



## Summer 2014 Newsletter.

In this, our Summer 2014 newsletter, our first article is an extract from Roger Gibson's new book, 'A Practical Guide to Disruption and Productivity Loss on Construction and Engineering Projects'. The book is to be published later this year by Wiley Blackwell.

Our first article is titled, 'Disruption; An Overview.'

Our second article is titled, 'Concurrent Delays; After City Inn and De Beers, Where Are We Now?'

Further articles on these two subjects will appear in our Autumn 2014 Newsletter.

### Article One: Disruption; An Overview

Claims for *disruption* and additional costs are routinely made during the course of a project yet they remain notoriously difficult to prove.

One of the main reasons for this is that productivity losses are often difficult to identify and distinguish at the time they arise, as opposed to other money claims which are more directly concerned with the occurrence of a distinct and compensable event together with a distinct and direct consequence, such as an instruction for a discreet variation during the progress of the works or a properly notified compensation event.

As such, most claims for disruption are dealt with retrospectively and the claimant is forced to rely on contemporary records to try and establish a causal nexus for identified losses (cause and effect) which are all too often inadequate for the purposes of sufficiently evidencing a loss of productivity claim.

When this happens the claimant is often forced into the situation where it advances a weak global or total cost claim of sorts to try and recover some of its losses.

The cause and effect burden of proof is the same for a claim for loss of productivity as for any other claim insofar as the claiming party must first establish that the event or factor causing the disruption is a compensable risk event under the contract. To do this, the contract needs to be reviewed to understand the basis of the agreement as certain productivity issues may have been foreseeable and therefore accounted for within the claimant's productivity allowances. The contract may also identify if a party expressly accepted certain productivity risks.

Where courts and tribunals have a clear focus on linking cause and effect, claims for disruption will come under greater scrutiny. It is unlikely that contractors and subcontractors will succeed where their claims for disruption are based simply on a global overspend on labour or plant for the whole of the contract working period. Sufficient detail is required to isolate the cause of the disruption complained of and evaluate the effects of that disruption.

In October 2002, the Society of Construction Law published its 'Delay & Disruption Protocol'. This Protocol provides guidance to people dealing with submissions for extension of time and delay claims, both during a contract and after completion of the works. The Protocol runs to some 82 pages and was drafted by a group of experts from all sections of the construction industry.

The Protocol envisages that decision-takers, e.g. contract administrators, adjudicators, dispute review boards, arbitrators, judges, may find it helpful in dealing with time-related issues.



## Article One: Disruption; An Overview(Cont'd)

### **So what is 'disruption'?**

Disruption (as distinct from delay) is disturbance, hindrance or interruption to a Contractor's normal working methods, resulting in lower efficiency. If caused by the Employer, it may give rise to a right to compensation either under the contract or as a breach of contract.

Phrases commonly used to define disruption include ripple effects, knock-on impacts, secondary effects, impact on unchanged work, lost productivity. Typically, the direct impacts of changes can be documented or estimated reliably, even if entitlement issues are argued. However, the real secondary effects of changes, i.e. disruption costs are problematic.

Productivity losses occur from disruption whether or not it occurs on the critical path and causes delay to completion. Loss of productivity means that the work progresses more slowly and if, as is often the case float is consumed or at least alleged to be the case.

Disruption is also concerned with more nebulous matters such as short interruptions, difficult working conditions, working around others and plant and materials being in the wrong place. It is the overall loss of productivity from these sorts of events that can also cause overall delay if the disrupted activity is on the critical path.

Disruption and loss of productivity are difficult to prove as generally there is very little contemporaneous data available from site showing the levels of productivity attained before and after the disruptive event. Any data kept that can establish disruption and productivity loss, particularly in respect of subcontractors who carry out the majority of the work, will be invaluable.

While Courts and Tribunals have accepted the idea of disruption costs, cases attempting to claim disruption generally have not been very successful. Historically, it is the disruption component of claims that has been the most difficult quantify, the most contentious, and has resulted in the lowest recovery for claimants.

In the nature of things disruption losses are harder to demonstrate than delay. There are two main reasons for this.

First, disruption claims are often based on myriad facts often occurring at the same time that are difficult to marshal at all let alone disentangle and analyse: In addition they are often poorly recorded.

Second, labour productivity is a matter of human reaction to a situation and is inherently variable. What the productivity would have been compared to what it actually was and why is almost automatically a matter for debate.

Nevertheless, however difficult disruption claims may be they are of the utmost importance.

The losses caused by even minor disruptions can be considerable. Academic studies have shown that disruptions lasting longer than half an hour cause productivity loss of between 20% and 40% over a day depending on the trade.

The degree of success of a disruption claim is likely to be directly proportional to the quality of the supporting records and documentation; Good records also give a much better chance of recovery of disruption costs during the course of the works as well as in any subsequent dispute resolution arena.

It is essential for the contractor to maintain and make available to the contract administrator good site records in order that the contract administrator may carry out proper assessments of disruption. The contractor should also give prompt notice of disruption whether it is required by the contract or not. The contract administrator can then promptly investigate the claim and he and the employer will be in a much more difficult position later if he does not.

### **Why are disruption claims so difficult?**

Disruption can be widely separated in space and time from the causative event(s), but to be claimed successfully must be causally tied to their source. Disruption impacts can be cumulative across large numbers of individual impacts. Disruption is fundamentally about productivity, which is hard to measure, and thus rarely measured well.



**Article One:**  
**Disruption; An Overview(Cont'd)**

The ideal form of damage quantification is to define the amount of impact, including disruption that would put the injured contractor in the condition it would have been but for the damaging events – a challenging analytical task. Disruption claims must screen out the effects of other concurrently occurring contributors, such as strikes.

Contractor/Employer discussions of project cost growth tend to be adversarial, even while the project continues, making efforts to quantify, explain and mitigate disruption especially challenging.

Finally, with all these difficulties, there is also, quite frankly, a poor track record of rigor in disruption quantification. It is far easier for both sides to put all blame on the other without rigorous analysis to back their claims. Assertions, such as "you caused all our problems", and the counter-assertion "you mismanaged everything!" are common.



## Article Two: Concurrent Delays; After City Inn and De Beers, Where Are We Now?

The TCC judgment in *De Beers v Atos*, by Mr Justice Edwards-Stuart, referred to a 'pet subject' of mine; 'Concurrent Delays'.

My first involvement with 'Concurrent Delays' was back in 1983 whilst I was working overseas in the Middle East. My employer at the time was involved in a substantial dispute with a state-owned oil company, who had withheld almost \$7M in liquidated damages because we were several months late with the project. We, in turn, had lodged several extensions of time which the Owner was showing no indication of granting. At the same time, my employer was being sued for almost \$10M by our Californian supplier, from whom we were withholding payments because of incomplete, late and deficient delivery of materials, which was a substantial contributory factor in the delay. Couple all that with the on-site labour skill problems and using local subcontractors and we had a financial disaster on our hands; and an unholy mess to sort out!

In one of the Arbitrations which followed, I asked a question to one of the lawyers, "What happens in a situation when the Owner and Contractor are both causing delay at the same time?"

- i) Is the Contractor entitled to an extension of time?
- ii) Can the Owner withhold liquidated damages?
- iii) Can the Contractor recover any part of his prolongation costs?"

The answer from the lawyer at the time was, "I don't really know."

### **What are Concurrent Delays?**

A question that frequently arises is the method of dealing with extensions of time which may be due to either or both of two causes, i.e. concurrent delays. The more complex the project the more likely that this issue will arise.

Concurrent delays, refer to delay situations when two or more delays, regardless of the type, occur at the same time or overlap to some degree – either of which had the delays occurred alone, would have affected the project completion date.

In analysing concurrent delays, each delay should be assessed separately and its impact on other activities and the project date for completion calculated. Much will turn on the quality of planning and programming, and record keeping. Not only will there often be several delay events running in parallel, but there may be parallel critical paths to contend with and periods of acceleration and/or mitigation to take into account. The contract conditions will also have to be taken into account on the analysis technique used.

### **The prominent authorities on concurrent delay.**

There are three disputes which are generally considered to provide the leading authorities on 'concurrent delay'. These are,

- '*Chestermount*'; Balfour Beatty Building Ltd v Chestermount Properties Ltd [1993] 62 BLR1.
- '*Malmaison*'; Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd [1999] 70 Con LR 32.
- '*Brompton*'; The Royal Brompton Hospital NHS Trust v Frederick A Hammond & Others [2000] EWHC Technology 39

'*Chestermount*' was heard before Mr. Justice Coleman in the Commercial Court, and arose from an appeal against an Arbitration award of Mr. Christopher Willis.

The following preliminary question was put before the Court,

*"In granting an extension of time in respect of the Relevant Event occurring during a period of culpable delay, ought the Architect to award a 'gross' extension (that is one that re-fixes the Completion Date at the calendar date upon which the work would reasonably be expected to be completed, having regard to the calendar date upon which it is instructed), ought it to be a 'net' extension (that is one which calculates the revised Completion Date by taking the date currently fixed and adding the number of days which the Architect regards as fair and reasonable)."*



## Article Two:

### Concurrent Delays; After City Inn and De Beers, Where Are We Now? (Contd).

The Court confirmed that the correct approach was that the architect should start with the existing completion date and extend it to the date that he considers 'fair and reasonable', having regard to the delay caused by the requirement to execute the variation instructions. The Court confirmed that it was the 'net' method that was appropriate.

The '*Malmaison*' case also concerned concurrent delays. In his judgment, HHJ Dyson considers how two concurrent causes of delay should be determined; one being a relevant event such that a contractor was entitled to an EOT and the other having no entitlement to an EOT. The judge said,

*"It is agreed that if there are two concurrent causes of delay, one of which is a relevant event and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event, notwithstanding the concurrent effect of the other event. Thus to take a simple example, if no work is possible on site for a week, not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers it fair and reasonable to do so, the architect is required to grant an extension of time of one week."*

HHJ Dyson went on to say that an architect is not precluded from considering the effect of other events when determining whether a relevant event is likely to cause delay to the works beyond completion.

Following on from Henry Boot, Judge Seymour QC in his judgement in '*Brompton*' provided a further explanation of what is meant by events operating concurrently. Where a Relevant Event occurs after a contractor-responsible event but runs concurrently on the critical path, this is referred to as net concurrency. But for either true or net concurrency to occur, the events must be shown to be on the critical path of the programme. In his judgement, His Honour Judge Seymour QC stated:

*"...In order to make an assessment of whether a particular occurrence has affected the ultimate completion of the work, rather than just a particular operation it is desirable to consider what operations, at the time the event which one is concerned happens, are critical to the forward progress of the work as a whole."*

In other words, an event complained of must be shown to have been on the critical path as opposed to one that is merely concurrent with the critical path. If an event is not on the critical path, it cannot affect completion and hence there is no entitlement to time.

#### **City Inn and De Beers.**

In July 2010, the Inner House of the Court of Session in Scotland issued its judgment in *City Inn v Shepherd Construction*. The Scottish Court decided that where two concurrent causes are operative, one being a relevant event and the other being an event for which the contractor is responsible, the certifier should approach the matter in a fair and reasonable manner and apportion the delay between the causes unless one of them is dominant.

The majority opinion was delivered by Lord Osborne, and he endorsed the approach taken by Lord Drummond Young in the previous judgment by the Scottish Outer House. However, in contrast Lord Carlaway, in his dissenting opinion, agreed with the overall result of the other judges, but applied different reasoning. He considered that apportionment was not the correct method of awarding extensions of time between two concurrent causes of delay.

In December 2010, Mr Justice Edwards-Stuart, sitting in the TCC, gave judgment in *De Beers v Atos Origin IT Services*. Paragraph 177 of his judgment states,

*"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"*



## Article Two:

### Concurrent Delays; After City Inn and De Beers, Where Are We Now? (Contd).

The Court's reliance on the prevention principle accords with the minority opinion of Lord Carlway in the *City Inn* appeal and previous English authorities. In essence, the prevention principle requires that a contractor have the time allotted to it within which to perform the works.

It is now reported that the *City Inn* litigation has settled; whereas it had been hoped that *City Inn* would proceed to the Supreme Court where authoritative guidance could have been given. However, although Mr Edwards-Stuart has given the decision in *City Inn* the cold shoulder, uncertainty surrounding claims for concurrent delay is likely to remain.

My Observations and Views;

1. For there to be concurrent delays in the sense that that one is a relevant event, i.e. an employer responsible event, and the other is a contractor responsible event; both events must be shown to be on the actual critical path of the project.
2. In my view, they are to be demonstrated as being on the actual critical path of the programme at the time of the events.
3. When faced with the problem of concurrent delays, it is always worthwhile pausing and asking whether the delays really are concurrent; as most delays are in fact consecutive. The test is to look at the project's actual critical path. Delays will generally be consecutive unless there are two or more critical paths. On some projects, several critical paths running in parallel is not uncommon, but even in such cases, true concurrency is rare. Usually, after investigation it can be established that one delay occurs after the other. Or, for example, only one delay is critical and the other delay is using up available float; i.e. it is a non-critical delay and is not delaying completion of the project.
4. Therefore, before the question of concurrency arises at all, it must be established that there are two competing causes of delay operating at the same time and affecting the critical path or paths of the project.
5. Apportionment. It is the author's understanding that apportionment is not applied as a general principle in English law to the entitlement to extension of time in the context of liquidated damages. Lord Carlway's approach is most consistent with established English law. It remains to be seen as to whether Lord Osborne's expansive approach agreed by Lord Kingarth is likely to be followed in English law.
6. Scottish decisions are not binding in England, and the *City Inn* decision by the Scottish Inner House has received a mixed reception from UK commentators. However, it can influence the decision making of adjudicators and arbitrators, and it remains to be seen whether it will be approved by the courts in England.

#### **Contact Us**

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