

Judicial Recognition of the UK Society of Construction Law's Delay and Disruption Protocol

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ENGLAND AND WALES

1. ADYARD ABU DHABI V SD MARINE SERVICES [2011] EWHC 848 (COMM) (HIGH COURT OF JUSTICE, QB DIVISION, COMMERCIAL COURT)

1.1 <http://www.bailii.org/ew/cases/EWHC/Comm/2011/848.html>

1.2 On the question of causation, the claimant advanced the submission that it was entitled to an EOT if the duration of the relevant event or act of prevention extended over the original completion date, regardless of what other events may have been delaying the works and regardless of whether the relevant event / act would have any impact upon the actual progress of the works. [para 258-261] The claimant's expert suggested that the Protocol supported this submission. [para 289]

1.3 The Court determined that the Protocol was of little assistance to that submission given: (a) "the SCL Protocol is not in general use in contracts in the construction industry and nor has it been approved in any reported case"; (b) there was no evidence that the parties were aware of it or that they contracted with it in mind; and (c) the Protocol itself says that "it is not intended to be a contractual document" and "[n]or does it purport to take precedence over the express terms of a contract or be a statement of law". [para 289]

1.4 The Court further determined that, even if the Protocol was relevant, there was no "real support" contained therein for the claimant's causation submission. [para 292] Rather, the Court determined that, based upon the relevant contract provision, it was necessary to ascertain whether there was actual delay using a retrospective delay analysis. [para 299]

2. MIRANT ASIA-PACIFIC CONSTRUCTION (HONG KONG) LIMITED V OVE ARUP [2007] EWHC 918 (TCC) (HIGH COURT OF JUSTICE, QB DIVISION, TCC)

2.1 <http://www.bailii.org/cgi-bin/markup.cgi?doc=ew/cases/EWHC/TCC/2007/918.html>

2.2 The court relied upon the Protocol in recognising: (a) that there may be more than one critical path; [para 123] and (b) the purpose and effect of critical path

analysis [para 126]. (Note the footnotes in the judgment that the Protocol has been misquoted).

3. GREAT EASTERN HOTEL COMPANY LTD V JOHN LAING CONSTRUCTION LTD [2005] EWHC 181 (TCC) (HIGH COURT OF JUSTICE, QB DIVISION, TCC)

3.1 <http://www.bailii.org/cgi-bin/markup.cgi?doc=ew/cases/EWHC/TCC/2005/181.html>

3.2 On the question of causation, the court quoted from the defence in which the defendants stated that they would rely on the Protocol in respect of the calculation of delay where there is concurrent delay. [para 298] There was no judicial discussion of the Protocol.

4. BALFOUR BEATTY CONSTRUCTION LTD V LAMBETH [2002] EWHC 597 (TCC) (HIGH COURT OF JUSTICE, QB DIVISION, TCC)

4.1 <http://www.bailii.org/ew/cases/EWHC/TCC/2002/597.html>

4.2 This concerned an application to enforce an adjudication decision which referred to the Protocol in its draft consultative form apparently for the purposes of describing available methodologies for delay analysis, one of which was selected and used by the adjudicator in making his determination without providing the defendant the opportunity to comment on that chosen methodology.

4.3 The Protocol was not before the Court and there was no judicial discussion of it.

AUSTRALIA

5. ALSTOM LIMITED V YOKOGAWA AUSTRALIA PTY LTD (No.7) [2012] SASC 49 (SUPREME COURT OF SOUTH AUSTRALIA)

5.1 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/sa/SASC/2012/49.html>

5.2 The court noted that the plaintiff's expert relied upon the definition of "critical path" [para 412] and explanation of logic links [para 416] and resource levelling [para 466].

5.3 The court rejected one of the plaintiff's expert's methods of delay analysis because it was not a "method recognised within the engineering profession". This was because the method did not feature in the Protocol, in Keith Pickavance's *Delay and Disruption in Construction Contracts* or, to the knowledge of the plaintiff's expert, any other text on construction law. [para 1282]

5.4 The court noted that the defendant’s expert’s use of an “As-planned v As-built” methodology was, in the circumstances, justified by the Protocol. [para 1321]

6. SMEC AUSTRALIA PTY LTD v MCCONNELL DOWELL CONSTRUCTORS (AUST) PTY LTD (NO.3) [2012] VSC 557 (SUPREME COURT OF VICTORIA)

6.1 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2012/557.html>

6.2 The plaintiff’s expert report relied upon the “Measured Mile” analysis of delay in accordance with the Protocol. [para 126] There was no judicial discussion of the Protocol given the case concerned a strike out application. There is no reported decision on the merits of the case at trial.

7. 620 COLLINS STREET PTY LTD v ABIGROUP CONTRACTORS PTY LTD (NO 1) [2006] VSC 490 (SUPREME COURT OF VICTORIA)

7.1 <http://www.austlii.edu.au/au/cases/vic/VSC/2006/490.html>

7.2 In an application to set aside an arbitrator’s decision for failing to take account of certain of the plaintiff’s submissions, the court noted that the arbitrator had relied upon “the guidelines for retrospective delay analysis published by the UK Society of Construction Law [2002]”. Ultimately the court decided there was no misconduct by the arbitrator in reaching the relevant conclusion. [para 55]

HONK KONG

8. LEIGHTON CONTRACTORS (ASIA) LIMITED v STELUX HOLDINGS LTD [2004] HKCFI 804 (HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION)

8.1 <http://www.worldlii.org/cgi-bin/sinodisp/hk/cases/hkcfi/2004/804.html>

8.2 The court noted that the Protocol supports the time slice methodology (which had been used by the experts for both parties), but went on to determine that the arbitrator’s rejection of the time slice delay analysis in the circumstances did not amount to misconduct. [paras 24-35]