ADR | Partnership
Partners in Alternative Dispute Resolution

Digest

Issue 11 Summer 2010

In this issue:

Welcome

In this edition of the *ADR Digest*, David Longbottom, Director of ADR Partnership Limited briefly outlines three approaches used to assess concurrent delays and the use of the apportionment principle considered in the Scottish case of *City Inn Limited v Shepherd Construction* [2007] CSOH 190.

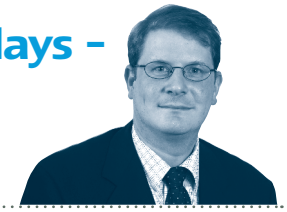
We are pleased to have Peter Berry as our guest writer. Prior to retirement, Peter was the Principal Assistant Secretary in the Hong Kong Government's Works Branch (now Bureau). He assisted in the drafting of Government's General Conditions of Contract from 1979 to 1985 and chaired the Conditions of Contract Committee. Peter, therefore, speaks with some authority on the intended meaning and application of the words in the Government's GCC Clause 64(2) "If the Contractor intends to claim any additional payment under the provisions of any Clause..." and the potential for misunderstanding that exists. Peter's intended meaning of these provisions has already proved to be controversial amongst practitioners and comments or debate on his article is most welcome!

Our *ADR Analysis* series continues with the meaning of 'substantial completion' within the context of the Hong Kong Government General Conditions of Contract and attempts to differentiate this term from the meaning of 'practical completion'.

Finally, in *ADR News* we include photographs of our annual cocktail reception at the China Club. More photographs of the evening can be viewed at **www.adrpartnership.com/news.html**

Patrick J O'Neill
Director

Concurrent Delays - Apportioning the Blame



*By **David S Longbottom** BSc(Hons) PgD(Law) MRICS MCIArb AMinstCES - Director, ADR Partnership Limited*

Introduction

There is a well known adage - "time is money". This phrase is common in business and it is of prime importance in the construction industry, where, as a result of the complex nature of projects, delays in progress frequently occur and can often result in significant cost overruns.

When excusable delays occur in the progress of the Works, contractors will often argue that the delays are compensable in an attempt to recoup the cost implications of delay, whereas employers will often argue that the excusable delays are not compensable. In defense of his position, the employer will often put forward the argument of 'concurrent delays' and for the period of the culpable delay the Contractor is not entitled to recoup the costs of the delay.

For the purposes of this article, a concurrent delay occurs when the delaying effects of two or more events overlap at some point in time and both impact upon the progress of the Works, with each delaying event having the ability to independently delay the completion of the Works. One or more of the concurrent delays is the responsibility of the contractor whilst the other concurrent delay(s) is the responsibility of the employer.

There are a number of methods typically used to assess extensions of time when concurrent delays occur and these include the 'Malmaison Approach', the 'Dominant Cause Approach' and the 'Apportionment Principle'.

This article briefly outlines these three approaches and then focuses on the apportionment principle which was followed

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in the relatively recent Scottish case of *City Inn Limited v Shepherd Construction* [2007] CSOH 190.

Malmaison Approach

One of the most commonly adopted methods of assessing concurrent delays is the Malmaison Approach[1] which is derived from an agreement reached between the parties to the dispute and ratified by the court before Mr. Justice Dyson, who said at paragraph 13:

> *"... 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 our 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..."*

Dominant Cause Approach

The Dominant Cause Approach requires the contract administrator to choose between the competing causes of delay according to which is dominant and is summarised in *Keating on Construction Contracts*, 8th Edition, at pages 272 - 273 as follows:

> *"If there are two causes, one the contractual responsibility of the defendant and the other the contractual responsibility of the claimant, the claimant succeeds if he establishes that the cause for which the defendant is responsible is the effective, dominant cause. Which cause is dominant is a question of fact, which is not solved by the mere point in order of time, but is to be decided by applying common-sense standards."*

Apportionment Principle

The Apportionment Principle, as its name suggests, apportions competing causes of delay between the contractor and the employer and was recently brought to the fore in the Scottish case of *City Inn Limited v Shepherd Construction* [2007] CSOH 190.

City Inn Limited v Shepherd Construction

The pursuers and the defenders (the case was held at the Scottish Outer House, Court of Sessions, hence the use of the terms *'pursuer'* and *'defender'*) are the employer and the contractor respectively who entered into a contract for the construction of a hotel. The contract incorporated the *JCT Standard Form of Contract (Private Edition with Quantities)* (1990 Edition) together with a substantial number of amendments.

The project was completed late and the contractor argued entitlement to 11 weeks extension of time whereas the employer claimed that the contractor was not entitled to any extension of time.

Concurrent Delays

In his Opinion, Lord Drummond Young concluded at paragraphs 157 - 161 that the delay in completion was the result of concurrent causes. He also concluded that the number of employer excusable delays was substantially greater than the number of contractor inexcusable delays with some of the excusable delays having significant effects on the progress of the Works. However, notwithstanding that each of the matters had a significant effect on the contractor's failure to complete, his Lordship did not consider that any of the causes of delay could be regarded as a 'dominant' cause.

In his Opinion, Lord Drummond Young considered the case was one of true concurrent causes and a critical question which he had to address was how long an extension is justified by the relevant event. He concluded at paragraph 18:

> *"...What is required by clause 25 is that the architect should exercise his judgment to determine the extent to which completion has been delayed by relevant events...*
>
> *The architect must make a determination on a fair and reasonable basis...*
>
> *Where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes; obviously, however, the basis for such apportionment must be fair and reasonable."*

As regards how apportionment should be carried out, at paragraph 158 Lord Drummond Young determined that the exercise is broadly similar to the apportionment of liability on account of contributory negligence. In his opinion two main elements were important:

- the degree of culpability (which he considered was likely to be the less important) involved in each of the causes of the delay; and

- the significance of each of the factors in causing the delay.

His Lordship did not consider culpability to be a major factor; however, the sheer quantity of late instructions and the architect's failure to issue instructions following requests for information by the contractor was, he considered, significant.

Taking all the circumstances into account, he was of the opinion that the part of the total delay apportioned to relevant events (i.e. contractor excusable delay) should be substantially greater than that apportioned to the two items for which the contractor was responsible (i.e. inexcusable delay). He considered that a *'fair and reasonable'* answer (following the provisions of GCC clause 25) would be that the contractor was entitled to an extension of time of nine weeks from the original Completion Date, and not the 11 weeks claimed.

Practical Completion was certified as having taken place on 29 March 1999 and he concluded that completion had been delayed beyond the Completion Date by relevant events for a period of nine weeks, or until 29 March 1999.

Lord Drummond Young rejected the employer's argument that the contractor would not be entitled to recover prolongation costs if prolongation costs are caused both by an employer delay and by a concurrent contractor delay...

Prolongation Costs
As regards prolongation costs, paragraphs 162 - 167 of the Opinion are relevant. It was submitted before Lord Drummond Young (paragraph 165 refers) that:

> *"... even if the defenders were entitled to an extension of time, they were not automatically entitled to prolongation costs for an identical period...*
>
> *...if a contractor incurs additional costs that are caused both by an employer delay and by a concurrent contractor delay, the contractor should only recover compensation to the extent that it was able to identify the additional costs caused by the employer delay as against the contractor delay."*

Lord Drummond Young concluded that he considered it was correct that a claim for prolongation costs need not automatically follow the assessment of the claim for extension of time (since different clauses, wording and conditions for each apply). In this regard, he referred to the decision in *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2004] SC 73, and which recognized that in an appropriate case where loss is caused both by events for which the employer is responsible and events for which the contractor is responsible it is possible to apportion the loss between the two causes.

In the present case, delay was caused by a number of different causes, most of which were found to be the responsibility of the employer but some of which were found to be the responsibility of the contractor. Lord Drummond Young therefore considered it was necessary to apportion the contractor's prolongation costs taking account of this.

In carrying out this apportionment exercise his Lordship considered that the same general considerations as assessing extension of time were important (i.e. the degree of culpability involved in each of the causes of the delay and the significance of each of the factors in causing the delay) and must be balanced. He considered on this basis the conclusion of the exercise should be the same, and the contractor was entitled to his prolongation costs for the nine weeks extensions of time assessed.

In forming his opinion, Lord Drummond Young rejected the employer's argument that the contractor would not be entitled to recover prolongation costs if prolongation costs are caused both by an employer delay and by a concurrent contractor delay; the employer arguing that the contractor would always have incurred these costs as a result of his delay.

Footnotes:
1 *Henry Boot Construction (UK) Limited v Malmaison Hotel* 70 Con LR 32

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Written Applications & Notices in the Hong Kong Government General Conditions of Contract

By ***Peter Berry***

Introduction

Recently, I attended a Dispute Resolution Advisor refresher course run by the Arbitration Centre. One startling thing (to me) that came out of the discussions on some of the questions raised for debate was the interpretation given by some of the attendees to the words in GCC Clause 64(2):

> "*If the Contractor intends to claim any additional payment under the provisions of any Clause...*",

that it means exactly what it says and overrules all other GCC Clauses. This conveniently leads me to the subject matter of this article.

Clause 63 ("*not....reimbursed under any other provision...*") and Clause 64 ("*any additional payment...*") are both written as 'sweeper' reimbursement clauses only to be used after all other contractual remedies (other than the disputes Clause) have been activated and exhausted...

Written Applications & Notices

On checking with those that should know about such matters (i.e. construction lawyers and claims consultants), I find that those at the DRA training course who supported the view that a written notice under Clause 64(2) is a condition precedent to any and all claims for more money (other than claims under Clause 64(1)) are not alone; i.e. that the wording includes all Clauses for which a "*written application*" by the Contractor has to be given (e.g. Clauses 54 - suspension of the Works and Clause 63 - disturbance to the progress of the Works).

It was not made clear to me by the supporters of this position if the Clause 63 notice is also to be sent before any action is taken by the Engineer/QS (the SO) under the proviso to Clause 61 which refers to the nature or extent of any variation affecting the rates for any unvaried work (e.g. a variation that changes the access to unvaried work) and presumably also for an adjustment in favour of the Contractor under a fluctuation clause.

I was party to the drafting of the wording of the GCC's in the early 1980's, in particular the Building version, so please don't blame me for some of the contentious risks put on the Contractor in the Civil version that seldom, if ever, apply to the Building version (e.g. ground conditions and utilities and services). The new edition of the GCC's was first put to use on 1st November 1985. In the ensuing quarter of a century, no issue that I know of has been raised concerning Clause 64 until just recently, so it comes as a complete surprise to me that my original intent appears to have been swept aside.

What now follows represents my 'original intent' and of course, (and I cannot stress this enough) it is not necessarily the correct legal interpretation. If I am not right, then I owe everyone involved an apology because I've allowed a bit of a procedural train wreck to take place. My 'original intent' is based on three main points.

- The first is the unavoidable contractual position set out in Clause 5(1) that all GCC clauses are to be read together and are to be given equal weight unless of course there are express words to the contrary; i.e. only Special Conditions of Contract prevail over other Contract documents. It therefore follows that Clause 64 does not overrule the other GCC clauses, subject to Clause 5(2) which deals with the correction of ambiguities and discrepancies.
- The second is that the Contractor should not have to pay for mistakes made by the Employer/SO. There is nothing revolutionary about this. It is the common law position that no one should be able to take advantage of their own wrong.
- The third is that Clause 63 ("*not....reimbursed under any other provision...*") and Clause 64 ("*any additional payment...*") are both written as 'sweeper' reimbursement clauses only to be used after all other contractual remedies (other than the disputes Clause) have been activated and exhausted; i.e. they provide contractual agreed procedures to reflect my second point.

I emphasize, the only purpose of having these two 'sweeper' clauses is that the Contractor is not to be put to additional financial loss by the (in) action(s) of the Employer and/or the SO beyond that already built into the Contract by the Contractor's own poor BQ rates.

For Clauses 63 and 64, my intention was (and still is) that the procedure common to both requires the Contractor and/or the SO to first follow the requirements set out in the provisions in the relevant other Clause; i.e. for Clause 63(b) it first requires the order of a variation under Clause 60 and for it to have been valued under Clause 61.

For Clause 64(2) the need for some primary action by the Contractor/SO is underlined by the words "*under the provisions of any other Clause*" which require the Contractor to identify the relevant Clause and then for "*the provisions*" set out in it to be followed by the Contractor and of equal importance, by the SO. Note that all the clauses which require the Contractor to make a written "*application*" do not refer to Clause 64(2) much less confer precedence on it.

It therefore follows that the Contractor is to be notified by the SO of the Cost/valuation/rate (if any) the SO has made following receipt of the Contractor's written application before the Contractor knows that there is an underpayment that requires

On the wording, I don't see why the SO's decision following the written application cannot be *"an event"*. It is not fundamentally different than for a variation where the event starting the process is the issuing of the instruction by the SO.

the Contractor to make a claim for more money under Clause 63 or 64.

This is the only reason for the inclusion of Clause 63(b) where it gives the Contractor the right to make up the peripheral Cost in any undervaluation (not involving the Contractor's rates under Clause 61) made by the SO (e.g. under the proviso to Clause 61 for anything not included by the SO and should have been and the increased cost of labour and materials not picked up in a fluctuation clause, if there is one).

In Clause 64(1) for the "top up" of BQ rates, the SO must first formally notify the Contractor of the proposed rate(s) (not the valuation) then, within the time limit, the Contactor gives the written notice; etc. if the Contractor wants more money.

Under the proviso to Clause 61, the BQ rates affected by the proviso can be either a partial adjustment (unreasonable rates) reflecting the Cost difference(s) or a complete revision (inapplicable rates) set at the appropriate 'market' value at the time of tender.

Unlike the other clauses that include a right for the Contractor to claim more money, the proviso does not refer to the need for a written application to be given by the Contractor (perhaps it should have done so). Instead it places the duty on the SO to make the valuation without the express requirement for a claim from the Contractor. So for reasons of practical self interest, the Contactor may have to 'point the way' to the SO. This seems to be the only way of making sure the SO considers the effect(s) of the proviso under a Clause 61 valuation. This has the benefit of allowing for profit to be included in the valuation. Clause 63(b) 'sweeper' is included should the SO not, or not sufficiently, include for the Cost (only) of the effect(s) on unvaried work under the proviso.

Unlike the Clause 61 proviso, a 'pointing the way' action is expressly included in a number of clauses where the Contractor is first required to make a written application (not give a written notice) to the SO (e.g. Clause 54). This procedure was intended to establish a difference between a *"written application"* (as in Clause 54) and a *"written notice"* under Clause 64. As I hope I've made clear, the intention was for an *"application"* to be followed by some, possibly interim action, by the SO, whereas under Clause 64, the SO's actions are *"final"* subject only to the disputes Clause for the Contractor to seek redress. This view is, I believe, supported by the common law rules of interpretation, i.e. where different words are used they are usually ascribed different meanings.

But, if in law there is in fact no difference between a *"written application"* and a *"written notice"*, it begs the question does the *"written application"* replace the need for a Clause 64(2) *"written notice"*? If so, what happens next is unclear. Does the SO make a valuation (as for a variation) in accordance with e.g. Clause 54, which refers to Cost, or await action further action by the Contractor under Clause 64(3) and then decide on the Cost? This seems to be what is now expected to happen in practice.

If there is a difference and, notwithstanding the sending of the written application, a Clause 64 written notice is also required, it doesn't make commercial sense to require two separate bits of paper, referring to two different clauses but otherwise saying the same thing to trigger the one claim. And what happens to the requirement for a Cost valuation under e.g. Clause 54? Does it automatically disappear to reappear under Clause 64? Certainly, none of this was within the contemplation of this drafter but if it is the correct legal interpretation then it's needlessly bureaucratic and oppressive and needs to be changed.

It has been suggested to me that under Clause 64(2) the *"event (that) may give rise to a claim"* would not include any decision of the SO following the Contactor's written application under e.g. Clause 63; i.e. such a decision would not be construed as an *"event"* for the purposes of Clause 64(2) on the ground that there would be nothing left to be covered by Clause 64(2).

(If you don't follow this line of argument, neither do I, but I include it in the hope of getting an explanation, for I have obviously missed something.)

On the wording, I don't see why the SO's decision following the written application cannot be *"an event"*. It is not fundamentally different than for a variation where the event starting the process is the issuing of the instruction by the SO. My reading of this is that it is under exactly the same circumstances for Clause 64(2) to become effective.

Conclusions

I believe that 'my intentions' as I have presented them produce a clear, commercially sensible contract procedure that I hope would be enforced by the Hong Kong courts. I am encouraged by some recent English Court of Appeal decisions which favour the robust commercial interpretation of contracts and by the widening of the rules of civil law evidence to look at what went before the contract was finally made, though that might be stretching the point for now.

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ADR | Analysis

The Meaning of 'Substantial Completion'

In the last *ADR Analysis* the meaning of 'Practical Completion' was briefly discussed and surmised as a state of affairs in which the building is completed free from any patent defects other than ones to be ignored as 'trifling'.

This *ADR Analysis* looks at a second phrase typically used in construction contracts to define completion; i.e. 'Substantial Completion'.

Substantial Completion

The phrase 'Substantial Completion' is relevant when the contract requirements have substantially, but not completely, been performed and is a phrase commonly found in the Hong Kong Government forms of contract.

The Government forms of contract require the contractor, pursuant to GCC Clause 53(3), to provide an undertaking to carry out *"outstanding works"* (in addition to maintenance and defect rectification works) during the Maintenance Period. These outstanding works do not need to be completed in order for Substantial Completion to have been achieved. Thus, in this context, Substantial Completion can be thought of as the point in time at which works associated with a construction contract have been completed to such a degree that the owner may use the property in the manner in which it was functionally or operationally intended, even though some work may remain outstanding.

Substantial Completion & Practical Completion

In summary, and as a comparison, Substantial Completion has traditionally applied to civil engineering works, whereby a client may be happy to take possession of the civil engineering facility with minor works outstanding. Practical Completion has, on the other hand, typically applied to building works, where the client would not be so happy to take possession of a building that had inherent defects and/or outstanding works at the date of handover.

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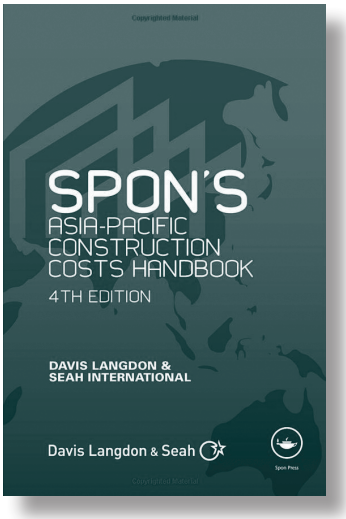
ADR | Review

Books

Spon's Asia-Pacific Construction Costs Handbook, 4th Edition

By Davis Langdon & Seah International



Spon's are the publishers of an excellent range of price books in the UK for civil engineering, highway, mechanical and electrical, landscaping and architectural and builder's works. Some of the construction price information included in these price books, whilst in pounds sterling, has some relevance to the Asia Pacific region including the construction production rates, outputs and man hour constants.

We were, therefore, full of high expectations when we ordered the *Asia-Pacific Construction Costs Handbook* which includes cost data for twenty countries. Unfortunately, we found the cost data to be somewhat generic and limited in application and no more than an introduction to each country. It includes:

- key data on the main economic and construction indicators;
- an outline of the national construction industry;
- simple labour and materials cost data;
- measured rates for a range of standard construction work items;
- approximate estimating costs per unit area for a range of building types; and
- price index data and exchange rate movements against £ sterling, US$ and Japanese Yen.

This handbook will likely have limited application to most practitioners, with perhaps the exception of developers or multinational companies assessing comparative development costs.

Publisher: Spon Press, 2010
ISBN: 978-0-415-46565-6
Price: £120.00

Annual Cocktails at the China Club, 3rd June 2010

More photographs of the evening can be viewed at **www.adrpartnership.com/news.html**

ADR | News

Britcham 'Jungle Rumble' Annual Ball 2010

On 11 June 2010, staff and guests in jungle-themed fancy dress attended the Britcham Annual Ball at The Grand Hyatt in support of the End Child Sexual Abuse Foundation (ECSAF). The mission of the ECSAF is to protect children from sexual abuse and further information on the foundation can be found at **http://www.ecsaf.org/English/index.php**.

ADR | Diary

Forthcoming Events 2010

6 Aug	*Lighthouse Club - August Get Together – Delaney's 1st Floor, Wanchai*
13 Aug	*HKIS / HKIPM – Delivery of Capital Works Projects: The Procurement Strategies – 8/F Surveyors Learning Centre, Jardine House*
3 Sep	*Lighthouse Club - September Get Together – Delaney's 1st Floor, Wanchai*
4 Sep	*HKIS – Annual Conference 'Building Adaptation & Revitalisation' – Conrad Hotel*
10 Sep	*Lighthouse Club - Contractor's Dinner – Maxim's Palace, City Hall*
11 Sep	*RICS – Hong Kong Annual Conference – 'Public Private Partnerships in Waterfront Developments' – Conrad Hotel*
14 Sep	*HKIE – Annual Dinner – JW Marriott Hotel*
8 Oct	*Lighthouse Club - October Get Together – Delaney's 1st Floor, Wanchai*
9 Oct	*British Chamber of Commerce – Boxing Smoker, Hong Kong Football Club*
17 Nov	*HKIAC - The Kaplan Lecture 2010 & 25th Anniversary Opening Reception, The Hong Kong Club*
18-19 Nov	*HKIAC - 25th Anniversary Conference & Dinner, JW Marriott Hotel*
26 Nov	*Lighthouse Club - Annual Dinner – Hong Kong Convention Exhibition Centre*
5-7 Dec	*Society of Construction Law Hong Kong - International Conference - Hong Kong Convention Exhibition Centre*

Based in Hong Kong, ADR Partnership Limited is a dynamic practice of construction professionals providing specialist commercial and contractual services to the construction industry.

If you would like to discuss any of the articles published in this *Digest* or your project requirements, please contact James Longbottom, Patrick O'Neill or David Longbottom at ADR Partnership Limited on **(852) 2234 5228** or e-mail us at **info@adrpartnership.com**

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