

BLAKE-TURNER & CO SOLICITORS

**CONTRACTUAL AND
PRACTICAL ASPECTS OF
MANAGING TIME IN
CONSTRUCTION PROJECTS**

1. Introduction

The subject of time management is always topical for the construction industry. Known generically as claims for “time and money”, they are more correctly referred to as claims for Delay and Disruption. These often form the basis of any claim relating to the UK building sector.

Ideally if time is managed properly then such claims will not occur or at least are more likely to be resolved amicably.

2. The Contractual Requirements

In order to have certainty a contract will have a start and a completion date.

If the Employer does not hand over the site at the start date then he immediately puts the Contractor into delay for which he may then become liable for prolongation costs (see below).

By contrast if the project completes late then in the absence of an extension of time award the Contractor may be liable for the costs of the delay.

This is why a contractual mechanism is provided for dealing with extending the period in which the Contractor has to complete the works. Without such a mechanism, the Contractor’s obligation would be simply to complete the works by the contract completion date. If there was any act of prevention by the Employer or anyone on his behalf, then time becomes ‘at large’, and the Contractor would have a reasonable period of time for completing the works.

If there is a liquidated damages provision in the contract then that would fall away and the Employer’s right to recover damages for late completion would be for general damages which may be capped at the rate of the liquidated damages stated in the contract. However, most lump sum forms of contract do set out a rate of damages as it provides some level of certainty and fixing of risk from both parties’ points of view.

So, providing a mechanism by which the contract period can be extended is useful as it provides a mechanism for dealing with acts of the Employer which would otherwise mean that time for completing the contract was at large with all the accompanying uncertainty. The benefit from the Contractor’s perspective is that he is relieved from a liability to pay liquidated and ascertained damages.

3. Contractual basis for claim – Extensions of Time

For the purposes of this paper it is assumed that the relevant contract is the JCT 2005 Standard Building Contract With Quantities.

In this form of contract there is an obligation upon the Contractor to “*regularly and diligently proceed with and shall complete the same [the Works] on or before the relevant Completion Date*” (clause 2.4). Furthermore, where there is a relevant event, the Contractor has to “*constantly use his best endeavours to prevent delay in the progress of the Works or any Section howsoever caused, and to prevent the completion of the Works or Section being delayed or further delayed beyond the relevant Completion Date*”. This particular obligation is onerous so far as the Contractor is concerned as the term “best endeavours” in essence means that the Contractor should “*leave no stone unturned*”. In most cases a Contractor’s obligation to mitigate delay does not include engaging additional resources, but the JCT form of contract may impose a higher burden ie possibly engaging additional resources.

Clause 2.27 of JCT 2005 is standard in that it imposes an obligation upon the Contractor, as soon as it is apparent that the progress of any part of the works is delayed or is likely to be delayed, to give written notice “forthwith”. The Contractor’s obligation following the issue of any notice is to provide such information and details as the Architect may reasonably require. Then, provided the Architect is satisfied that the relevant part of the works is likely to be or has been delayed beyond the period or periods for completion by the reasons (relevant events) stated in clause 2.29, the Architect shall “*as he then estimates to be fair and reasonable*” (clause 2.28) fix a later date as the Completion Date. The Architect is bound to make his decision as “*soon as is reasonably practicable*” and in any event within twelve weeks of the receipt of any notice (clause 2.28.2). As soon as Practical Completion has been achieved, the Architect is bound to make his decision within a period of twelve weeks whether or not he has received the relevant information from the Contractor. Further it is not a condition precedent to the grant of an extension of time that the Contractor has given such notice.

The court held in Balfour Beatty v Chestermount Properties (1993) 62 BLR 1 that an extension of time should be assessed using a standard of what is fair and reasonable and should be added to the previously fixed completion date.

On the issue of whether an extension of time should be granted, the judge said the following:

“If a contractor overshoots the previously-fixed completion date he must pay liquidated damages for the whole of the period of time from that date to practical completion unless the architect subsequently extends the time for completion by reason of a relevant event by retrospectively postponing the

completion date. If the relevant event is a variation instruction the architect will have to consider whether it is fair and reasonable that the contractor's total period of time for completion should be increased. If the variation works can reasonably be conducted simultaneously with the original works without interfering with their progress and are unlikely to prolong practical completion, the architect might properly conclude that no extension of time was justified."

The simple basis of any claim for additional time is that the Contractor must show that, as a result of a relevant delaying event, the works were *critically* delayed ie cause and effect.

Global Claims

The main authority in relation to "global claims" (ie those where the connection between the matters complained of and their consequences in terms of time and money are not spelled out) is Wharf Properties Ltd v Eric Cumine Associates Limited (1991) 52 BLR 1.

In this case the Court noted the "*obligation on the plaintiff to plead his case with such particularity as is sufficient to alert the opposite party to the case which is going to be made against him at the trial*".

The case demonstrates that a claimant must be specific as to the delay it alleges to have been caused by a particular event. This requires proper presentation of a claim based on contemporaneous records in order to show a discernible link between the relevant event and the delay.

It follows that those responsible for the preparation of any claims will need to work hard with those who have first hand knowledge of the events to provide an adequate description of them. It comes down to a factual analysis of the claim based upon the best contemporaneous evidence available. It is an exercise of sifting through the huge amounts of what are usually irrelevant issues to identify what were the events that actually delayed the works and this is where the programmer comes into his own.

4. Delays to the Project

Delay claims do not exist in isolation. A delay can only give rise to an extension of time if:

- it is a "Relevant Event" (as defined in the contract);
- for which the Employer agreed to bear the contractual risk;
- which sits on the critical path (at the relevant point in time); and
- which pushes out completion beyond the contractual completion date.

5. How to identify critical delays

In any major construction project the Contractor will produce its own master programme. This is prepared by the Contractor at the outset of the project and is the base line against which progress should be measured.

It is unusual for such a programme to be a contract document. Instead it should be thought of as an expression of intent to outline the way in which the Contractor will approach the project. It is not recommended that such a programme has the full force of a contractual document as this would remove any flexibility from the Contractor's approach to the project and would run the risk that any deviation from the programme will allow the Contractor to apply for a variation under the contract. The problem with making the programme a contractual document is that this would require the Contractor to carry out its work in the manner and sequence set out in the programme. It is obvious that in most cases a contractor cannot work to such a programme.

The contract programme should be agreed by the Contractor and the project manager/contract administrator appointed by the Employer as a feasible programme for carrying out the works. The programme should be a full working programme with a critical path clearly identified, logic links between the various activities and should dovetail with the Contractor's method statement with respect to the various project activities.

The very nature of construction projects requires the Employer and Contractor to have some measure as to the progress on site and without this the project manager/contract administrator cannot certify any extension of time to the Contractor. This leaves both the Employer and the Contractor in a very uncertain position.

A distinct point within this subject is the compilation and retention of factual data. In order for a project manager/contract administrator to take a reasoned view as to any application made by a contractor for an extension of time he must have available sufficient factual data to allow him to make that decision.

The importance of establishing a documentation system is that it ensures that both the Employer and the Contractor maintain a complete, contemporaneous, chronological and provable record of what happened on site, the problems and their impact upon progress, schedule and cost. The success of a delay claim almost always depends on the relevant party's ability to submit full and complete files.

It is normal for the Contractor to make an application for an extension of time with sufficient supportive documentation to support the claim. However in the case of John Barker v London

Portman Hotel (1996) 83 BLR 31 it was found that an architect in a contract must make a fair assessment of the extension of time due to the Contractor regardless of the quality of the documentation supplied. This assessment must be made on a calculated basis rather than an impressionistic basis. The judgment in John Barker was based on Clause 25 in the JCT 1980 form of contract. The Judge found that the architect had “quasi-arbitral” powers and had a duty to act “fairly and lawfully”. This test clearly applies to a wider class of contracts than JCT 1980 and it is suggested that the architect will always have to apply himself to the facts as are available and in the case of most applications for extensions of time by contractors these facts will be contained in documentary evidence.

It is only later if a claim goes to court or arbitration (or occasionally adjudication) that evidence will be presented in witness statement form and examined orally.

It is therefore essential that all documentation is retained. This includes emails, computer programmes, photographs, progress reports, diaries and all correspondence and memoranda including pre-tender documentation.

It is only by compiling a full record of the relevant data that it is then possible to consider from a retrospective analysis whether an extension of time claim is valid. This does not just apply to the Contractor but also to the project manager/contract administrator and equally to the Employer. Indeed an employer will often wish to present an alternative explanation of events to the project manager/contract administrator and will require factual data support any alternative position.

6. What were the causes of delay?

This subject requires a careful scrutiny of the contract. It is often said that a contract should not be signed and then put in the drawer until completion. Nowhere could this be more relevant than with respect to applications by contractors for extensions of time during the currency of a contract.

Clauses 2.26 – 2.29 of the JCT 2005 Contract address adjustment of the Completion Date and relevant events.

Clause 2.29.2 refers to Employer’s Instructions under clause 5.3 which addresses changes in the Employer’s Requirements (commonly referred to as “variations”).

On an analysis of the Clause 2.29 delay events it can be seen that JCT 2005 requires the Contractor to give written notice of the cause and estimate of any delay.

Taking as examples the Relevant Event of “exceptionally adverse weather conditions”, it would not be unusual in the UK for a construction project to run into time tabling difficulties as a result of some form of weather related issues. In such circumstances JCT 2005 has been drafted so that the Employer will take the risk and it is for the Contractor to make an application for an extension of time if such a delay event occurs and if the Contractor is able to demonstrate that the event has caused a delay to an item of work on the critical path which will delay completion to the project.

This need to estimate delay highlights why it is essential that the Contractor’s programme is feasible from the outset and if possible is updated as the project progresses.

7. Who is responsible?

This follows on from the analysis of the contract conditions. It is normally possible to determine whether a delay event is at the Contractor’s risk or the Employer’s risk from a simple reading of the contract.

If for example there is an unrelated explosion in the gas mains below the project which caused the Health and Safety Executive to close the site for one month, this would clearly be a delaying event of one month which would delay all work on the project and for which the Employer would be responsible. Equally if a contractor required local authority consent to close a network of roads around the project in order to transport a crane through the streets or perhaps to erect scaffolding and the Contractor failed to apply in good time to the local authority then this would be a default by the Contractor for which the Contractor would not be entitled to an extension of time.

However difficulties arise where the Contractor’s programme has “float” and where there is more than one delaying event and responsibility for the delaying events in question can be divided between the Employer and the Contractor.

Float

“Float” is a topic best left to planners and programmers to deal with in detail.

As a basic explanation, the latest case law on the subject in England and Wales is the judgment of Hicks LJ in Ascon Contracting Limited v Alfred McAlpine Construction Isle of Mann Limited (1999) 66 CON.L.R.119. The position of the English Courts is that it is the project which owns the float. What this means in reality is that if a contract programme has a built in flexibility that allows certain items to overrun their allotted time without affecting the completion date then the Contractor is not able to make an extension of time application until such time has been fully utilised.

Concurrent delay

The subject of two or more conflicting delay events is an altogether more complicated issue. This has been dealt with in the paper delivered to the Society of Construction Lawyers by John Marrin QC. In his paper Mr Marrin defines “concurrent delay” as *“a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency”*.

There are a number of approaches to concurrent delay. The first is to attempt to consider the financial consequences of the conflicting delays and then apportion the delays on what is effectively a “set off”. This approach has not been followed in this country although it is well established in Canada. The concern with the apportionment approach is that it is inconsistent.

The second approach is that adopted in America where the American courts have distinguished three separate categories of delay. These are “excusable delay” which we will understand as “relevant events”, “compensatable delay” which is the same as an excusable delay but with monetary compensation in addition and “inexcusable delay” which we will understand as a delay event for which the Contractor was liable.

The American approach is very tightly defined and would not sit comfortably in this country with the principle that the project manager/contract administrator has the discretion to determine for himself extensions of time and use his own judgement to award such extension.

The third approach identified by John Marrin is the “but for” test. This approach is most frequently chosen by contractors. The English courts have declined to follow this test (Hicks LJ in Turner Page Music Limited v Torres Design Associates Limited [1997] CILL 1263.

The next approach is that which is known as the “dominant cause approach”. This approach requires the architect to determine which delaying event in his view is the most causative delay to the project and then adopt this for the purpose of determining whether the delay event can rise to an extension of time or not. This approach was rejected by Fox-Andrews LJ in H Fairweather & Company Limited v London Borough of Wandsworth. [1987] 38 BLR 106

The approach which the English courts have chosen to follow was set out in the case of Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Limited [1999] 70 CON LR32. In this case Dyson LJ, determined that if there were two concurrent causes of delay one of which was a relevant event for which the Employer was culpable, and the other was not, then a contractor would be entitled to an extension of time for the period of delay caused by the relevant event.

This in effect reflects the allocation to risk by parties when they enter into contracts. This approach has been followed by Seymour LJ in Royal Brompton Hostel NHS Trust v Hammond & Others (No. 7) [2001] 76 CON LR148.

So, responsibility for a delay event will normally be determined by the contract. When there are one or more conflicting delay events then it will normally be in the discretion of the contract administrator/project manager as to what weight and credibility he gives to the conflicting delay events but in the current legal climate he should allow the Contractor an extension of time for any delay event which falls on the critical path and for which the Employer is contractually responsible even if there are other delay events running concurrently for which the Contractor is responsible.

In terms of loss and expense in a situation of concurrent delay, in order for the Contractor to recover damages, the relevant event must be an event which entitles the Contractor to compensation under the terms of the contract. The Contractor will then only be able to recover the costs resulting from that event if those costs can be distinguished from the costs arising from a delaying event for which the Contractor is liable. This will inevitably therefore be an issue of fact to be shown by the Contractor from contemporaneous records.

Where, in these circumstances, apportionment of the costs incurred by the Contractor between the two delaying events (that of the Contractor and that of the Employer) is not possible, the Courts have held that the loss “lies where it falls” ie neither party can recover damages from the other.

8. Does it result in additional time or damages for late completion?

Having established that there is a delay event at the Employer’s risk, it is necessary to demonstrate that this lies on the critical time path and therefore will cause delay to the completion of the project. This is the point at which the contract programme becomes critical. If the project is still active and has not reached completion, then the option available to the project manager/contract administrator is to assess the delay by reference to the contract programme.

Once completion has been achieved, then it is normal (certainly on large projects) for the Contractor and the project manager/contract administrator to meet to try to agree the final account and any applications for extensions of time. It goes without saying that inevitably there will be some projects where the Contractor and the Employer, through its agents, cannot agree time and money, and the dispute is referred to arbitration or the courts. In this event, there will certainly be the need for expert planners/programmers, and even if a formal dispute is not commenced, it is still helpful on occasion to employ the services of such consultants.

They will utilise computer programmes and depending on the amount of factual information available and the measure of agreement between the parties, will employ one of a number of methodologies.

There are a number of methods utilised by programming experts, all of which have differing rationales. In brief they either involve a consideration of the “as planned” contract programme, the construction (if enough information is available) and consideration of an “as built” programme, or a comparison of the two.

Whatever method is utilised, once delay events have been agreed or found to be critical to the completion of the project, it is then necessary to consider the consequences of the critical delay.

In addition to any obviously identifiable expenses resulting from the delay event (such as additional material or costs of sub-contractors etc), there are a number of heads of damage which are commonly grouped together under the generic description of “prolongation”.

9. Prolongation costs

Where the Contractor is entitled to an extension of time and to compensation based on that extension, the normal measure is the actual cost of the prolongation.

The recoverable measure of loss is the element of prolongation ie, this is a time-related claim. The actual cost of the work is not normally recoverable, since the work will not have changed in scope of quantity.

Although this may seem a burdensome undertaking, it is far easier, and more persuasive, than a reconstruction made after the claim has been presented.

It also makes it possible to maintain an element of consistency between what is presented to the Employer during the course of the contract and what is included within any claim document.

To some extent, the documents which are needed to support the costs element of claims by the Contractor are self-evident. He first needs to identify the type of claim which has arisen – is it delay or disruption? – and then, with the application of common-sense, a little legal guidance and the detailed records which will be to hand – the claim should be straightforward.

The heads of damage that are normally claimed by contractors are:

(a) Additional supervisory personnel costs

- (i) Additional supervisory expenses during contract overrun can normally be calculated using wage records.
- (ii) Occasionally, formulae are required to determine additional costs per productive hour during ordinary period of work and during accelerated working periods.

(b) Increased material costs

- (i) Where materials are ordered late because of delays, additional costs are usually proved by comparing original quotations and actual invoice costs.
- (ii) Double handling claims are demonstrated by daily reports and time cards, coupled with wage records for the individual persons involved.

(c) Extended head office overheads

These are costs of the Contractor's business. Insofar as they are costs allocated to the project in question, the Contractor should have sufficient records to show his extra expenditure on the project owing to the prolongation.

In relation to head office overheads not allocated to a particular contract but spread among all the contracts on which the Contractor is working at that point in time (for example rent, some salaries and expenses – often including directors' salaries), these costs are normally only recoverable if the Contractor can show that it has been prevented from taking on other overhead-earning work during the period of prolongation and that it has been unable to recover such overheads because its resources have been tied up by Employer-generated prolongation.

(d) Additional Site overheads

This is a simple prolongation claim. The recoverable cost is the extra cost of maintaining a site establishment for the period of the contract overrun. Evidence is provided by invoices covering, for example, the cost of site huts, power, water and so on.

(e) Financing costs

These are normally relevant to variations but also impact on delay claims.

A Contractor has to allow for the cost of financing the job, and will require capital for this purpose. This capital will either be borrowed (in which case interest charges will be incurred) or will be provided from the Contractor's own resources (in which case interest will be foregone).

This is something that the Contractor can, and should allow for in the normal course of events. However, by definition, he cannot allow for it when he is required to finance varied or delayed work, since this cost was not foreseeable at the outset.

Accordingly, the cost of financing this varied or delayed work is recoverable as part of the Contractor's direct loss or expense of that work.

(f) Interest

Some contracts specifically provide for the payment of interest. In the UK there is also statutory recognition of the right to interest. But bear in mind that this is interest on late payments, and is not therefore specifically referable to any claim which the Contractor might have under the contract and which we are considering now. Normally, it is not something for which the Contractor needs specifically to apply.

(g) Costs of claims preparation

These costs are normally not recoverable as part of any claim, since they are presumed to be built in to the Contractor's overheads. But the Contractor will lose nothing by keeping records of who did what in terms of claims preparation. Contract forms which are subject to UK law or procedures will normally provide that an unsuccessful party will have to pay the successful party's costs of the proceedings, and this may well include an element of claims preparation, particularly at the stage of formulating the Claim document.

As a final point, if there is delay to the project and this is not found to be at the Employer's expense but the Contractor's expense, it is normal for most projects to provide for the Contractor to have to pay liquidated damages to the Employer for each week of delay.

10. Disruption costs

Disruption is often treated by the construction industry as though it were the same as delay – it is not. In essence delay is lateness (so that delayed completion is late completion); and disruption is loss of productivity, disturbance, hindrance or interruption to progress. Disrupted work is work carried out less efficiently.

Where the work (or the Contractor's progress) has been disrupted, the Contractor may have a claim for the cost of reduced efficiency of its workforce. This is an efficiency-related, and not a time related claim.

One such head would be loss of productivity. This can be proved by :

- maintaining data showing job performance under a given set of conditions and comparing this data (using experts where necessary) with performance on the job under disrupted conditions; or
- comparing the progress while the work is being inefficiently performed with progress while the work was performed under normal circumstances.

11. Marshalling the facts

It should be clear from this paper that successful claims for (or defences to claims for) Extensions of Time and the costs of Delay and Disruption can only succeed when founded on fact based analyses. Theoretical analyses and assumptions will fail. It is therefore imperative that all parties to a construction contract both create and then maintain good records. Set out at Appendix A is a list of such documents. There are no surprises on the list; what is surprising that these are often missing or never came into existence.

Possibly the most important of all documentation is a good photographic record of progress on site where the photos are date stamped.

In creating (or defending) a claim for an Extension of Time, it is crucial that whoever compiles the claim has access to all the documentation and can with ease, produce a credible explanation of the sequence of events on site, why the project departed from the Contract Programme and ultimately who was responsible for the critical delays to the project.

12. Obtaining Agreement between the Parties

This requires an early and open exchange between the parties to include to Construction Professional employed by the Employer. Attempts at covering up late supply of information or a sub-contractor's poor performance will ultimately be discovered. It may be naive, especially in a recession to propose that "honesty is the best policy", but actually failing to be open within the contract period leads to entrenched positions at a later date. Such positions in turn lead to acrimony and ultimately expensive litigation which could often have been avoided.

Above all; If in doubt consult a lawyer!

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APPENDIX A

MARSHALLING THE FACTS – RELEVANT DOCUMENTS

Typical records include the following:-

(a) The Site Daily Report

This will include:

- daily record of work progress, containing an accurate record of what in fact happened on site
- descriptions of site conditions and weather
- delays in deliveries, hold-ups due to Employer interference or breach
- requests for clarification, and responses if any
- description of work actually performed.

(b) Memoranda, telephone logs and emails

Most disputes will occur after the project has been completed. This can be many months – in some cases years – after the relevant events. People’s memories will have faded, or in extremis the people may have moved away or even died. A signed memorandum will have vital corroborative value, particularly on disputed issues.

(c) Minutes of Meetings

Don’t let these pass unanswered, or uncommented upon. If there is something which is disputed, say so at the time – otherwise, the evidential burden moves against you.

(d) Photographs

We don’t need to tell you the value of a visual aid – but remember that any claim is all about time, so make sure that the photograph is dated!

(e) Cost accounting records

These are self-explanatory.

(f) Experts Reports

Experts should be consulted as and when necessary when their advice and input can be most useful. The experts may fulfil one of two functions: either to provide information necessary to continue the job (for example, on whether ground conditions are suitable or in accordance with the contract) or to supplement existing expertise (for example in relation to the maintenance of logic-linked programmes on an on-going basis).

(g) Variations/Change Orders

All Variations/Change Orders should be supported by back-up calculations, whether agreed by the Employer or not, showing what was taken into account in preparing the cost impact analysis for the Change.

(h) Other documents

This heading covers a whole range of documents, ranging from procurement and delivery schedules and invoices, materials invoices (with quantities), contract notices and correspondence.