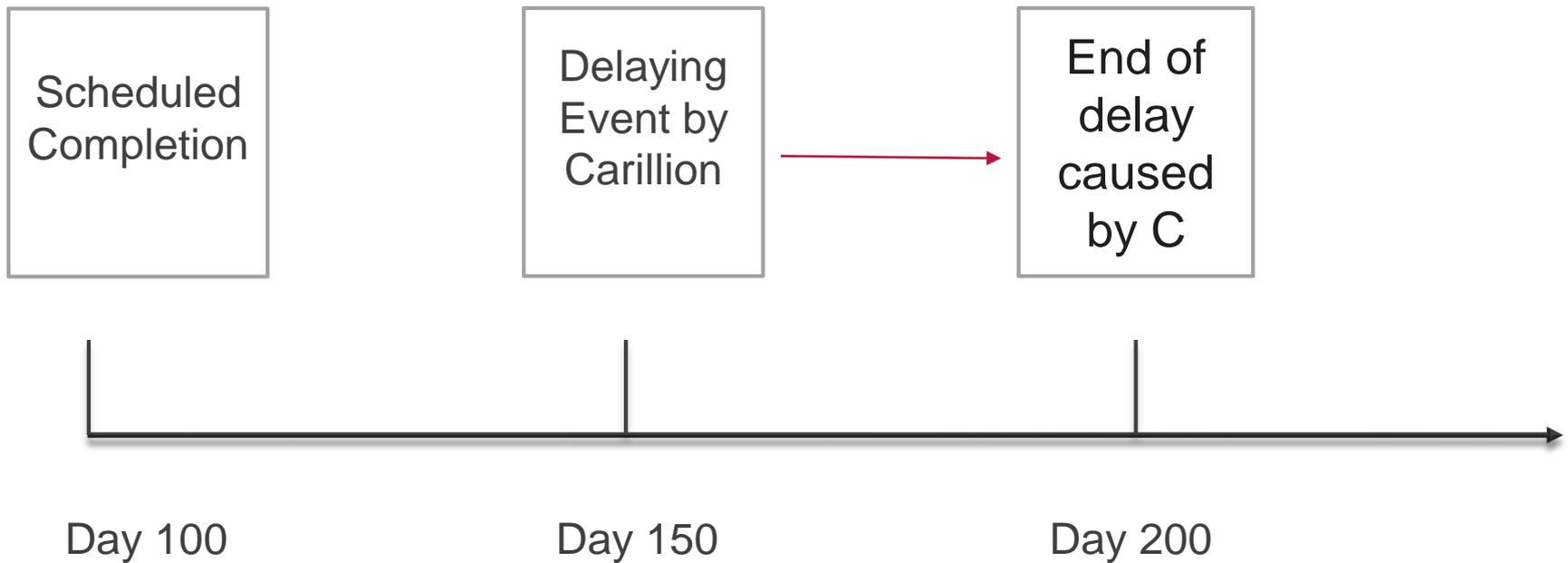
The Problem



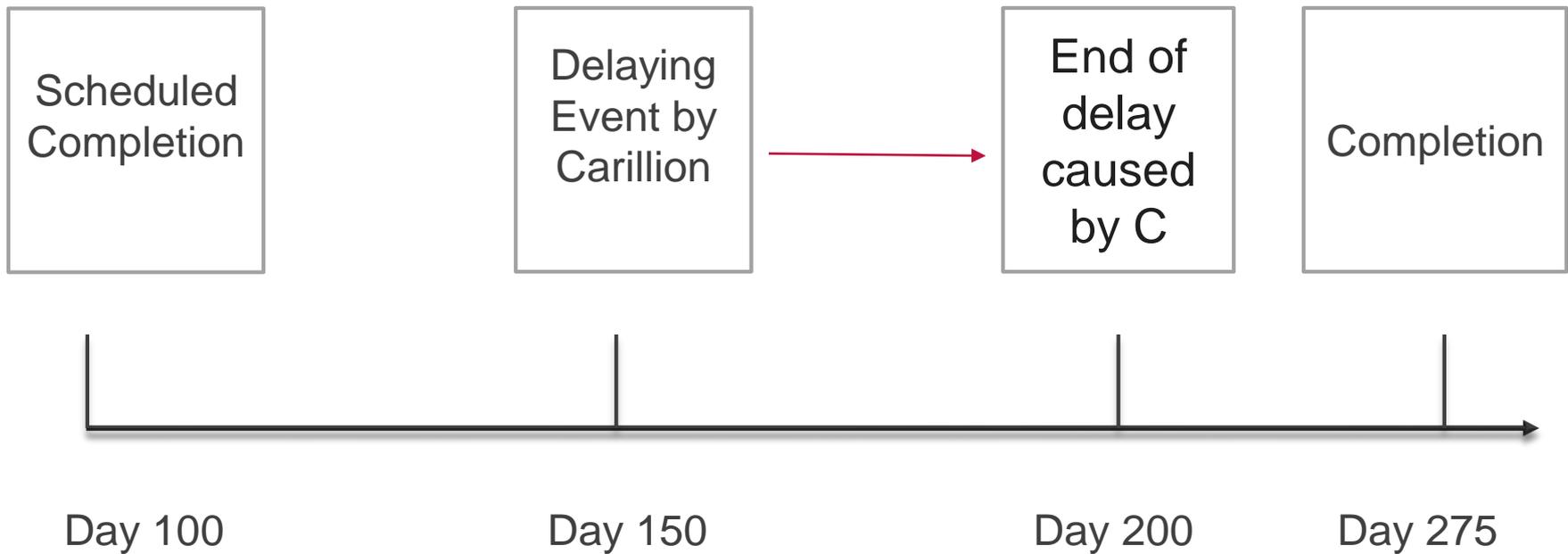
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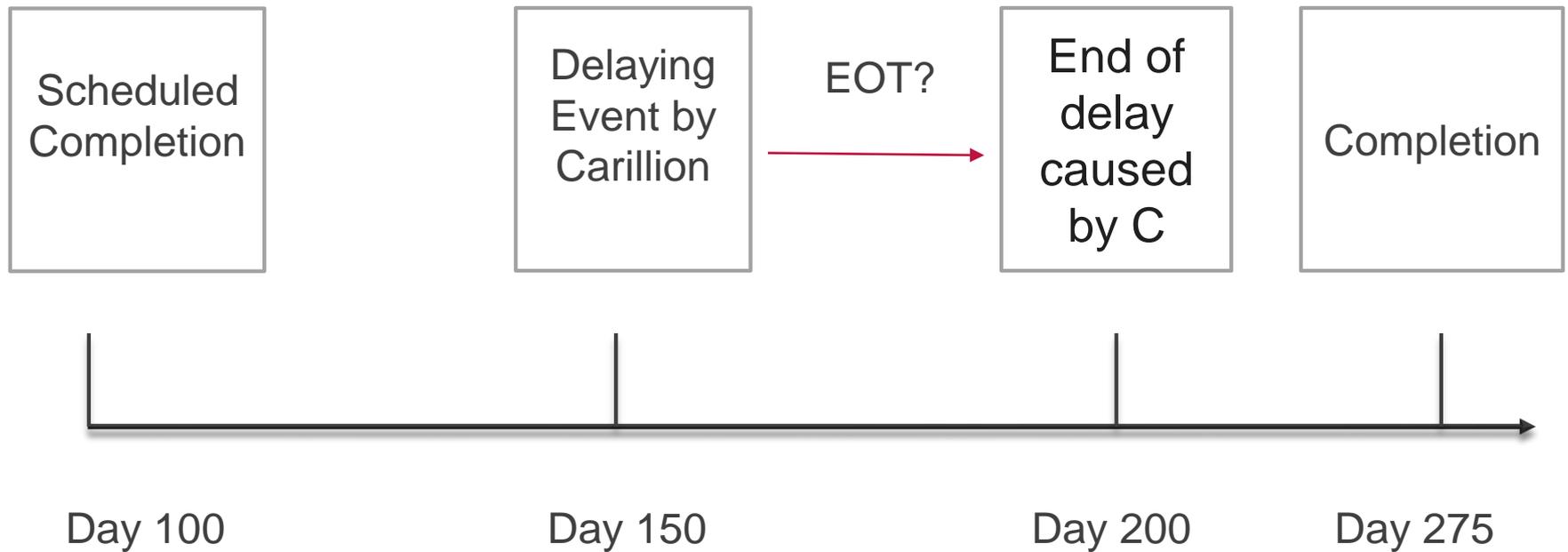
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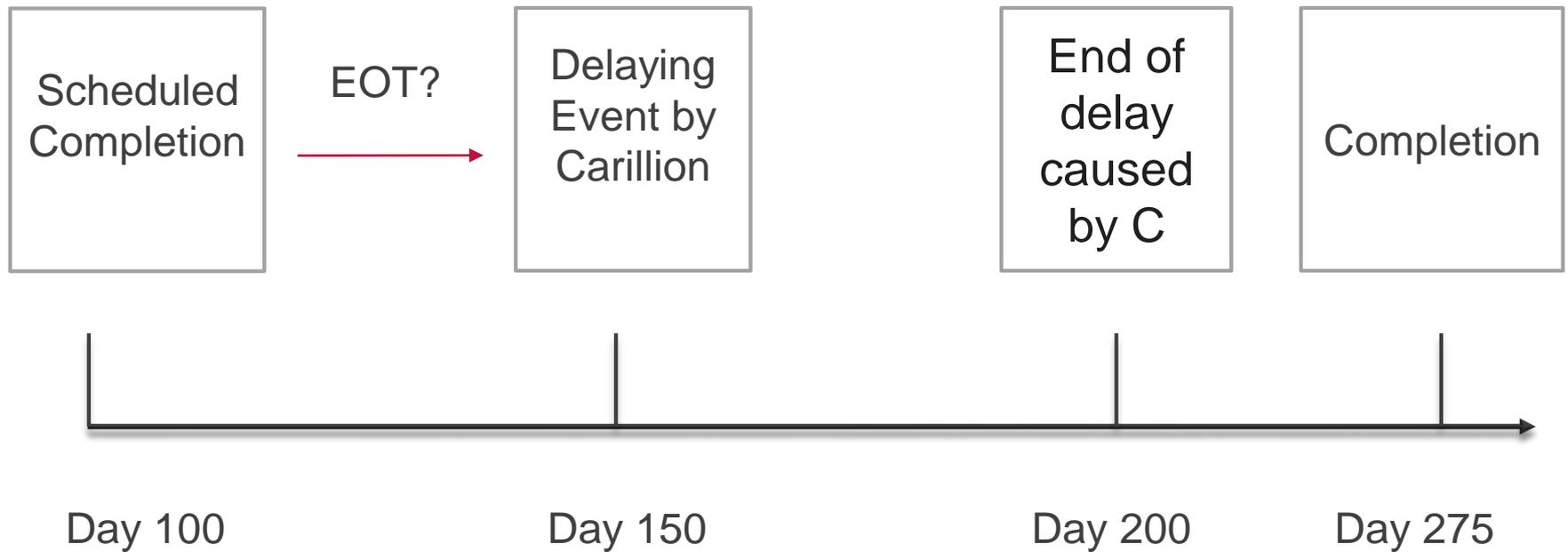
The Problem



The Problem



The Problem



The Problem

- ▶ Actual Emcor delay is for days 100-150, 200-275 – 125 days
- ▶ If EOT for days 150-200, Emcor liable to compensate actual losses caused by their culpable delay.
- ▶ If EOT ‘contiguous’, Emcor liable to compensate for days 150-275 – 125 days.
- ▶ BUT, different days!

Construing the Clause

- ▶ *“If on receipt of any notice...the Contractor properly considers that:*
 - *Any of the causes of the delay is an act, omission or default of the Contractor...or is the occurrence of a Relevant Event; and*
 - *The completion of the Sub-Contract Works is likely to be delayed thereby **beyond the period or periods stated...or any revised such period or periods,***

- ▶ *Then the Contractor shall, in writing, give an **EOT**...by fixing such **revised or further revised period or periods** for the completion of the Sub-Contract Works...”*

Supreme Court

- ▶ *“If detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that **flouts business common sense**, it must be made to yield to business common sense.”*
- ▶ *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, Lord Diplock

Supreme Court

- ▶ *“If there are **two possible constructions**, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other”*

- ▶ ***Rainy Sky SA v Kookmin Bank*** [2011] UKSC 50, Lord Clarke

Supreme Court

- ▶ *“The exercise of interpreting a provision involved identifying what the parties meant through the eyes of a reasonable reader, and, **save perhaps in a very unusual case**, that meaning is most obviously to be gleaned from the language of the provision”.*

- ▶ *Arnold v Britton* [2015] UKSC 36, Lord Neuberger

Supreme Court

- ▶ *“Business common sense is useful to ascertain the purpose of a provision and how it might operate in practice. But in the tug o’ war of commercial negotiation, **business common sense can rarely assist the court in ascertaining on which side of the centre line marking the tug o’ war rope lay, when the negotiations ended**”*
- ▶ ***Wood v Capita Insurance Services Ltd** [2017] UKSC 24, Lord Hodge*

Supreme Court

- ▶ *“Rainy Sky and Arnold were saying the same thing...The recent history of the common law of contractual interpretation is one of continuity rather than change”*
- ▶ *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, Lord Hodge

Construing the Contract

- ▶ None of the previous cases were on point.
- ▶ Nobody had ever argued EOT could be non-contiguous.
- ▶ Clause 11 referred to the period being “extended”.

Construing the Contract

- ▶ *“Emcor may be exempted from liability under clause 12 during a period when Emcor is in culpable delay.*
- ▶ *Emcor would then be made liable to the employer under clause 12 during a period when Emcor is not in culpable delay, for example because it is complying with a late variation instruction.*
- ▶ *The loss and damage suffered by Cartillion during those two periods is unlikely to be the same. Therefore one or other party will gain a windfall benefit”.*

Construing the Contract

- ▶ *“It is, at the very least, an oddity...”*
- ▶ *“On the other hand...these considerations cannot displace the natural meaning of the words used”.*

The Future...

Thank you for listening! Any questions?

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