MONEY and DELAY CLAIMS under the PUBLIC WORKS CONTRACT

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Importance of keeping records

Many claims could be paraphrased as:

"I have lost one million Euro and it's not my fault"

Everyone on site should take copious notes of what is happening, using:

1. site notebooks/diaries/laptops
2. camera or smart phone photos
3. annotations on drawings and one-off sketches
4. recording events in daily emails to relevant people

Cause and effect

In England in *Walter Lilly & Co Ltd v Mackay (No 2)*, [2012] EWHC 1773 (TCC), [2012] BLR 503, the court dealt with delay and disruption claims. Akenhead J said:

> "[para 486] ... the contractor has to demonstrate on a balance of probabilities that, **first,** events occurred which entitle it to loss and expense, **secondly,** that those events caused delay and/or disruption and
> **Thirdly,** that such delay or disruption caused it to incur loss and/or expense (or loss and damage as the case may be) ..."

The distinction between mere assertion and proof was emphasised in *Cleveland Bridge UK Limited v Severfield-Rowen Structures Limited* [2012] EWHC 3652 (TCC) where Akenhead J said:

> [para 98] … In all these delay cases, it is necessary to show that the claiming party was actually delayed by the factors of which it complains;

> it simply does not follow as a matter of logic, let alone practice, on a construction or fabrication project, that, simply because a variation is issued or that information is provided later than programmed or that free issue materials are issued later in the programme than envisaged originally, the claimant is delayed. If the real cause of the delay is, say, overwork or disorganisation within the claimant, the fact that there have been variations, late instructions or information or late issue of materials is simply coincidental"

Claims register

On anything but a very small project; some sort of spreadsheet to keep track of claims is essential. It should be updated regularly and note reference number, claim title, date notice sent/acknowledged, date follow-up particulars sent/acknowledged, if no response: date chasing letter sent, date of claim determination, date of response to claim determination, date of conciliation notice if applicable, note of appendices and relevant files.

Notice requirements concerning claims

Within 20 working days of a relevant event, the Public Works Contract, clause 10.3.1 requires the contractor to give notice in writing to the employer's representative. Thereafter, within 20 working days of the contractor giving the notice, the contractor must give the ER details of "all relevant facts about the claim" together with a calculation of an adjustment to the contract sum. Clause 10.3.2 states that the contractor will lose its entitlements unless it has complied with clause 10.3.1.

Whether notices are a condition precedent to entitlement

This will depend on the precise wording of the contract in question. To be effective, a notice clause must be written in clear language. In *WW Gear Construction Ltd v McGee Group Ltd* [2010] EWHC 1460 (TCC), (2010) 131 Con LR 63, Akenhead J said:

> "[para 13] … conditions precedent which have the effect of excluding what would otherwise be perfectly valid claims or entitlements are to be construed strictly … the contractual language used to exclude rights of set-off or other common law or equitable rights must be 'sufficiently clear'."

In *P Elliott & Co Ltd v Minister for Education* [1987] ILRM 710, the contract was subject to the RIAI Conditions of Contract 1968 edition, which provided that the final certificate was conclusive in regard to certain matters. The Supreme Court accepted the contractor's contention that, because the final certificate clause restricts the parties' right to litigate either in court or in arbitration, (in the words of Finlay CJ at pages 721 and 722) it must:

> "be strictly construed in the sense that **any claim which falls to be barred** by the issue of the final certificate **must be unambiguously within the terms of that sub-clause**" [emphasis added]

Where the wording of a condition precedent type of notice clause is clear, the courts will enforce it.

***City Inn v Shepherd Construction* [2003] BLR 468**

Clerk LJ emphasised that the clause was a condition precedent and he said [para 23]:

> "But if he wishes an extension of time, he must comply with the conditions precedent that clause 13.8 provides ..."

Where notice in some form is given - some flexibility is allowed

This is evident from the following case law:

Multiplex Construction (UK) Ltd v Honeywell Control Systems **[2007] BLR 195**

This case concerned Wembley Stadium in London. The notice clauses were quite stringent. The court [Jackson J - page 210] took a very practical view of the notice clauses, as follows:

> "80 ... **I do not read clause 11.2 as requiring the sub-contractor to serve notices or to provide supporting details which go beyond the knowledge and information available to him** …
>
> 82 ... **The obligation imposed upon the sub-contractor is an obligation to do his best as soon as he reasonably can"**

W Hing Construction Co Ltd v Boost Investments Ltd **[2009] BLR 339 -** The editors of the Building Law Reports commented [page 341]:

> "One needs to bear in mind the art of the possible or practicable: the Contractor cannot provide details of things of which it is unaware."

The court [Westbrooke SC - page 347] took a practical approach, as follows:

> "71. … **Clearly the amount of "full details" which can be given within 28 days, may not be as great as may be later apparent.**"

Kajima UK Engineering Ltd v The Underwriter Insurance Co Ltd **[2008] EWHC 83 (TCC), (2008) 122 Con LR 123, [2008] Insurance and Reinsurance 391 -** The court [Akenhead J, para 99] took a practical view of the clause, thus:

> "(e) … **the notification only covers those matters of which the insured is actually aware**....
>
> (i) **The claim** which is later pursued **must arise** not only from the notified circumstances but also **only from the circumstances of which the insured was aware ...** Put another way, **a subsequent claim which relates to matters of which the insured was not aware** at the time of the notification **would not** and could not **arise from the notified circumstances** ..."

The notice must clearly refer to the event giving rise to the claim

In *Glen Water Ltd v Northern Ireland Water Ltd* [2017] NIQB 20, [2018] BLR 141, the contract stated that the contractor must:

> "33.2.2.1 As soon as practicable, and in any event within 21 days after it became aware that the compensation event has caused or is likely to cause delay, breach of an obligation under this contract and/or the contractor to incur costs ... give to the authority a notice of its claim …"

The key issue in the case was whether a letter from the contractor to the employer, dated 20 October 2009 which referred to the cooling water claim, was a proper notice in regard to a different claim, namely the line 1 incinerator claim. Keegan J said:

> "56 The plaintiff stakes its claim on the letter of 20 October 2009. … **A notification should be clear and unambiguous** …" [emphasis added]

In *Education 4 Ayrshire Ltd v South Ayrshire Council* (2009) 26 Const LJ 327, the relevant clause, dealing with extra payment and an extension of time, stated that the notice had to be sent within 20 business days of the event causing delay.

The notice had to be sent by first class post, by fax, or delivered by hand to the Chief Executive of the Local Authority. The contractor did not write initially to the Chief Executive but sent an email to a staff member, who was involved in the project, and (in a second email) enclosed a letter from a sub-contractor describing problems arising from the discovery of asbestos on site.

The court rejected the claims on the basis that the notice clause had not been complied with. Lord Glennie said:

> "[para 19] It matters not that, at certain levels, employees of the Authority may have been aware of what was going on. Nor ... does it help [the contractors] to say that [various letters read in conjunction with the sub-contractor's letter] would have enabled the Authority to infer that the claim by [the sub-contractor] was going to be passed up the line to them. ... **The [contractors] were required to tell the Authority what claim they were making. It does not do for them to say: 'here is what [the sub-contractor] has written to us, you work it out for yourself'**. That is not a valid notice under the clause" [emphasis added]

Who needs to be aware of the something that gives rise to the claim?

In clause 10.3.1 of the Public Works Contract; time starts to run from when the contractor became aware, or should have become aware, of whatever it is that gives rise to the claim. But, where the contractor is a large company, who needs to be aware? - the managing director? - the site foreman? – the man pouring the concrete? – an employee of a minor sub-contractor?

The contractor is not aware of the event unless a director or senior manager of the company is aware – time does not start to run if only a relatively junior employee of the contractor is aware of the event. But see clause 4.2.2 of the PWC (below).

The mind of a company

In *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 171, Lord Reid in the House of Lords said:

> "Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not."

Irish law

The courts in Ireland have held that notice of important terms must be brought to the attention of senior management and not just given to junior employees.

In *Noreside Construction Ltd v Irish Asphalt Ltd* [2011] IEHC 364, unreported, High Court, 4 October 2011, Finlay Geoghegan J said:

> "38 … neither a reasonable man nor any haulier or site operative signing a delivery docket on behalf of the plaintiff would have understood that his signing of the delivery docket potentially varied the terms of the contract already agreed …"

In *James Elliott Construction Ltd v Irish Asphalt Ltd* [2014] IESC 74, the Supreme Court said:

> "[para 140] … **It would be somewhat surprising** to reach the conclusion **that reasonable notice** of an exclusion clause **could be given** to the party to be bound **by informing a low level member of staff of the existence of the exclusion clause.**"

Contractor's Representative and Supervisor

Clause 4.2.2 of the Public Works Contract states:

> "Matters of which the Contractor's representative or supervisor are aware [including communications and instructions] are presumed to be within the Contractor's knowledge"

Therefore, having regard to this clause and to the English and Irish case law (see above); under clause 10.3.1 of the Public Works Contract, the contractor does not have to give notice unless (within the contractor's company) a director, senior manager, the contractor's representative (appointed for the project) or supervisor (appointed for the project) are aware of the something that gives rise to the claim.

Notice requirements under clause 10.3 of the Public Works Contract

Clause 10.3.1 of the PWC provides that:

> "**If the Contractor considers** that under the Contract there should be an extension of time or an adjustment to the Contract Sum, or that it has any other entitlement under or in connection with the Contract, **the Contractor shall**, as soon as practicable and in any event *within 20 working days after it became aware, or should have become aware, of something* that could result in such an entitlement, **give notice of this** to the Employer's Representative ..."

When should the notice under clause 10.3.1 of the PWC be triggered?

At first sight, clause 10.3.1 seems to be straightforward. But, when analysed, there are at least three different times when the clause might be deemed to kick-in, as follows:
(1) when the contractor became aware of the relevant event, or
(2) when the contractor ought to have become aware of the relevant event, or
(3) when the contractor considers that there should be an adjustment to the Contract Sum

When interpreting similar clauses, the courts have held that the notice period runs from whichever is the later of two options:
(1) when the contractor became aware of the relevant event, or
(2) when the contractor ought to have become aware of the relevant event

***WW Gear Construction Ltd v McGee Group Ltd* [2010] EWHC 1460 (TCC), (2010) 131 Con LR 63**
This case concerned entitlement to loss and expense. Akenhead J said [para 18]:

> "... **the wording is such that** … **periods run from one of two stages, namely either when it has become apparent or when it should reasonably have become apparent that the progress of the works was or was likely to be affected**. …
> **giving the Contractor the option of making its application ... at the later of the two alternative stages ... it may be that the time for making any given application under Clause 4.21 can await a time when actual delay ... has materialised**"

***Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028 (TCC) [2014] BLR 484**

This case concerned a notice clause which was similar in wording to clause 10.3.1 of the Public Works Contract. The contract in the *Obrascon* case was the FIDIC Yellow Book.

The court took a liberal view of when the contractor had to issue a notice. Akenhead J said:

> "[para 312] … **the extension of time can be claimed either when it is clear that there will be delay (a prospective delay) or when the delay has been at least started to be incurred (a retrospective delay)**. ...
> [para 313] … The notice must be given as soon as practicable but the longstop is 28 days after the Contractor has become or should have become aware. **The onus of proof is on the Employer ... to establish that the notice was given too late**"

Does the notice period run from date when the contractor considers that there should be an adjustment of the contract sum in respect of the relevant claim?

Or does the notice have to be given within 20 working days from when the contractor "became aware, or should have become aware, of something that could result in such an entitlement" [even though, at that stage, the contractor does not consider that there should be an adjustment to the Contract Sum]?

Some assistance may be gained from the decision of the Court of Appeal in England in *Nobahar-Cookson v The Hut Group Ltd* [2016] EWCA Civ 128. Briggs LJ said:

> "[para 9] … **it is well-settled that contractual limitation periods for the notification or bringing of claims are forms of exclusion clause**. …
> [para 36] … **That being the purpose, it seems to me that it is better served by an interpretation which focuses upon awareness of the Claim than upon awareness of the underlying facts**"

Employer claims – notice requirements

Clause 10.9.1 of the Public Works Contract provides:

> "If the Employer … considers that, under the Contract, there should be a reduction of the Contract Sum, or that any amount is due to the Employer from the Contractor under the Contract, the Employer or the Employer's Representative shall, as soon as practicable, give notice and particulars of the event or circumstances …"

A similar clause was considered in *NH International (Caribbean) Ltd v National Insurance Property Development Co Ltd* [2015] UKPC 37, (2015) 162 Con LR 183, in which Lord Neuberger said:

> "[para 9] … **'[t]he notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim'**. …
>
> [para 38] … it is hard to see how the words of cl 2.5 could be clearer. **Its purpose is to ensure that claims which an employer wishes to raise … should not be allowed unless they have been the subject of a notice, which must have been given 'as soon as practicable'.**

Claim particulars and level of back-up required

Many forms of contract require that the contractor's notice of claims should be followed up with particulars of the claims. An issue that arises from time to time is:

1. What level of particularisation is required in the follow up documents? and
2. To what extent does the contractor have to go in order to vouch and prove the claims?

In *Walter Lilly & Co Ltd v Mackay (No 2)*, [2012] EWHC 1773 (TCC), [2012] BLR 503. Akenhead J said:

> " [para 465] … **an entitlement to various heads of loss and expense will not be lost where for some of the loss details are not provided. ... there is no reason to believe that an offer to the architect or quantity surveyor for them to inspect records at the contractor's offices could not be construed as sub-mission of details of loss and expense** …

[para 468] ... **It is argued ... that the architect or the quantity surveyor cannot ascertain unless a massive amount of detail and supporting documentation is provided**. ... **it is necessary to construe the words in a sensible and commercial way that would resonate with commercial parties in the real world. The architect or the quantity surveyor must be … satisfied that** all or some of **the loss and expense** claimed **is likely to be or has been incurred**. **They do not have to be "certain".** … **the ultimate dispute resolution tribunal** will decide any litigation or arbitration on a balance of probabilities and at that stage that tribunal **will (only) have to be satisfied that the contractor probably incurred loss or expense** as a result of one or more of the events listed in clause 26.2. ...

[para 470] … **The fact that what is put forward** is not accepted by the quantity surveyor or architect or even that it **does not provide all the details absolutely necessary to prove beyond doubt every penny's or pound's worth of loss and expense does not mean that the condition precedent is not achieved** at least in respect of what is reasonably capable of being established."

The *Glen Water* case

In *Glen Water Ltd v Northern Ireland Water Ltd* [2017] NIQB 20, [2018] BLR 141, the contract stated that the contractor must:

> "33.2.2.2 Within 14 days of receipt by the authority of the notice referred to in clause 33.2.2.1 above, give full details of the compensation event and the extension of time and/or any estimated change in project costs claimed"

Keegan J said [para 55]:

> "55… it was agreed that the notification is a condition precedent. … That is the first stage under the contract. The second stage is regarding the provision of details. … **some latitude may be allowed to a contractor claimant who is genuinely not in a position to give detail required by a notice but he will still be required to give the best information available to him**" [emphasis added]

Prevention principle and notice clauses

It is a cardinal principle that a party should not benefit from its own breach of contract – *Alghussein Establishment v Eton College* [1988] 1 WLR 587.

It has been contended that an employer cannot levy liquidated damages on the contractor if the delay has been caused by the employer's own fault. This is known as the prevention principle.

It must of course be shown that the delay was caused by the employer before the prevention principle will be applied. In *Jerram Falkus Construction Ltd v Fenice Investments Inc* [2011] EWHC 1935 (TCC), (2011) 138 Con LR 21, Coulson J said:

> "[para 52] Accordingly, I conclude that, for the prevention principle to apply, the contractor must be able to demonstrate that the employer's acts or omissions have prevented the contractor from achieving an earlier completion date and that, if that earlier completion date would not have been achieved anyway, because of concurrent delays caused by the contractor's own default, the prevention principle will not apply"

But what happens if the contractor does not get an extension of time for an employer delay where the contractor has not complied with a condition precedent requiring written notice of the delay?

In Australia, in *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* [1999] NTSC 143, (1999) 16 BCL 449, the court applied the prevention principle to those circumstances and held that the employer was estopped from levying liquidated damages for delay. But, *Gaymark* has not been followed in several cases including:
Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd [2007] EWHC 447 (TCC), (2007) 111 Con LR 78 [UK]
Steria Ltd v Sigma Wireless Communications Ltd [2007] EWHC 3454 (TCC), [2008] BLR 79, (2007) 118 Con LR 177 at paras 94 and 95 [UK]
Penninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd [2002] NSWCA 211, (2002) 18 BCL 322 [Australia]
City Inn Ltd v Shepherd Construction Ltd 2003 SCLR 795, 2003 SLT 885 [UK]
Hsin Chong Construction (Asia) Ltd v Henble Ltd HCCT 23/2005 at paras 133 to 135 [Hong Kong]

These cases were discussed in *Hong Kong (Sar) Hotel Ltd v Wing Key Construction Co Ltd* (2016) 166 Con LR 186 which also declined to follow *Gaymark.*

Chan J said:

> "[para 188] "The employer's entitlement to damages, it might be said, was caused not by the delay but by the delay coupled with the contractor's failure to satisfy the condition precedent.'"

Valuation of variations under the Public Works Contract

PWC clause 10.1.1 provides:

> "… if a Compensation Event occurs **the Contract Sum shall be adjusted** … **by the amount provided in sub-clause 10.6** …" [emphasis added]

PWC clause 10.6 provides that:

> "10.6 **Adjustments to the Contract Sum**
> Adjustments to the Contract Sum for a Compensation Event shall only be for the **value of any additional**, substituted, and omitted **work required** as a result of the Compensation Event under this sub-clause 10.6 **and** any **delay cost** under sub-clause 10.7. **Additional**, substituted, and omitted **work shall be valued** as follows:

10.6.1 If the Compensation Event requires additional, substituted or omitted work similar to work for which there are rates in the Pricing Document, to be executed under similar conditions, the determination shall use those rates.
10.6.2 If the Compensation Event requires additional, substituted or omitted work that is not similar to work for which there are rates in the Pricing Document, or is not to be executed under similar conditions, the determination shall be on the basis of the rates in the Pricing Document when that is reasonable.
10.6.3 If the adjustment cannot be determined under the above rules, the Employer's Representative shall make a **fair valuation** based on rates for similar work in the locality, if available" [emphasis added]

Clause 10.6 refers to the **value of** any **additional work <u>and</u>** any **delay cost** [they are additional to each other – they are not alternatives].
Where there is delay in Substantial Completion of the <u>Works</u> [but not a Section – see PWC clause 10.7.5]; **PWC clause 10.7.1 provides for delay costs** resulting from a Compensation Event to be paid at the rate per Site Working Day inserted in the Schedule part 2D by the contractor at tender stage.

This is often priced at zero. So, this provision is of little benefit to the contractor.

Rules 10.6.1 and 10.6.2 are straightforward: variations are priced at rates in the Pricing Document or using rates based on rates in the Pricing Document. Rule 10.6.3 requires "**a fair valuation based on rates for similar work in the locality**, if available". That suggests rates for measured quantities such as a rate per square metre for plaster, per cubic metre for concrete or per tonne for steel. But it could also refer to the **going rate per hour in the locality** for plasterers, for example, with such rate being applied to the number of hours worked.

In *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [1999] BLR 123**,** Judge Lloyd QC said at page 137:

> "**A fair valuation** when used as an alternative to a valuation by, or by reference to, contract rates and prices generally **means a valuation which will not give the Contractor more than his actual costs reasonably and necessarily incurred plus similar allowances for overheads and profit**" [emphasis added]

In *Floods of Queensferry Ltd v Shand Construction Ltd* [1999] BLR 319 at 324, Judge Lloyd QC held that:

> "The guiding principle is that set out in clause 9(2): the valuation must be fair and reasonable. Where, in general, contract rates and prices are not available or appropriate and **where the contractor's actual costs of labour, plant and materials reasonably and properly incurred** can be established with an acceptable degree of certainty **then those figures, together with an appropriate addition for site and head office overheads and profit, would produce a fair and reasonable valuation."** [emphasis added]

The *Healthy Buildings* case

In the assessment of a fair valuation, evidence of the time actually spent by the contractor in carrying out additional work is important. In *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd* [2017] NIQB 43, [2018] BLR 157, there was a dispute about the valuation of work done by a consultant who had been engaged to assess the risk of asbestos in buildings. Deeny J said:

> "35 **Evidence, from time sheets and other material, of what the consultant actually did in that period, particularly with reference to the change in instructions, is not only relevant evidence but clearly the best evidence to assist the court in calculating the "compensation" to which the consultant is entitled**. …" [emphasis added]

Fair valuation and delay/disruption costs under the Public Works Contract

If a 'fair valuation' is to encompass all of these elements, then **it must include delay and disruption costs**. However, under the PWC, there is a clear conflict between a 'fair valuation' under clause 10.6.3 and the provisions of clause 10.7.4 which states:

> "10.7 **Delay Cost** …
>
> 10.7.4 Except as provided in this sub-clause 10.7 [notwithstanding anything else in the Contract] **losses or expenses** arising from or **in connection with delay, disruption, acceleration, loss of productivity or knock-on effect shall not be taken into account** or included in any increase to the Contract Sum, and the Employer shall have no liability for such losses or expenses" [emphasis added]

Save for delay costs priced at the rate per Site Working Day inserted in the Schedule part 2D; **clause 10.7.4 purports to exclude all delay and disruption claims**.

Clause 10.7.4 appears under the heading '10.7 Delay Cost' and it may be contrasted with '10.6 Adjustments to the Contract Sum'. Therefore, it might be argued that it relates only to circumstances which involve a delay to the project. But its terms seem to be all-embracing – particularly the rider "**notwithstanding anything else in the Contract**".

If clause 10.7.4 did not exist, there would be no doubt but that a fair valuation under clause 10.6.3 would include delay and disruption costs. **Does clause 10.7.4 modify clause 10.6.3 and give clause 10.6.3 a narrow**, indeed contrived, **meaning that excludes delay and disruption costs?**

Matters are not helped by the inconsistent use of language in the two clauses, thus:
Clauses 10.6 and **10.6.3** refer to 'value' and 'fair valuation' whereas
Clause 10.7.4 refers to 'losses or expenses'. <u>But it does not exclude a fair valuation</u>.

PWC clause 1.2.4 purports to exclude the *contra proferentem* rule of construction. It provides:

> "No rule of legal interpretation applies to the disadvantage of a party on the basis that the party provided the Contract or any of it or that a term of the Contract is for the party's benefit"

However, clear words are required to exclude rights that the contractor would otherwise have in respect of events caused by the employer.

In *P Elliott & Co Ltd v Minister for Education* [1987] ILRM 710, the RIAI Contract provided that the final certificate was conclusive. Because the final certificate clause restricts the parties' right to litigate either in court or in arbitration, (in the words of Finlay CJ at pages 721 and 722), the Supreme Court held that the clause must:

> "be strictly construed in the sense that **any claim which falls to be barred** by the issue of the final certificate **must be unambiguously within the terms of that sub-clause**"

Other than the rate per Site Working Day; PWC clause 10.7.4 clearly excludes ‘losses or expenses’ in connection with delay and disruption. **But**, having regard to the Decision of the Supreme Court in *Elliott*, **clause 10.7.4 does not exclude the constituent elements of a fair valuation** of any additional, substituted, and omitted work.

The Schedule part 1K provides for 21 events and many of these will be Compensation Events. Subject to certain pre-conditions which are set out in the PWC, it seems to me that PWC clauses 10.6.3 and 10.7 when read together provide that:

1. In respect of any additional, substituted, and omitted work, **the contractor can recover delay and disruption costs as constituent elements of a fair valuation** but
2. In respect of **all other Compensation Events** (which are also Delay Events)**, the contractor is restricted to recovering delay costs at the rate per Site Working Day** inserted in the Schedule part 2D

Concurrent employer/contractor delays

In England in *Walter Lilly & Co Ltd v Mackay (No 2)*, [2012] EWHC 1773 (TCC), [2012] BLR 503, the court dealt with this issue. Akenhead J said:

> "[para 370] … where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the contractor to an extension of time ... the contractor is entitled to a full extension of time."

However that does not mean that the contractor can automatically recover delay costs in these circumstances. In *De Beers UK Ltd v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC), (2010) 134 Con LR 151, Edwards- Stuart J said:

> "[para 177] The general rule in construction and engineering cases is that **where there is concurrent delay to completion caused by matters for which both employer and contractor are responsible, the contractor is entitled to an extension of time but he cannot recover in respect of the loss caused by the delay.**

The court in *Saga Cruises BDF Ltd v Fincantieri SPA* [2016] EWHC 1875 (Comm), (2016) 167 Con LR 29, said:

> "[para 249] … (ii) . .. '**There is only concurrency if both events in fact cause delay to the progress of the Works and the delaying effect of the two effects is felt at the same time**';
>
> (iii) … '**The act relied upon must *actually prevent* the contractor from carrying out the Works within the contract period** or, in other words, must cause some delay';
>
> (iv) **soundly rejects the idea of reliance on 'notional or theoretical delay' as contrasted with proof that the event or act causes actual delay to the progress of the Works**
>
> "[para 251] … unless there is a concurrency actually affecting the completion date as then scheduled the contractor cannot claim the benefit of it. Causation in fact must be proved based on the situation at the time as regards delay …"

Two concurrent delays rarely are concurrent for their full duration in the sense that they both start and finish on precisely the same dates.

In *CMA Assets Pty Ltd v John Holland Pty Ltd* [2015] WASC 217, (2016) 32 Const LJ 520, Allanson J said:

> "[para 326] … Where a **subsequent delay event** begins to operate concurrently, it **is only taken to affect the critical path from when the event earlier in time ceases to be effective**. It is the delay which first becomes critical which causes a delay in reaching practical completion …"

Concurrent delays under the Public Works Contract

Clause 10.7.2 of the Public Works Contract states:

> "If the Works are concurrently delayed by more than one cause, and one or more of the causes is not a Compensation Event, there shall be no increase to the Contract Sum for delay cost for the period of concurrent delay"

This effectively accords with the common law position as set out by Edwards-Stuart J in *De Beers UK Ltd v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC), (2010) 134 Con LR 151 (see above).

Parties to a contract can agree as to how concurrent delays are to be dealt with. In *North Midland Building Ltd v Cyden Homes Ltd* [2017] EWHC 2414 (TCC), (2017) 174 Con LR 1, clause 2.25 of an amended JCT Contract provided that:

> "any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account" [when assessing an extension of time]

Fraser J held that the prevention principle was not relevant where the wording of the contract was clear. He said:

> "[para 18] … The parties agreed that … if the contractor were responsible for a delaying event which caused delay at the same time as, or during, that caused by a relevant event, then the delay caused by the relevant event 'shall not be taken into account' when assessing the extension of time …"

This decision was upheld by the Court of Appeal in England – [2018] EWCA Civ 1744, (2018) 180 ConLR 1.

If an employer delay is the ‘dominant cause’ of delay, the contractor is entitled to both time and money

In Scotland in *Laing Management (Scotland) Ltd v John Doyle Construction Ltd* [2004] BLR 295 the court dealt with claims where the employer alleged that some of the delays and costs incurred by the contractor were the liability of the contractor. Lord MacLean said [at page 302]:

> “15. ... **if an event or events for which the employer is responsible can be described as the dominant cause of an item of loss, that will be sufficient to establish liability,** notwithstanding the existence of other causes that are to some degree at least concurrent. ...”
>
> 16. **In the third place,** even if it cannot be said that events for which the employer is responsible are the dominant cause of the loss, **it may be possible to apportion the loss between the causes for which the employer is responsible and other causes**. ... In such a case **responsibility for the loss can be apportioned between the two causes, according to their relative significance. ...**”

In paragraph 17, Lord MacLean explained that, where there are culpable delays by the employer or the architect, as well as delays caused by other events, **the contractor should be able to recover his losses despite any practical difficulties in demonstrating which losses flow from the employer's breaches of contract**; as follows [at page 303]:

> "17. … **in such cases the contractor should be able to recover for part of his loss and expense,** and we are not persuaded that the practical difficulties of carrying out the exercise should prevent him from doing so"

In England in *Walter Lilly & Co Ltd v Mackay (No 2)*, [2012] EWHC 1773 (TCC), [2012] BLR 503, Akenhead J said [in a paragraph of the judgment that is not in the BLR law report]:

> "[para 503] ... **there is nothing wrong with an attempt to apportion** continuing site or project related **costs** on a project such as this ... The issue should be, not **whether apportionment is appropriate (because it clearly is)** but, what the right apportionment is"

Fair and reasonable extension of time

The courts have held that an extension of time should be fair and reasonable.

In *Sattin v Poole* (1901) Hudson's Building Contracts, 4th edition volume 2, 306, Phillimore J said in regard to the architect:

> "[pages 311, 312] He is bound to act. He is bound to make a fair and reasonable extension of time. … It is to be a fair and reasonable extension of time, that is, fair and reasonable to both parties …"

Bailey: Construction Law 2011, volume II, page 850, footnote 243, states:

> ".. If a contract leaves the assessment of an extension of time to the discretion of the contract administrator … **the contract administrator must exercise its discretion in a manner which is fair and reasonable**. …"

Assessment of extension of time is not an exact science

In *John Barker Construction Ltd v London Portman Hotel Ltd* (1996) 83 BLR 31 at 61 and 62, the court said:

> "(1) [The architect] did not carry out a logical analysis in a methodical way of the impact which the relevant matters had or were likely to have on the plaintiffs' planned programme.
> (2) He made an impressionistic, rather than a calculated, assessment of the time which he thought was reasonable for the various items individually and overall.
> …"

However, in *London Underground Ltd v Citylink Telecommunications Ltd* [2007] BLR 391, Ramsey J said:

> "[para 164] … The question of **what is fair and reasonable in the circumstances indicates that the remedy is not tied to a particular analysis … The assessment is one which necessarily has a subjective element** and is based on an assessment of the circumstances.
> [para 165] Secondly, **whilst analysis of critical delay by one of a number of well-known methods is often relied on** and can assist in arriving at a conclusion of what is fair and reasonable, **that analysis should not be seen as determining the answer to the question.**

> **It is at most an area of expert evidence which may assist the arbitrator or the court in arriving at the answer of what is a fair and reasonable extension of time** in the circumstances. …"

In *Norwest Holst Construction Ltd v Co-Operative Wholesale Society Ltd* [1997] EWHC Tech 356, [1998] All ER (D) 61 QBD, Judge Thornton QC said:

> "[para 139] **It cannot be said than an element of give and take is precluded by a contractual assessment process which is to be fair and reasonable**."

Critical path analysis

Whilst this can be a useful method to establish the cause of delays to a project, there is no legal requirement to use it. In *Van Oord UK Ltd and Sicim Roadbridge Ltd v Allseas UK Ltd* [2015] EWHC 3074 (TCC), Coulson J said:

> "[para 77] … All too often in cases like this, each side relies on a programming expert, but the reports that these experts produce are simply vehicles by which the parties reargue the facts, rather than reports focussed on programming differences …"

In England in *Walter Lilly & Co Ltd v Mackay (No 2)*, [2012] EWHC 1773 (TCC), [2012] BLR 503, the court dealt with delay/disruption claims. Akenhead J said:

> "[para 486] ... (c) It is open to contractors to prove these three elements with whatever evidence will satisfy the tribunal and the requisite standard of proof. **There is no set way for contractors to prove these three elements"**

In Scotland in *City Inn Ltd v Shepherd Construction Ltd*, [2010] CSIH 68, [2010] BLR 473, Lord Osborne said:

> "[para 42] ... the decision as to whether the relevant event possesses such causative effect is an issue of fact which is to be resolved ... by the application of principles of common sense. … **while a critical path analysis, if shown to be soundly based, may be of assistance, the absence of such an analysis does not mean that a claim for extension of time must necessarily fail"**

In *Skanska Construction UK Ltd v Egger (Barony) Ltd* [2004] EWHC 1748 (TCC), Judge Wilcox rejected the evidence of a programming expert and said at para 419:

> "It is evident that the reliability of [the expert's] sophisticated impact analysis is only as good as the data put in."

In *Carillion Construction Ltd v Emcor Engineering Services Ltd* [2017] EWCA Civ 65, [2017] BLR 203, (2017) 170 Con LR 1. Jackson LJ said:

[para 43] … There are two common strands in the decisions. First, in each case **the court only allowed extensions of time reflecting the actual delay caused by [the] event** …"

The courts have always been very wary of complex notional analyses. In *Leighton Contractors (Asia) Ltd v Stelux Holdings Ltd* (2007) 23 Const LJ 70, the court in Hong Kong upheld an arbitrator's decision to largely reject expert evidence using time slice analysis (time impact analysis). Reyes J said at para 28:

> "… Stressing prospective delay regardless of actual delay, time slice methodology would have been of limited relevance on Leighton's pleadings of delay and the arbitrator's findings of fact"

In *Great Eastern Hotel Co Ltd v John Laing Construction Ltd* [2005] EWHC 181 (TCC), (2005) 99 Con LR 45, the court said at paras 306 to 308:

> "[306] **[The delay expert] carefully constructed three critical paths … At best they are theoretical constructs identified retrospectively once the project was completed**. …
>
> [308] **His theory that the second critical path did not run through the infill block collided with reality on site**, as was clearly evidenced in documentary and photographic evidence made available to him which he choose to ignore. …"

Again in Australia, in *Kane Constructions Pty Ltd v Sopov* [2005] VSC 237, (2006) 22 BCL 92, the court said at para 673:

> "… Whilst theoretical calculations, particularly those contained in computer software programmes, are useful tools in the building industry, generally further information will be required. Whilst there may be assumptions and calculations, **it is necessarily a matter of the claimant proving in a proper way that there has been actual delay such as to substantiate claims for reimbursement**"

In *PPG Industries (Singapore) Pte Ltd v Compact Metal Industries Ltd* [2013] SGCA 23, the court said at para 9:

> "… Therefore, **we reject [the expert's] view that there were no concurrent delays in the completion of the project, for it does not accord with either logic or common sense**"

In *Bluewater Energy Services BV v Mercon Steel Structures BV* [2014] EWHC 2132 (TCC), (2014) 155 Con LR, the court said at para 324:

> "… **[The delay expert's] analysis is purely a theoretical exercise and does not consider what actually happened**"

Prospective and retrospective delay analysis

Be aware of the difference between methods of delay analysis that are:
Prospective methods that look forward at a particular point in time when the delay is still happening, e.g. the time impact method, or
Retrospective methods that look back at records after the delay has occurred, e.g. the as-planned/as-built, collapsed as-built, impacted as-planned methods.

During a live project, when delays are occurring, prospective methods are likely to be the only option of delay analysis. Clause 30 of the RIAI Contract requires that:

> … the Architect shall, as soon as it is possible for him to do so, make a fair and reasonable extension of time for completion of the Works. …"

That language suggests a prospective assessment of the likely delays.

In the Supreme Court of New Zealand in *Fernbrook Trading Company v Taggart* [1979] 1 NZLR 556, Roper J said:

> "I think it must be implicit in the normal extension clause that the contractor is to be informed of his new completion date as soon as is reasonably practicable. If the sole cause is the ordering of extra work then in the normal course **the extension should be given at the time of ordering so that the contractor has a target for which to aim**. Where the cause of delay lies beyond the employer … the extension should be given a reasonable time after the factors … have been established" [emphasis added]

But, when the project is complete and good records are available, retrospective methods are likely to be more appropriate in arbitration or litigation. This is certainly the case where there is a claim under clause 29(b) of the RIAI Contract which uses retrospective language, thus:

> "… any time lost from this cause shall be ascertained and certified by the Architect and the Employer shall pay or allow to the Contractor such damages as the Contractor shall have incurred by the delay."

Similarly, where clause 10.7.1(2) of the Public Works Contract applies, the analysis should be retrospective because the clause refers to:

> "expenses … unavoidably incurred by the Contractor as a result of the delay …"

So it will depend on the language used, in particular clauses in a contract, as to whether a prospective or retrospective method of delay analysis should be used. In *CMA Assets Pty Ltd v John Holland Pty Ltd* [2015] WASC 217, (2016) 32 Const LJ 520, Allanson J said:

In *CMA Assets Pty Ltd v John Holland Pty Ltd* [2015] WASC 217, (2016) 32 Const LJ 520, Allanson J said: "[para 323] … whether the contract called for a prospective or a retrospective analysis of delay. … [it should be prospective] …

[para 324] There are many factors in cl 10 which lead to this construction:

1. The program has a current operation governing what is now happening and what will happen. …
2. In providing for revisions to an Approved Construction Programme, cl 10.6 provides that John Holland 'will approve a revision' if CMA is entitled to an extension of time …
3. CMA must report 'actual progress' against the programme monthly: cl 10.7.
4. The language of cl 10.10 is prospective: the Subcontractor may claim an extension if it 'is or will be delayed'.
5. The requirements for making a claim by giving notice to John Holland continues throughout the relevant delay: cl 10.11.
6. In determining whether CMA is entitled to an extension, John Holland shall have regard to the critical path and whether the Subcontractor '[has] been or [will] be delayed in reaching Practical Completion': cl 10.14. …"

Extension of time should be added directly to the original date for completion

Suppose that the contractor is in culpable delay for five months and then the employer causes a delay of another month. In *Balfour Beatty Building Ltd v Chestermount Properties Ltd* (1993) 62 BLR 1, the court rejected the notion that the contractor should get a gross extension of time of six months rather than a net extension of time of only one month. But the question remains as to whether:

(A) the one month extension of time to cover the employer delay should be added directly to the original date for completion (i.e. as if it occurred in the first month) or whether

(B) the one month extension of time should be added to the end of the fifth month?

The Court of Appeal in England endorsed option (A) in *Carillion Construction Ltd v Emcor Engineering Services Ltd* [2017] EWCA Civ 65, [2017] BLR 203, (2017) 170 Con LR 1. Jackson LJ said:

> "[para 39] … b) The simple phrase "extension of time" … has the natural meaning that the period of time which is allowed for the work is being made longer. …

> [para 43] … There are two common strands in the decisions. First, in each case the court only allowed extensions of time reflecting the actual delay caused by [the] event … Secondly, it was common ground between the parties that whatever extensions of time were awarded should be contiguous. In no case did either party contend that there should be an intervening period during which the contractor … was liable for delay, followed by a non-contiguous extension of time. …"