

Time is money... except when it isn't

Financial consequences of extensions of time in construction contracts

Time and money are often seen as going hand in hand in construction contracts. In a typical employer contractor relationship, if the project is delayed by matters for which the contractor is responsible (non-excusable delay events), then the contractor may find itself liable to the employer for damages.



This article looks at some of the considerations that should be applied to contractors' claims for delay associated costs, including the types of delay related costs that may be claimed, the relevance of the timing of those costs, and some of the obstacles that may stand between an extension of time award and a right to recover associated delay costs.

Damages payable to an employer for late completion of a construction project are commonly referred to as liquidated damages. They are typically expressed as an amount per week and should represent an estimate of the losses the employer will suffer as a result of a delay to the completion of the project.

By contrast, if the project is delayed by matters which, so far as time is concerned, are the responsibility of the employer (excusable delay events), the contractor will ordinarily be entitled to an extension of the time which it has to complete its works.

Extension of time awards are frequently followed by claims for prolongation and loss and/or expense are often seen as the financial side of delay claims.

However, an award for an extension of time does not automatically give rise to a right to recover prolongation and loss and expense. There are in fact a number of considerations that should be applied to a contractor's claim for delay associated costs, and a number of obstacles that stand between an award of an extension of time and the ability to successfully recover prolongation and other loss and expense costs.

It is not uncommon to find a contractor who, having been awarded an extension of time, has subsequently been unsuccessful, either in part or in full, in its efforts to recover prolongation and other delay associated costs.

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Those familiar with this experience will be all too aware that the familiar maxim, “*time is money*”, is not necessarily true of extension of time awards.

This article looks at some of the considerations that should be applied to contractors’ claims for delay associated costs, including the types of delay related costs that may be claimed, the relevance of the timing of those costs, and some of the obstacles that may stand between an extension of time award and a right to recover associated delay costs.

I have been awarded an extension of time, what next?

In the ordinary course, for a contractor to successfully bring a claim for prolongation and loss and/or expense, it will be required to demonstrate that:

1. The delay event in relation to which it was awarded an extension of time was a compensable delay event;¹
2. That it has incurred “recoverable” costs; and
3. That those costs have been incurred as a consequence of the compensable delay event.

In relation to the first point above, it is important to remember that not all events that carry an entitlement to an extension of time carry an entitlement to compensation for prolongation. Adverse weather conditions are perhaps the most common example of such an event. In the case of adverse weather, it is commonly the case that the employer bears the time risk whereas the contractor is required to bear the cost risk.

Accordingly, in circumstances where an extension of time has been awarded for delay caused by adverse weather conditions, it may commonly be the case that the contractor is unable to recover the additional costs it has incurred as a result of that delay.

In respect of the second and third points above, the contractor will have to demonstrate that the costs it is claiming for have been incurred (this is usually done by reference to project cost records) and that they are recoverable heads of cost.

Standard forms of construction contract use different terminology such as *compensation* and *direct loss and/or expense* to describe the further payment that a contractor may be entitled to in relation to delay².

Whilst in many instances the description of what constitutes loss and/or expense is unhelpfully vague, costs that are recoverable under these provisions are generally considered as analogous³ to those that may be recovered under a claim for damages at common law under the first limb of *Hadley v Baxendale*⁴ and are commonly put forward under the following heads of claim:

- I. **PROLONGATION COSTS;**
- II. **LOST CONTRIBUTION TO HEAD OFFICE OVERHEADS;**
- III. **LOSS OF PROFIT;**
- IV. **INCREASED COSTS (INFLATION); AND**
- V. **INTEREST**

Each of these heads of claim are discussed briefly below.

I. PROLONGATION COSTS

A claim for additional preliminaries is often referred to as a claim for prolongation. It typically refers to those costs that are time-related and are not incorporated into the works, such as site supervision, scaffolding, water and electricity usage, and plant and tool hire.

Frequently prolongation claims are made using a calculation that multiplies the contract rates for preliminary resources by the period of overrun at the end of the project.

Claims presented in this manner are often dismissed as being overly theoretical and not in accordance with the objective of compensation for prolongation, which is to put the contractor in the same financial position it would have been if the delay event had not occurred.

¹ In other words, a delay event that gives rise not only to an entitlement to an extension of time, but also to the right to recover prolongation (and other loss and expense) costs.

² Although the focus of this article is in relation to cost associated with critical delay, loss and expense clauses commonly facilitate recovery of costs associated with localised delay and disruption that flow from prescribed events but that do not cause a delay to the completion of the project.

³ See for example *F.G. Minter Ltd v Welsh Health Technical Services Organisation* (1980) 13 B.L.R. 1

⁴ *Baxendale* (1854) 9 Ex. 341 (i.e. damages that arise naturally from the breach)

The Society of Construction Law's Delay and Disruption Protocol states that:

"...compensation for prolongation should not be paid for anything other than work actually done, time actually taken up or loss and/or expense actually suffered. In other words, the compensation for prolongation caused other than by variation is based on the actual additional cost incurred by the Contractor"

Accordingly, unless the contractual machinery states otherwise, it is suggested that claims for prolongation should be based on the actual costs incurred by the contractor during the period that the delay was suffered.

For example, if a project was suspended for 3 weeks in March by reason of a compensable delay and this had the effect of moving the completion date forward by 3 weeks from early September to late September, the correct prolongation costs are those costs that were incurred in the three weeks of suspension during March.

A pragmatic way of calculating "actual" prolongation costs is to work out a daily average of the actual time-related costs during the period of delay.

This can be done firstly by identifying from the project cost records (such as invoices, cost reports etc.), the actual cost of preliminary items during the period in which the contract was delayed.

Once the actual cost of preliminary items has been determined, care should be taken to differentiate between those preliminary items that were on-site longer because of the delay and those that were required to deal with matters that were not affected by the delay. The latter should not be included in the calculation of the average cost.

Having removed any items that were not prolonged as a result of the delay to the project, an average actual cost per day may be calculated. The contractor's entitlement to prolongation is then determined by the application of the average actual cost per day to the period of compensable delay.

II. LOST CONTRIBUTION TO HEAD OFFICE OVERHEADS

In a claim relating to delay it may be appropriate in certain circumstances to include a claim for the loss of an opportunity to recover a contribution to head office overheads. Claims of this type are generally made on the basis that in its usual course of business a contractor recovers its head office overhead costs through a contribution generated from the execution of construction contracts and therefore, if a project is

delayed, a contractor may receive less contribution from the revenue generated over time to support its fixed head office overheads.

A claim for lost overhead recovery may succeed if the contractor is able to demonstrate that, but for the delay, its workforce would have had the opportunity of being employed on another contract and that contract would have had the effect of contributing to its overheads during the overrun period.

A formulaic approach⁵ may be used to quantify lost overhead recovery, however, the contractor will still need to demonstrate on the balance of probabilities that there were other revenue and profit earning work available which, but for the employer delay, it would have secured.⁶

III. LOSS OF PROFIT

Subject to the express provisions of the contract, a claim for loss of profit in relation to a delay may be a permissible head of claim. Claims of this nature ordinarily arise out of a diminution of turnover as a result of the delay preventing the contractor from carrying out work on other contracts. However, similarly to a claim for loss of overhead contribution, it is suggested that a contractor would have to demonstrate that at the time of the delay, it could have used the lost turnover profitably⁷.

IV. INCREASED COSTS (INFLATION)

Claims for increased costs are often made on the basis that the delay caused the works to be carried out at a later date (in a new year or new financial year) and as a result, the contractor suffered an increase to its material and labour costs. Some contracts may contain fluctuation clauses under which the contractor may be entitled to payment for inflationary increases. Where no such clause exists, the contractor may demonstrate the actual increases from its cost records or may prefer to use a published inflation index.

V. INTEREST

It is generally recognised within the construction industry that it will be within the contemplation of the parties that if deprived of money, the contractor will pay interest or lose the ability to earn interest.⁸

5 The three most commonly used formulae are Hudson, Emden and Eichleay.

6 See *Walter Lilly & Company Limited and (1) Giles Patrick Cyril Mackay (2) DMW Developments Limited* [2012] EWHC 1773 (TCC) for a list of evidence provided by the successful claimant contractor.

7 Furst, S. & Ramsey, V. (2012), *Keating on Construction Contracts*, Ninth Edition, London: Sweet and Maxwell at 9-033.

8 Society of Construction Law Delay and Disruption protocol second edition: February 2017 at page 54.

To successfully make a claim for the cost of interest (or the loss of opportunity to earn interest) the contractor will have to demonstrate that such a loss was actually suffered.

The appropriate time from when a claim for interest starts to run is the date on which the principal sum could have become payable. This is likely to be the date for payment of the certificate issued immediately after the contractor applied for payment of the principal sum. There may, of course, be an argument from the employer that the time should start to run from the date that the contractor has provided all the information needed to satisfy them that the principal sum was properly due.

Notwithstanding the matters discussed above, there are still a number of other factors which could affect or extinguish a contractor's right to recover delay associated costs following an extension of time. One such factor is the existence of concurrent delay.

“Concurrency is perhaps one of the most contentious issues when it comes to claims for an extension of time and recovery of prolongation costs.”

Concurrent delay

WHAT ARE THE EFFECTS OF CONCURRENCY ON ENTITLEMENT TO PAYMENT OF DELAY COSTS?

Concurrency is perhaps one of the most contentious issues when it comes to claims for an extension of time and recovery of prolongation costs.

The Society for Construction Law Delay and Disruption Protocol 2nd Edition⁹ states that in instances where there is concurrent delay, and as a result of that delay the contractor has incurred additional costs, the contractor should only receive compensation to the extent that it can separate the additional costs caused by the delay for which the employer was responsible, from those caused by its own delay. In practice this can be very difficult, if not impossible, for a significant part of the contractor's costs.

The Protocol states that if the contractor *“would have incurred the additional costs in any event as a result of Contractor Delay, the Contractor will not be entitled to recover those costs.”*

The position set out in the Protocol is consistent with the situation described by Mr Justice Edwards-Stuart in *De Beers UK Ltd v Atos Origin It Services UK Ltd*¹⁰, who stated:

*“...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.”*¹¹

This is because the contractor cannot recover damages for delay *“in circumstances where he would have suffered exactly the same loss as a result of causes within his control or for which he is contractually responsible”*.¹²

WHAT IS CONCURRENT DELAY?

The generally accepted definition of concurrent delay is *“a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency.”*¹³

Instances of “true” concurrency in this sense are in reality very rare, and more often than not it will be the case that, through a factual analysis of the day to day progression of a construction project, one cause of delay will be of greater “causative potency” than the other events that are alleged to be “concurrent”.

Notwithstanding the relatively limited practical application of concurrent delay, recent developments have confirmed that the potential effects of concurrent delay are not limited to the contractor's ability to recover compensation for prolongation.

In 2018 it became clear that subject to the express provisions of the contract, instances of concurrent delay may extinguish a contractor's right to an extension of time and expose it to a liability for liquidated damages.

THE EFFECT OF NORTH MIDLAND BUILDING LTD V CYDEN HOMES LTD

In 2018, the case of *North Midland Building Ltd v Cyden Homes Ltd*¹⁴ came before the Court of Appeal. This case considered the enforceability of an amendment to the standard wording of a 2005 edition of the JCT Design and Build contract.

¹⁰ *De Beers UK Ltd v Atos Origin It Services UK Ltd* [2010] EWHC 3276 (TCC)

¹¹ *De Beers UK Ltd v Atos Origin It Services UK Ltd* [2010] EWHC 3276 (TCC) at 177, this case is also referred to by Mr Justice Akenhead in *Walter Lilly & Company Ltd v Mackay & Anor* [2012] EWHC 1773 (TCC) at 368

¹² *De Beers UK Ltd v Atos Origin It Services UK Ltd* [2010] EWHC 3276 (TCC) at 178

¹³ This definition put forward by John Marrin QC in his article “Concurrent Delay by John Marrin QC (2002) 18 Const LJ No. 6 436” has been cited with approval in *Dhabi v Sd Marine Services* [2011] EWHC 848 (Comm) At 277, and in *Walter Lilly & Company Ltd v Mackay & Anor* [2012] EWHC 1773 (TCC) at 369.

¹⁴ [2018] EWCA Civ 1744

⁹ Society of Construction Law Delay and Disruption protocol second edition: February 2017

In his judgement Coulson LJ, with whom the other two judges agreed, decided it was possible to include within a contract a clause stipulating that:

“...where there is concurrent delay (properly so-called), the contractor will not be entitled to an extension of time for a period of delay which was as much his responsibility as that of the employer”.

This decision made clear that it was possible for parties to agree to reverse the accepted position under the unamended JCT extension of time provisions, which in the event of concurrent delay maintained the contractor's entitlement to an extension of time.

Succeeding in an extension of time claim

An entitlement to an extension of time does not create an automatic right to recovery of prolongation costs and loss and expense. In order to succeed in such a claim, a contractor will need to demonstrate that it was delayed by a **compensable** delay event, that the costs it incurred are recoverable, and that they were incurred as a result of the compensable delay event.

The objective of a payment for prolongation and loss and expense is to put the contractor in the same financial position it would have been in if the compensable delay event had not occurred.

Accordingly, payment for prolongation should be based on the actual costs incurred by the contractor during the period that the delay was suffered, and care should be taken to remove costs for resources that were not affected by the delay event.

Consideration should also be given to the existence of concurrent delay. Whilst true concurrency is relatively rare, to the extent that it does exist, it may significantly reduce (or eliminate) the contractor's entitlement to recovery of costs if the concurrent delay was caused by matters which are the responsibility of the contractor.

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