

# **RESOLVING COMPLEX DELAY CLAIMS**

Jeremy Winter and Peter Johnson

A Report on the Meeting of the Society of Construction Law  
on 6th June 2000 at the National Liberal Club, Whitehall Place, London

## **Report by Samuel Townend**

It was standing room only in the Lloyd George Room at the National Liberal Club on the evening of 6th June 2000 as the members of the Society of Construction Law gathered to listen to the address given by Mr Jeremy Winter and Mr Peter Johnson.

The Speakers and topic were presented by Mr Richard Bayfield, Chairman of the proceedings and recently appointed Vice Chairman of the Society. He referred back to previous talks on the area, 'Extensions of Time under JCT Contracts' given by Mr Martin Barnes on 3rd February 1987, and 'Concurrent Delays' given by Mr Ian Wishart on 4th June 1996, and to the continuing difficulties of analysis in the area. He introduced Mr Jeremy Winter as a Partner in Baker & McKenzie, Manager of the Construction and Engineering Group, experienced in litigation and arbitration. Also Mr Peter Johnson of Linacre Associates as a distinguished Chartered Civil Engineer also experienced in arbitration.

The topic was introduced by Mr Winter in terms of an analysis of techniques that may be used in relation to delay and entitlements to time and to money.

## **TIME**

### **Status Quo on site**

Mr Winter's view is that most standard forms of construction contract do not adequately deal with how to determine appropriate Extensions of Time ("EoTs"). Further, most contractors' programmes do not have the necessary links, are not resource-driven, and on the whole are not prepared to reflect what will actually happen on site, but are designed to win the job for the Contractor. Once the job begins the programmes are not properly updated with progress and typically an inadequate record is kept of potential dispute areas. This has led to consequent difficulties in proving the causes of delay and the consequent costs.

### **Status Quo in Court**

There is still no definitive judicial ruling on the method by which to assess delay and a general lack of certainty about some basic principles. This is coupled with a general mistrust of critical path modelling. EoTs are not determined by Judges scientifically but on what the Judge feels is the right amount of time. The uncertainty was illustrated by two recent court decisions on delay issues.

### **Recent Court Decisions**

In *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*, [1999] All ER 118, there was a prior agreement between the lawyers that where there were two causes of

delay, one of which was the Employer's responsibility (e.g. poor weather conditions), the other of which was the Contractor's responsibility (e.g. Contractor had provided no labour), the Contractor was still entitled to an extension of time. The judge did not seem to have applied that agreement fully, because he still considered the Contractor's performance to be relevant in determining its entitlement to an extension. The parties and the Judge also seem to have assumed that there could be no EoT unless the delaying event was on the critical path. This was something that had not been, but should be tested by the courts.

In *Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd*, (1999) 66 Con LR 119, a Sub-Contractor and Contractor blamed each other for the late completion of works. The Judge said that a Sub-Contractor cannot claim acceleration costs, EoT and prolongation costs for the full period of the EoT entitlement. Mr Winter considered that the Judge was, of course, right that a contractor could not claim prolongation costs for a period of delay that he had overcome by acceleration, but questioned whether he was right in relation to EoTs. He stressed that EoTs should be considered in terms of contemporaneous entitlement rather than retrospective need. The Contractor had argued that he could apply the float in the Contract as he wished; the Court did not agree and did not regard float as a 'tradeable commodity' (at paragraph 92). The Judge gave an example of a Contract in which there was 6 weeks float; 6 Sub-Contractors then caused one week delay sequentially and the float is eaten up (at paragraph 93). In these circumstances the Judge considered that the Contractor has suffered no loss. Mr Winter questioned this conclusion, because if there had been no delay, the Contractor would have been able to complete six weeks earlier, and would not have incurred six weeks extra site costs. He did however acknowledge that the authorities supported the Judge's decision (*Glenlion Construction v The Guinness Trust* (1988) 39 BLR 89).

In the context of these cases Mr Winter urged all members to anticipate and draft around difficulties with respect to time before they arise, and tackle float and concurrency expressly in their contracts. This has been attempted in the standard forms of Australia. Mr Winter advised avoiding reliance on sometimes confused legal principles and instead to rely on a good analysis of the facts.

## **Methods of Analysis**

Peter Johnson looked at various methods of analysing the progress of a Contractor and of delaying events and their causes:

- (1) The most basic method is the comparison of an As Planned Bar Chart with an As Built Bar Chart. The obvious difficulty with this method is that it does not show the causes of the delay and therefore who is responsible.
- (2) Critical Path methods:
  - i) As Planned Projected. In which one inserts dates as the project goes on, such as late provision of information by the employer or additional works. The problem with this method is that it takes no account of Contractor progress or delay.
  - (ii) As Built Collapsed Network. This is the opposite of (i). It takes the As Built programme and deducts the assessed effects of Employer delays - it is then assumed that any remaining delay is the responsibility of the Contractor. Unfortunately it takes no account of the realignment of Contractor's resources from what has become non-critical to what has become critical because of what has happened previously.

(3) Window analysis. This takes small windows of the As Built programme. The problem with this method is that it is a subjective and incomplete analysis.

(4) Time Impact analysis. This shows the effects of each individual delay and the contractor's actual progress. The difference between the two networks, immediately before and immediately after each event is demonstrably solely caused by the delaying event. This analysis takes account of:

- Original planned method and resources;
- Progress and events so far; and
- Direct cause and effect of single events as they unfold.

This is a proven method. In the United States it has been a specified method of analysis since the 1960s.

It involves Network Analysis. By this analysis the work is broken down into specific items; usually a single trade and preferably less than 14 days duration. The resources, costs and values are assigned to that activity. Each update tracks and records actual progress on all activities. These are then joined together by logic. For example, if Y task cannot begin until after X task, they are linked. The computer processes these links. At the end there are bars which represent the different tasks over time. Lines are shown after each bar where there is projected float. Bars are red where there is no float - where the item is on the critical path.

As the job goes on the network is updated. It is able to show the change in float and in the critical path.

Each cause of delay is considered separately, and added into the project networks whether the delay is caused by the Contractor or Employer. If the impact is over a month or over separate delaying events the computer can produce a series of subnets which show the precise build up over time. One can also combine the impact of both Contractor and Employer delays and observe what the delay is before and after the Employer's delay event.

## **MONEY**

Mr Winter then considered entitlement to money - prolongation costs. It is important in every case to be able to demonstrate exactly what the causes are. These are best proven on a time basis and for that reason much the same tools are used as described above. By presenting the claim in detail in terms of time and loss, the claimant avoids the difficulties of concurrency (for which the courts seem to prefer the dominant cause test- see the section in Keating on Building Contracts 6th ed. at 309) and of global claims and the principles set down in *Crosby (J.) v Portland Urban District Council* (1967) 5 BLR 121 and the succeeding line of cases. The appropriate method to use is a sequential analysis of delay. Such analysis is beneficial to a Contractor because in many cases where there are multiple causes of delay, that delay leading to prolongation, the Contractor may need only to prove entitlement in relation to some claims in order to be able to recover all its prolongation costs.

Mr Johnson then described how best to present a case for prolongation costs. His view is that a Claimant should look at how the different costs were incurred (head costs, geographical costs etc.) and at the site structure as it was actually used. An 'envelope' of time-related

overhead costs should be examined and the effect of delays on that 'envelope'. Any analysis on this basis requires critical path software. In Mr Johnson's experience on such a close analysis there are seldom in fact concurrent causes of delay. Causes which appear to be concurrent usually arise sequentially but appear to impact at the same time. This method allows the tracking of actual prolongation and cost.

## **Overall Conclusions**

Mr Winter hoped that by adopting such methods it should enable parties at the earliest possible time to reach an understanding as to the causes of delay, minimise the scope for disagreement and maximise the scope for settlement. It does necessitate a detailed and proper programme as its basis.

Following the presentation of the topic Mr Bayfield announced the setting up of a Working Group of members of the Society to draft a Code or Recommendation of delay methodology to be publicised in the Society's newsletter. Mr Winter and Mr Johnson agreed to join the Working Group and invited others to join. Mr Bayfield also opened the floor for discussion and questions.

A lively debate ensued. This included Mr Martin Barnes commenting on how the NEC contract attempts to shrink the problems by making who owns the float a matter of agreement for the parties. He took the view that although there was no absolutely correct method in every case his preferred form was the As Built Collapsed method of analysis (see 2(ii) above). Anyone presenting a case using this method only needs to know what actually happened: there is no need for the Contractor to plan properly. Mr Johnson answered this by saying that to use such method required a great deal of skill after the event. He referred to Dan Quackenbush's article "How to Analyze and attack Collapsed As Built Schedule Analysis" Defence Research Institute Inc. Construction Law Seminar, March 7-8, 1996 in Chicago, USA.

Peter Shaw, Partner of Taylor Joynson Garrett, gave the vote of thanks and endorsed and joined the Working Group.

## **SAMUEL TOWNEND**

Information about the working group can be found on the Society's website at [www.scl.org.uk](http://www.scl.org.uk)