Awarding Extensions of Time
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“an extension of time provision confers **benefits on both parties**; in particular it enables a contractor to recover reasonable extensions of time whilst still maintaining the contractually agreed structure of a specified time for completion”

*Steria v Sigma Wireless Communications* [2007] EWHC 3454 (TCC)

Similarly in *Multiplex v Honeywell* [2007] EWHC 447 (TCC)
• Programmes
• Assessment of delay
• Contract requirements
We must start with the contract ...

• The prevention principle

Where a party to a contract has, by any act or omission, prevented the other party from performing a particular obligation under the contract, they cannot insist upon the performance of that obligation by the other party.

See for example *Multiplex v Honeywell* [2007] EWHC 447
So express terms allow the Employer to adjust the completion date...

- JCT and similar
  - SBC 2011, 2.28
  - DB 2011, 2.25
  - IC 2011, 2.19
  - MW 2011, 2.7
- NEC3, 63.3
• SBC 2011, 2.28; DB 2011, 2.25 wording

  • a Relevant Event; and
  1. “... completion of the Works or any Section
  2. is likely to be delayed thereby
  3. beyond the relevant Completion Date.”

  • ‘Prospective’ assessment...
  • with ‘Retrospective’ review 12 weeks after PC (SBC 2.28.5)
• NEC 63.3
  • a compensation event; and
  1. “A delay is assessed as ... the length of time that ...”
  2. planned Completion is later than
  3. Completion as shown on the Accepted Programme”

• ‘Prospective’ assessment...
• no ‘Retrospective’ review
• Delay to the completion date must therefore be assessed by reference to the progress of the works to the then projected completion date.

_Balfour Beatty v Chestermount Properties_ [1993] 62BLR1
• Merely establishing delay caused to a particular work activity which does not impact the completion date of the works as a whole, or theoretical delay, will not suffice.

*Adyard Abu Dhabi v SD Marine Services* (2011)
Giving / receiving notice

• Express terms
• when it becomes reasonably apparent that the progress of the works is being or is likely to be delayed
• notice to be given forthwith
• Condition precedent?
  
  *LB Merton v Leach* [1986] 32BLR51

see however FIDIC 1999 Red Book for example, and *Steria v Sigma Wireless Communications* [2007] EWHC 3454
Giving / receiving notice

• *LB Merton v Leach* [1986] 32BLR51

The giving of a notice (under JCT 63) was not a condition precedent before the architect was under a duty to consider any possible extension of time. However failure to give a notice on it becoming reasonably apparent that the progress of the work was delayed was a breach of contract and that breach could be taken into account by the architect providing an extension of time.
Giving / receiving notice

- JCT SBC 2011, 2.27
- NEC3, 61

- Format for presentation of EOT claim?

- Next steps
  Can the CA/PM ‘require’ the Contractor to submit more information?
Using best endeavours to mitigate delay

- SBC 2011, 2.28.6.1
- A “constant” obligation
- Contractor to do all that may reasonably be required to proceed with the work
Programmes

- Planned programme
- Updated programmes
- Finishing/Completion programmes
- As-built programme
Programmes: Planned programme

- Requirements of the contract
  As soon as possible after execution of the contract
- Contact document or not
  - JCT forms
  - NEC, 31.2
    acceptance / reasoned non-acceptance
- Enhanced requirements of programme information by particular conditions
Programmes: Updated programmes

JCT SBC 2011 2.9.2, within 14 days of EOT or pre-agreed adjustment

NEC3, 32, within period of reply / intervals as contract data
Programmes

- Finishing/ Completion programmes
Programmes

• As-built programme
Providing / obtaining the data

- Keeping good records
- Minutes of meetings
- Contractor’s progress reports
- Payment applications and certification
- Other records of progress
- Method statements
- CoW reports
- Resource schedules
- Plant
Assessing the delay

  “I recognise that the assessment of a fair and reasonable extension involves an exercise of judgment, but that judgment must be fairly and rationally based.”

1. A logical analysis in a methodical way - not impressionistic
2. Calculated assessment of the time which CA/PM thinks is reasonable for various items individually and overall.
3. In accordance with the contract provisions.
4. Allowance which bears a logical and reasonable relation to the delay caused.
Assessing the delay

- Cause, effect, responsibility
- Float
  
  Ascon Contracting v Alfred McAlpine [1999] 66 Con LR 119
  Royal Brompton Hospital v Hammond

- JCT / NEC - Contractor entitlement to complete early?
Assessing the delay

• Assessing the critical path
  • at the time of the relevant event
  • use ‘as-built’ information

• Working with/without Critical Path Analysis
Assessing the delay

- Working with Critical Path Analysis

"... in projects where CPN techniques have already been used to manage the construction process and monitor its progress, CPN provides an excellent tool for establishing the causes and effects of delay..."
Assessing the delay

• Working with Critical Path Analysis

• *City Inn v Shepherd Construction* [2008] BLR 269
  “... the pursuers went too far in suggesting that an expert could only give a meaningful opinion on the basis of an as-built critical path analysis... [with critical path analysis] any significant error in the information that is fed into the programme is liable to invalidate the entire analysis...”
Assessing the delay

• Working with Critical Path Analysis
• *Great Eastern Hotels v John Laing Construction* [2005] EWHC 181 TCC

“... Laings also altered the logic link... by changing the finished relationship from seven weeks to four weeks Laing were enabled to under report the true delay...”
Assessing the delay

- Working without Critical Path Analysis
- *Walter Lilly v Mackay* [2012] EWHC 1773 TCC
 Assessing the delay: without CPA

• *Walter Lilly v Mackay* [2012] EWHC 1773 TCC
• Logical analysis progressing month-by-month based on all contemporaneous information
• To review what in each month was probably delaying overall completion, and cross check by reference to what actually happened
Assessing the delay: without CPA

• and *De Beers v Atos* [2010] EWHC 3276 TCC

  “... There has been no analysis of the critical delays to the project, and so I must do my best to assess what delays were in truth driving completion...”
Calculating the extension due (whether using CPA or not):

1. Check programme construction logic and assess probable critical path at the time

2. Consider contractor’s options for mitigation – i.e. amending programme where reasonable

3. Focus on the overall effect on the Completion Date, not solely on the activity or activity sequence
Calculating the extension due (whether using CPA or not):

4. ‘Dotting on’ net addition of time - *Balfour Beatty v Chestermount*

5. Allow for consequential effects

6. Work in calendar days

7. Adhere to the contract

8. Remember that a final review will be undertaken (JCT)
Concurrent delay

• What is concurrent delay?

“a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency.” John Marrin QC

• Adyard Abu Dhabi v SD Marine Services (2011) approved

• Also SCL Delay and Disruption Protocol, 2002, ref Steria Ltd v Sigma Wireless Communications Ltd (2008) BLR 79, TCC at 130-131
Time in the event of concurrent delay

- Full award where one cause of delay is a Relevant Event
- *Walter Lilly v Mackay* [2012] EWHC 1773 TTC
  "...where a delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time."

- *Henry Boot Construction v Malmaison Hotel*

- Apportionment (Scottish law)
- *City Inn v Shepherd Construction*
Making the Award

- In accordance with the contract
- SBC 2011, 2.28, time attributed to each relevant event
- NEC3, 32.1 – the effect of implemented compensation events on the revised programme
- Observing the contract time frames
Keeping a record of the Award

- Recording the methodology of assessment
- Recording the calculation

Review after Practical Completion - JCT

- 12 week review – SBC 2011, 2.28.5
Later disputes

- Retrospective Critical Path Analysis
- *The Royal Brompton Hospital NHS Trust v Hammond and Others*, (2000)
- Importance of contemporaneous documents
What if the award is later found by the Court to be wrong?

“The duty of a professional man, generally stated, is not to be right, but to be careful... The fact that he is in the event proved to be wrong is not, in itself, any evidence that he has been negligent. His conduct has to be judged having regard to the information available to him, or which ought to have been available to him, at the time he gave his advice or made his decision or did whatever else it is that he did.”

• Royal Brompton Hospital v Hammond [2000] -HHJ Seymour
Guidance for professionals

- SCL Delay and Disruption Protocol, 2002

Authoritative legal reference books

- Keating on Construction Contracts, 9th Ed., August 2011
- Construction Law, Julian Bailey, April 2011
Other sources of interest

• SCL Paper 179, Concurrent Delay Revisited, John Marrin, February 2013


Source for full texts of judgments

• www.bailii.org