

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

The information contained in this summary document is intended for use as a general statement and guide only. Neither the Society nor any committee or member of the Society or any member of the group that drafted the Protocol accept any liability for any loss or damage which may be suffered as a result of the use in any way of the information contained herein and any person using such information or drafting contracts, specifications or other documents based thereon must in all cases take appropriate professional advice on the matters referred to in this publication and are themselves solely responsible for ensuring that any wording taken from this document is consistent with and appropriate to the remainder of their material.

Although this information has been produced following a thorough search of cases, the SCL does not warrant the completeness or accuracy of this information. If the reader is aware of a relevant case that is not currently included in this document, the SCL would be pleased to consider it for inclusion in the next edition.

ENGLAND AND WALES

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

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

- 1.1 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.

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

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

<https://www.bailii.org/ew/cases/EWHC/TCC/2005/181.html>

- 2.1 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.

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

<http://www.bailii.org/ew/cases/EWHC/TCC/2007/918.html>

- 3.1 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).

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

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

- 4.1 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]

- 4.2 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]

- 4.3 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]

AUSTRALIA

5. **620 COLLINS STREET PTY LTD V ABIGROUP CONTRACTORS PTY LTD (NO 1) [2006] VSC 490 (SUPREME COURT OF VICTORIA)**

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

5.1 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]

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

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

6.1 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].

6.2 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]

6.3 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]

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

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

7.1 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.

8. ALLMORE CONSTRUCTIONS PTY LTD V K7 PROPERTY GROUP PTY LTD (BUILDING AND PROPERTY) [2016] VCAT 1770 (20 October 2016)

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2016/1770.html>

- 8.1 The court noted that one of the expert Quantity Surveyors called upon to give evidence made reference to the table at paragraph 4.13 of the first edition of the Protocol, which set out four alternative types of analysis that can be used to assess a claim for delay, including Time Impact Analysis [para 123].
- 8.2 The expert in question used the Time Impact Analysis technique in order to create a chronology of key factual information, identify the relevant contractor's programme, link the delay activities to the existing programme activities, and determine the effect of the claimed delay event on practical completion.
- 8.3 The Court noted that the Quantity Surveyor for the other party did not use any of the four alternative types of analysis in the Protocol but used what he called "first principles" analysis.

9. SANTOS LTD V FLUOR AUSTRALIA PTY LTD [2017] QSC 153 (26 July 2017)

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC/2017/153.html>

- 9.1 Fluor sought to strike out a number of paragraphs of Santos' claim on the basis that Santos relied upon multiple breaches as causing the works to be delayed and disrupted. Fluor asserted that Santos failed to identify a causal link between these multiple breaches and the claim for disruption.
- 9.2 Santos had calculated the extent of disruption using a measured mile analysis. Fluor submitted that a measured mile analysis in accordance with the Protocol proceeds upon the basis that it is not possible to undertake a critical path analysis of delay or to analyse the cause and effects of the claimed delay. Fluor submitted that if a measured mile analysis was the basis of the claim, Santos should have expressly pleaded that it was not possible to disentangle the causative contribution of individual breaches [para 111].
- 9.3 However, the judge refused to strike out the paragraphs referring to delay and disruption and found that Santos' claim did, in fact, include a sufficient pleading of material facts.

10. LUCAS EARTHMOVERS PTY LIMITED V ANGLOGOLD ASHANTI AUSTRALIA LIMITED [2019] FCA 1049 (5 JULY 2019)

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2019/1049.html>

- 10.1 Much of the evidence and submissions contained references to the "baseline program" and to delays being critical or non-critical.

10.2 The court noted that the parties agreed as to the concepts of "critical path" and "critical delay". The court adopted the definition of "critical path" in the Protocol [para 136].

HONG KONG

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

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

- 11.1 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]

NORWAY

12. OPPLAND FYLKESKOMMUNE v HAB CONSTRUCTION AS HR-2019-1225-A, (sak nr. 18-175510SIV-HRET) (SUPREME COURT OF NORWAY)

[Link to Judgment not available]

12.1 This case in the Norwegian Supreme Court concerned a Court of Appeal judgment regarding delay and disruption to a road-building project.

12.2 The Supreme Court held that causality in disruption claims must be established in two steps:

- First, the contractor must prove disruption / loss of productivity caused by conditions for which the owner / employer is responsible; and
- Second, the contractor must substantiate causality between the disruption and the actual financial loss. Causality must be established based on specific evidence.

12.3 The judges noted that the parties made extensive reference to the Protocol's guidance on how to properly assess disruption claims [para 81].

12.4 Unfortunately the complete judgment is in Norwegian and is not available online.