



Extensions of Time & Delay Analysis Update

Presented to:
Chartered Institute of Arbitrators
 East Anglia Branch

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Presented by:
 Dr John Keane

Extensions of Time & Delay Analysis Update


Architect / CA (say JCT):

- Under pressure to grant 'prospective' EOT. A 'best' assessment (*John Barker v London Portman 1995*)

Arbitrators & Adjudicators (& Court):

- Start with what contract requires in relation to fixing EOT(s)
- Have advantage of knowing what happened when reviewing what EOT(s) due
- Must decide on 'balance of probabilities' what delay has actually been caused by such RE(s) as found to exist
- Decision must be based on evidence both factual and expert

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Extensions of Time & Delay Analysis Update

Walter Lilly & Company Ltd v Mackay~[2012]

EWHC 1773 (TCC) (11 July 2012)

- Con: JCT 1998 Priv. without Quants, some CDP
- Con Sum: £5.2m F A/C: £8.5m
- Con Time: 80 weeks Asb: 206 weeks
- LADs: >44 days £158k, +44 days £45k p/w
- EOT: 129 weeks Risk: 78 weeks

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Walter Lilly & Company Ltd v Mackay~[2012]

EWHC 1773 (TCC) (11 July 2012) [WLC started action 31.03.2010]


WLC claim: EOT to PC (78:0) L&E & Return LADs, plus return of sums wrongly deducted for defects and unpaid works value sums.

Mackay Posn: No further EOT and substantial LADs, plus £2m defects and Works overvalued

Issues considered during trial included:

- Concurrency
- Delay Experts: differing approaches
- Global assessment (Quantum issue)

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Legal Principle Case References:

Balfour Beatty Building Ltd v Chestermount Properties Ltd (1993) 62 BLR 12


Henry Boot Construction (UK) Ltd v Malmalson Hotel (Manchester) Ltd (1999) 70 Con LR 33

City Inn Ltd v Shepherd Construction Ltd [2007] SUWCS CSOH_190 (30.11.2007)

De Beers UK Ltd v Atos Origin IT Services UK Ltd [2010] EWHC 3276 (TCC), 16.12.2010

Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 Comm. Court

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Concurrency

- City Inn v Shepherd [2007]:
 - Apportionment
 - Supported under appeal (Except for Lord Carlway)
- Walter Lilly (2012):
 - Reverted to Malmalson position

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Concurrency – Concurrent Delay/Effect

- Definition:
 - "...a period of project over-run which is caused by two or more effective causes of delay which are of equal causative potency..."
(Concurrent Delay paper by J Mann QC – Feb 2002)
- Difficult Issues:
 - Identification and Apportionment of Liability
 - Assessment of EOT
 - Calculation of Compensation (e.g. L&E)
 - Multiple causes of delay
 - Multiple critical paths
 - Complexity of Project
 - Pacing claims

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Concurrency – Concurrent Delay/Effect

- Underlying Principle:
 - "...concurrent delay theory is that neither the employer nor the contractor can recover damages from one another when they contribute to the delay..." (Keane & Caletka)
- Approaches:
 - First-in-line
 - Dominant cause approach
 - Apportionment approach

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Delay Expert Approaches

- City Inn v Shepherd [2007]:
 - Traditional v Critical Path Analysis
 - Note: Lack of programmes after a certain stage
- Walter Lilly (2012):
 - Objective v Subjective
 - Note: No substantial programmes were produced after last revised CD (16.02.07) 78 weeks before PC. How to analyse critical delay?
 - Windows approach adopted by court

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EWHC 1773 (TCC) (11 July 2012)

[WLC started action 31.03.2010]

Decided:

- EOT: Full to PC (72.4 weeks)
- LADs: NIL
- Net Works Value Due: £2.3m
- Plus...

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