DGA

DGA GROUP EBRIEFING
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CONTENTS

MESSAGE FROM THE MANAGING DIRECTOR

JIM BOURKE

Welcome to the first 2022 edition of our E-Briefing publication, which once again incorporates a mix of internal DGA professionals' construction industry insights together with those of the guest author.

Having just arrived back from a long weekend skiing in the Italian Alps, life really does feel like it is returning to normal, and indeed, the positive news coming out of the UK construction press, in particular, would support this.

In this edition, we have 4 articles, the first provided by Karen Wenham, our newly appointed Director of Programming Services for our Asia -Pacific region based in DGA's Melbourne office. Karen's article looks at the long-term effects of Covid on the construction market in Australia as a result of its Government's early closed border policies, including the subsequent impact this has had on the country's critical overseas supply chains.

Lee Mallek, from our London office, follows up on his well received Part 1 review of the definition of concurrency from our last publication, with his Part 2 focusing on the application of analysis in concurrent delay cases.

Jacob Roderick, now also with our London office having spent some 18 months with the DGA Melbourne team, uses his knowledge gained of the Australian and UK jurisdictions to provide an insight and comparison into how each region approaches its respective statutory adjudication process.

Our guest author for this edition is Linda Holland, partner at Eakin McCaffery Cox in their Sydney office. Linda looks at how contractors, subcontractors and suppliers should view and allocate monies received under the Security of Payments process in Australia, with particular reference to directors' duties under the Corporations Act 2001 (Cth) in respect of both the declaration and payment of dividends.

Thank you to Linda, Karen, Lee and Jacob for taking the time to research and produce these informative pieces.

The arrival of Karen Wenham as an experienced testified delay expert, together with a further six new consultants across our Melbourne and Sydney offices, provides a great boost to the already established teams in both locations. Our Singapore and UK offices are also currently looking to expand their in-house capabilities at expert and dispute support team levels to meet increasing client requirements for our services.

From my own local observations, recent weeks have seen an increased presence on public transport and the streets of London following the UK government relaxation of work from home guidelines. It is great to see our teams' rubbing shoulders once again and conversing both professionally and socially in a more direct and natural but informal manner. I look forward to this method of communicating steadily increasing both internally and externally with our clients and fellow professionals, with the imminent annual SCL lunch in central London an ideal opportunity for this, where we have a number of our key clients joining us as guests.

The UK construction press have reported that growth in the construction sector rose to its highest level in six months in January, according to the Purchasing Managers' Index (PMI), with the rolled back pandemic restrictions being seen to boost optimism and prompt people to spend more on commercial projects. Civil engineering was also reported to have returned to growth, albeit house building saw its activity increase at its slowest pace for four months.

There were also signs that the materials shortages from 2021 have eased coming into 2022. Construction companies reported that the delays for materials were at the lowest level since September 2020. The rate of inflation also eased. Recent government data showed the price of steel and timber fell at the end of 2021.

However, tender prices have been forecast by a recent survey to rise by 4-5 per cent a year until 2025 with rising material, and increasingly labour, costs driving up tender prices for building and infrastructure contracts in the coming years. This will offset a potential slowdown in demand that could happen if investors start to view construction costs as being too expensive. For infrastructure, tender prices are expected to rise by 4 per cent this year, rising to 4.5 per cent in 2023, then topping out at 5 per cent in both 2024 and 2025.

The centre of the UK government's 'levelling up plans' is local transport upgrades, rejuvenation of town centres and brownfield estates, with the UK governments "levelling up" secretary, Michael Gove, recently saying the plan for the regions would work to end the "historic injustice" of a "postcode lottery" on investment. The Government acknowledges that enhanced transport infrastructure is weighted towards the south of England and, therefore, wants to upgrade regional public transport systems to bring them closer to the standard of that in London by 2030.

In addition to this, the UK government has said that some 20 towns and city centres would also be rejuvenated with the regeneration of King's Cross in London seen as a template. It is intended that a large proportion of a £1.8bn brownfield development fund will be re-directed from London and the south-east towards sites in the north and the Midlands.

Such announcements are always welcomed by the industry, but the inevitable questions come as to how such objectives would actually be achieved in practice. The London Kings Cross

template is indeed something to aspire to, but without an equal level of both private sector and government backed support it will not be realised further afield. As always, time will tell!

In general, and if achievable, all of this is positive for 2022 and beyond for the UK construction market, supported by January showing the best month for job creation in construction since October 2021, as stronger work pipelines pushed companies to up their recruitment.

On a more indirect front, I personally see 2022 as a period of returning opportunities for face-to-face training seminars, whether that be breakfast sessions, or more structured bespoke in-house or public sessions focused on professional development and / or matters currently affecting how we resolve matters of dispute on projects. Full details of what DGA can offer in this respect are provided at the end of this publication.

If you would like to discuss any of the featured topics or any related matter, please feel free to contact us.

LONG COVID AND THE AUSTRALIAN CONSTRUCTION INDUSTRY

HOW AUSTRALIA'S EARLY RESPONSES TO THE PANDEMIC CONTINUE TO CAUSE DELAY AND DISRUPTION IN THE CONSTRUCTION INDUSTRY.

KAREN WENHAM

DIRECTOR OF PROGRAMMING SERVICES - ASIA-PACIFIC

At the end of 2021, Laura Walton, Partner in Norton Rose Fulbright's Projects and Construction team, invited me on her Constructive Feedback podcast to discuss the impact of COVID-19 on construction projects, and how it differed from what had been assumed in the early days of the pandemic. Laura and I agreed on two things. Firstly, that we desperately needed to find new words to describe the events of the past few years (exactly how many conversations can one open with "Well, it's been an interesting few years..."),

and second, there had in fact been a noticeable misconception regarding the perceived short-term nature of the many restrictions put in place to manage the spread of the virus, particularly those limiting social mobility and density limits, resulting in not only changed work methods across sites, but also lower productivity, and project delays and perhaps somewhat naively, that the restrictions would be both temporary and short-lived.

While much of the predicted doom and gloom thankfully has not materialized, many of the restrictions implemented in the early days of 2020 remain in place and continue to have a deleterious effect on a wide range of industries and businesses not least construction, which continues to face the ongoing effects of international border closures and the inevitable impact this has on the overseas supply chain and project resourcing generally. It has also become apparent that private sector projects have been affected differently to publicly funded infrastructure projects. As we enter the third year of the pandemic, our industry continues to

face difficult and disruptive ongoing challenges, not all of which can yet be properly addressed through prevailing conditions of contract.

There are however positive and early signs of a step toward economic recovery through the planned implementation of a series of public sector infrastructure projects in New South Wales, Victoria and Queensland which hopefully will serve as the catalyst for a re-emergence of the construction sector although the lifting of internal border restrictions it seems will have a significant part to play.

IMPACT OF CLOSED BORDERS ON OVERSEAS SUPPLY CHAINS

Until very recently, Australia had been relatively successful in keeping COVID-19 away from its shores, and when it did manage to sneak in, it was mostly contained in the two major gateway cities of Sydney and Melbourne. This was made possible by the Federal Government's decision in March 2020 to close Australia's borders to all but only limited numbers of returning Australian citizens, select others, and freight. The international border closures began to be relaxed in November 2021, but thus far only Sydney and Melbourne international airports have reopened for limited arrivals of exempt travelers only.

As an island nation, and one of the most remote islands in the world, Australia is highly dependent upon overseas supply chains for a great many goods, services and materials.

Whilst the closed border policy has undoubtedly been useful in keeping case numbers low and geographically contained, the decision to do so has created or contributed to a negative

impact on the international supply chain which shows no obvious sign of improvement in the foreseeable future, suggesting there are still difficult times ahead.

Pre-pandemic, it was common practice to use belly freight to transport goods and materials. Typically, these were transported to the nearest international airport and loaded on to the next available passenger aircraft, which significantly lowered shipping timeframes. Oversized materials were shipped either by chartered flight or port freight.

In 2019 Australia averaged more than 2,000 international flights each week. Since March 2020, we have averaged 110 international flights each week which equates to a reduction of 95% of international passenger aircraft activity. Chartered flights were once easy to book and reliable. Many contractors are reporting that a chartered flight now takes at least three weeks to arrange and can be cancelled with little notice if there is insufficient cargo for it to be financially viable. Our dependency on port freight has therefore increased significantly.

Whereas pre-pandemic, Australia could transport most construction goods and materials on passenger aircraft out of Italy, Spain, China or Indonesia with customs clearance complete within two to three days, most materials currently can only be transported by boat. Logistics companies have reported increased timeframes for port freight all around the world, and in our own experience, we have recently encountered the following circumstances and events which significantly delayed and disrupted project delivery as a consequence of port freight departing China:

- Increased demand and use of port freight causing inevitable congestion and increasing container unloading times from one / two days to seven days;
- Increased demand and use of port freight causing vessel berthing delays increasing container loading times from one / two days to five days;
- Increased traffic in shipping lanes increasing sailing times from an average of 15 days, to 25 - 35 days;
- Further delays due to "blank sailings" where vessels delayed in voyage have deliberately avoided designated ports to make up on time in scheduling, causing general shipping disruptions and rolling of containers compounding transit and delivery times to Australia; and
- Intermittent shutdown of operations at Chinese ports throughout 2021 in response to a rise in positive COVID cases and other outbreaks of the virus.

In 2021 the Maritime Union of Australia undertook protected strike action across the Ports of Sydney, Melbourne, and Fremantle. The strike action dramatically affected productivity in berthing and discharging vessels from offshore. Port Botany in Sydney recorded being on

average seven days behind on loading and discharging vessels during the months of February to November 2021. During periods of industrial action, clearance time and unloading at Port Botany has taken as long as 21 days.

The shift in dependency to shipping for the transport of international goods and materials makes the construction industry as a whole less agile but also creates huge uncertainty and vulnerability for particular projects, allied industries and sectors heavily dependent if not wholly reliant on the overseas supply chain. Supply chain risks have typically been borne by head contractors and subcontractors, and the ability of many to seek relief or financial compensation for the delay and disruption suffered may be limited.

Whilst border restrictions were relaxed in November 2021, this is not without limitation. There is currently no official timetable or promulgation when Australian borders will become fully open and therefore no way of knowing when any sense of social or economic pre-pandemic normality could return. It is therefore likely if not inevitable that the Australian construction industry will continue to suffer the ongoing effects of continuing delay and disruption due to the constraints imposed on the international supply chain by the COVID pandemic well into 2022 and perhaps beyond.

PRIVATE SECTOR PROJECTS VS. PUBLICLY FUNDED INFRASTRUCTURE: COST IMPACTS OF COVID-19

Between June and October 2021, both the New South Wales and Victorian state governments implemented two-week shutdowns of the construction industry to manage the spread of the then dominant Delta variant in the second half of 2021, as well as implementing restrictions on the distance people were permitted to travel from their homes. The restrictions were in place for approximately four months in both locations and overwhelmingly impacted people who were unable to work from home including construction workers. Notwithstanding the contractual provision on entitlement, the state governments worked closely with head contractors delivering publicly funded infrastructure to ensure that they received reasonable compensation for the additional costs and delay and disruption incurred because of those restrictions.

Although subjected to the same level of COVID restrictions, Project Stakeholders in the Private sector faced challenges of a different kind. Unlike their state government department / agency counterparts who were able to expense any compensation paid to head contractors, private sector project Stakeholders were required to capitalise any additional compensation and/or relief afforded to head contractors, together with their own employee costs, cost of borrowing and finance charges.

The effect of this is primarily two-fold. There is an unexpected pressure to maintain a healthy cash-flow and a potential negative effect on the predicted return on investment which may or may not be sustainable.

In a wider economic context, there is a real risk of rising inflation the counterbalance to which will see a potential rise in interest rates. This will disproportionately impact on the private sector more so than the public adding greater financial pressure and an increased appetite for those seeking additional financial entitlement and/or compensation to be more vigorous in their endeavours.

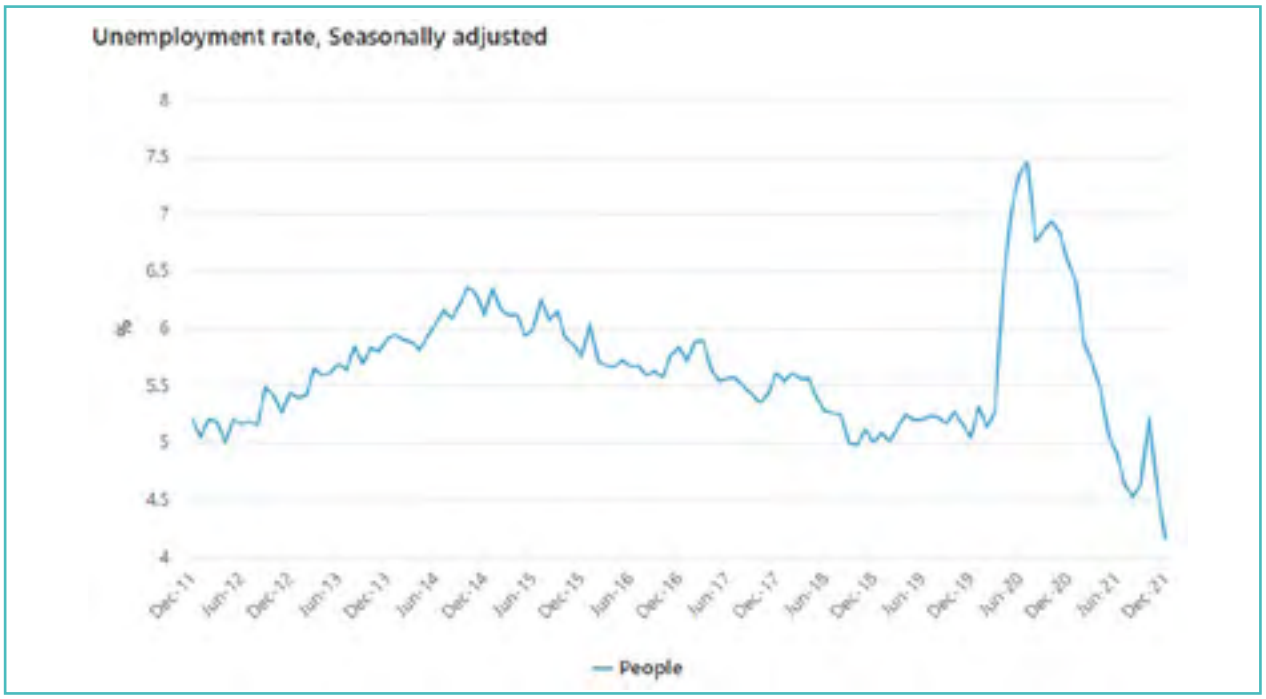
INFRASTRUCTURE-LED RECOVERY FROM COVID-19

New South Wales, Victoria, and Queensland are each planning an infrastructure-led recovery from COVID-19. Deloitte Access Economics estimates the annual infrastructure spend in New South Wales and Victoria alone will exceed $15B annually. In recent months both New South Wales and Victoria State Governments have awarded contracts for large and complex road and rail projects including:

- M6 tunnel (NSW) - $2.6B
- Warringah Freeway Updgrade (NSW) - $14B
- Western Harbour Tunnel Stage 1 (NSW) - $0.7B
- Sydney Metro West (NSW) - $18B
- North East Link (Vic) - $10B

Australia's closed border policy has resulted in the lowest levels of unemployment in the last 10 years. Australian Bureau of Statistics (ABS) figures show that unemployment peaked at 6.8% in June 2020 which coincided with "stay-at-home" orders impacting residents of New South Wales and Victoria and the Federal Government's introduction of its Jobseeker and Jobkeeper packages. Other than a small increase in October 2021 which coincided with strict lockdowns in New South Wales and Victoria, unemployment has continued to drop month on month to December 2021 and now sits at a 10-year low of 4.2%.

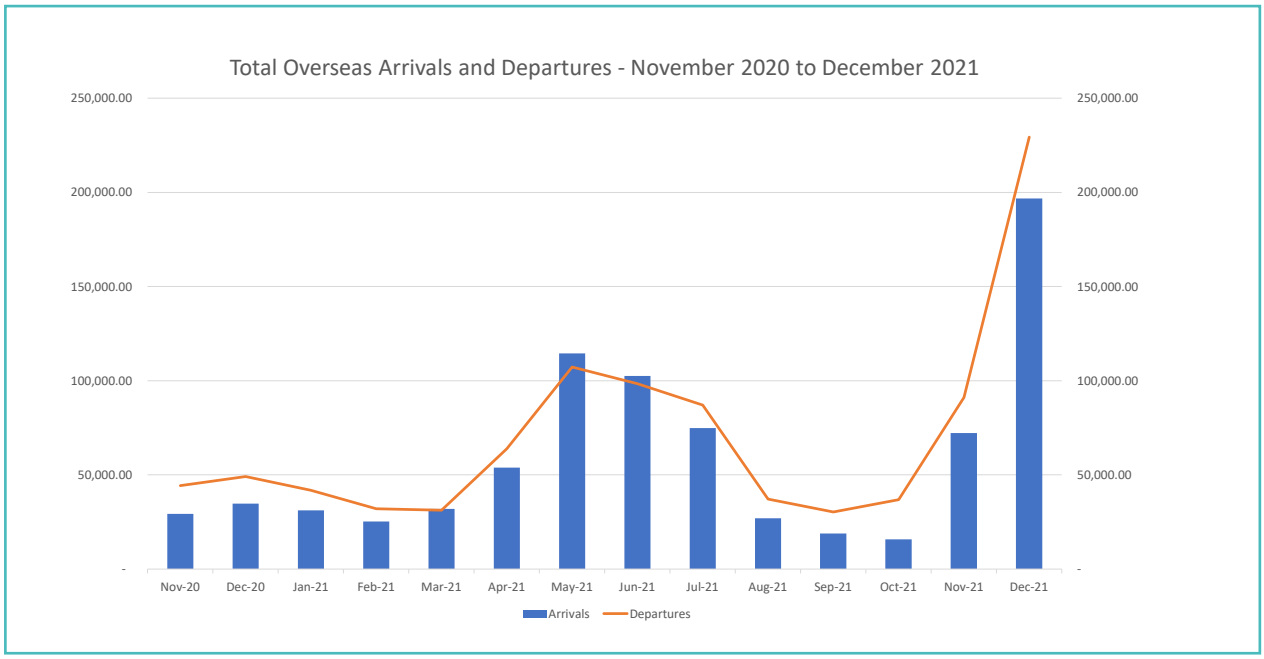
Australia has maintained a long-term unemployment rate of 4.0-4.5% for the last 10 years. Based on a current unemployment rate of 4.2%, it might be reasonable to extrapolate that right now the only people without a job are people who don't particularly want or need one. This sentiment has been reflected in my conversations with client organisations, contractors, subcontractors, and consultants alike who are finding recruitment to be extremely competitive.



Source: Australian Bureau of Statistics (ABS)

In the 12 months to December 2021, ABS figures show that there were 828,740 international arrivals to Australia and 979,810 international departures. In effect, approximately 150,000 more people have left Australia than have arrived.

ABS data also shows the continuing impacts of Australia's border closure policies on migration. In March 2020 the Federal Government introduced caps on the number of people able to return to Australia. The caps were raised in May 2021 which led to an increase of returnees and for the first time since the pandemic began more than 12 months earlier the number of people arriving in Australia exceeded the number of people leaving. In August 2021 the caps on international arrivals were lowered in response to an outbreak of the Delta variant in Sydney and Melbourne and remained in place until November 2021 when some relaxations around international travel were implemented. Even now, only Sydney and Melbourne international airports are processing international travelers. However, the trend of more people leaving Australia each month than arriving has continued and likely will continue until there are further relaxations on the types of travelers that can enter Australia.



Source: Australian Bureau of Statistics (ABS)

The continued effects of our closed borders on the workforce perhaps presents a greater risk to our infrastructure-led recovery from COVID than perhaps even overseas supply chain issues. The challenge ahead will be how we resource these projects at every level – engineering, project management, skilled and unskilled labour. Each new contract awarded is taking scarce resources from existing projects. Each of the live projects that I am currently working on are experiencing shortages of both project management/design management, site supervision, and subcontract labour. Scarcity of resources are having and will continue to have an impact on the cost timing and delivery of much needed public and private sector construction projects.

CONCURRENCY PART 2 – APPLICATION OF ANALYSIS IN CONCURRENT DELAY CASES

LEE MALLEK

ASSOCIATE DIRECTOR, UK

INTRODUCTION

In my previous article, I defined the term "concurrent delay", reviewed the available guidance about concurrency in delay analysis, and examined certain contract provisions relating to it. In this article, I discuss the approaches taken by the courts when considering concurrent delay.

As mentioned in Part 1, the initial step in any analysis will be to identify if there are any contractual provisions relating to concurrent delay within the specific contract. As noted in *'North Midland Building Ltd v Cyden Homes Ltd [2017]* [i] , the Court of Appeal decision stated that a clause in a construction contract which allocated the risk of concurrent delays to the Contractor is valid and enforceable. In England, this means that the general approach to concurrency is subject to the express terms to which the parties have agreed.

If there is no contract provision, then more general legal principles will be relevant. In order to consider this, I have examined relevant case law from the UK to consider how the courts have treated concurrency.

It should be noted that I am not a lawyer, and this paper does not seek to give legal advice.

Additionally, when considering an approach for assessing different concurrent delay scenarios, it is evident that each individual case will turn on its own facts and merits. We strongly advise getting project-specific legal or practical advice as necessary.

Although this paper does not cover forensic delay analysis methodologies, it's important to note that some form of critical path analysis will almost always be necessary when assessing concurrent delay. Firstly to establish the relative extent of the delay, and the potential causes, before moving on to establish liability and entitlement. It may be that (as I noted in my previous paper) the question of concurrent delay could be avoided in its entirety.

However, to the extent there is a need to consider concurrency, potential analysis and assessment methodologies may include:

- As-Planned v As-Built Method.
- Collapsed As-Built Method.
- Time Impact Analysis Method.

Construction contracts generally provide extension of time clauses. These protect both

i North Midland v Cyden Homes Ltd [2018] EWCA Civ 1744

parties, allowing the Employer to recover liquidated damages if the Contractor is late completing, while potentially allowing the Contractor to claim an extension of time for Employer-responsible delay events. These clauses typically protect the enforcement of a contractual completion date from the activation of the "Prevention Principle", which could lead to time becoming "at large" (as I discuss below) and throwing into doubt the time that the contractor has to complete the works (where this would revert to a "reasonable period").

The provisions for concurrent delay in Standard Forms of Contract (JCT, NEC and FIDIC) were briefly discussed in Part 1 of this series. As noted there, while we are starting to see some cases relating to NEC contracts, the majority of UK case law is still based on JCT Contracts.

To the extent the works are late, and the Contractor is responsible, the Employer may claim liquidated damages for delayed project completion. However, to the extent there are (concurrent) Employer delays, the Contractor can claim those delays as a defence to the damages claim (an entitlement to an extension of time) and potentially to claim prolongation costs.

The "problem" for the parties, in respect of concurrency, is that without clear contractual guidance about concurrent delay, and assuming those delays are of "approximately equal causative potency"[ii] , then it may be the case that both the Employer delay and the Contractor delay be considered an effective cause of critical delay to project completion. In such a situation, then it could be that:

- Both the Employer and Contractor claims succeed (with the Contractor claiming full compensation for the delay, while the Employer claims full Damages)
- Both the Employer and Contractor claims fail (with the Contractor being refused compensation for the delay, with the Employer similarly not being entitled to claim Liquidated damages).

This article discusses the following legal approaches to the assessment of concurrent delay:

- The Prevention Principle.
- The 'But For' Test.
- The Dominant Cause Approach.
- The Malmaison Approach (Time No Money).
- Apportionment.

Furthermore, it is noted that there is a clear division between the approaches that have found favour in English Law and Scottish Law and, therefore, I discuss these separately below.

ii This term having been coined by John Marrin in his SCL Concurrency papers

ENGLISH LAW

PREVENTION PRINCIPLE:

The Prevention principle, under English law, can be summarised by the phrase "a party cannot benefit from its own wrong" (whether that is a breach of contract or some other act which "prevents" the other party from performing). Without express terms to the contrary, the "Prevention Principle" will apply to the determination of liability and damages resulting from concurrent delay.

For example, a Contractor may be in a position where progress is being limited by an act of prevention from the Employer. However, that act is not identified within the extension of time clauses as something that would permit an extension of time. As such, there is no contractual provision for the Employer to extend the completion date, and he would be in a position where he might otherwise benefit from his act of prevention. Without an enforceable date for completion, most common law jurisdictions would consider "Time at large". Under English law, the Contractor's obligation would only be to complete the remaining works within a "reasonable period" (with such a period often being unclear in the circumstances). This is somewhat unsatisfactory (to both parties) but ensures that the Employer does not benefit from his own act of prevention.

In short, the Employer cannot cause delay to the Contractor while maintaining the original contractual completion date, and still claim liquidated damages for late completion. It would be a rare contract that allows the Employer to claim liquidated damages in such a scenario.

The Prevention principle has roots dating back to, *'Holme v Guppy (1883)*[iii], where 'time at large' was first introduced. Lord Esher upheld that decision in *'Dodd v Churton (1897)*[iv] .

In *'Holme v Guppy'*, the plaintiff (Contractor) agreed to carry out carpentry works on a new brewery in Liverpool. The contract specified a completion date and provided for liquidated damages if the completion was delayed. When delays occurred, the defendant (Employer) withheld certain payments resulting in the Contractor bringing an action for the balance of the contract price. It was established that the Employer delayed site possession. It was also established that there were other Contractor delays and further delays caused by the Contractors engaged by the Employer. The cause was tried before Coltman, J at the Liverpool Summer Assizes in 1837, resulting in an award of £200 to the Contractor. The award was then unsuccessfully challenged by the Employer and upheld by the Court of Exchequer.

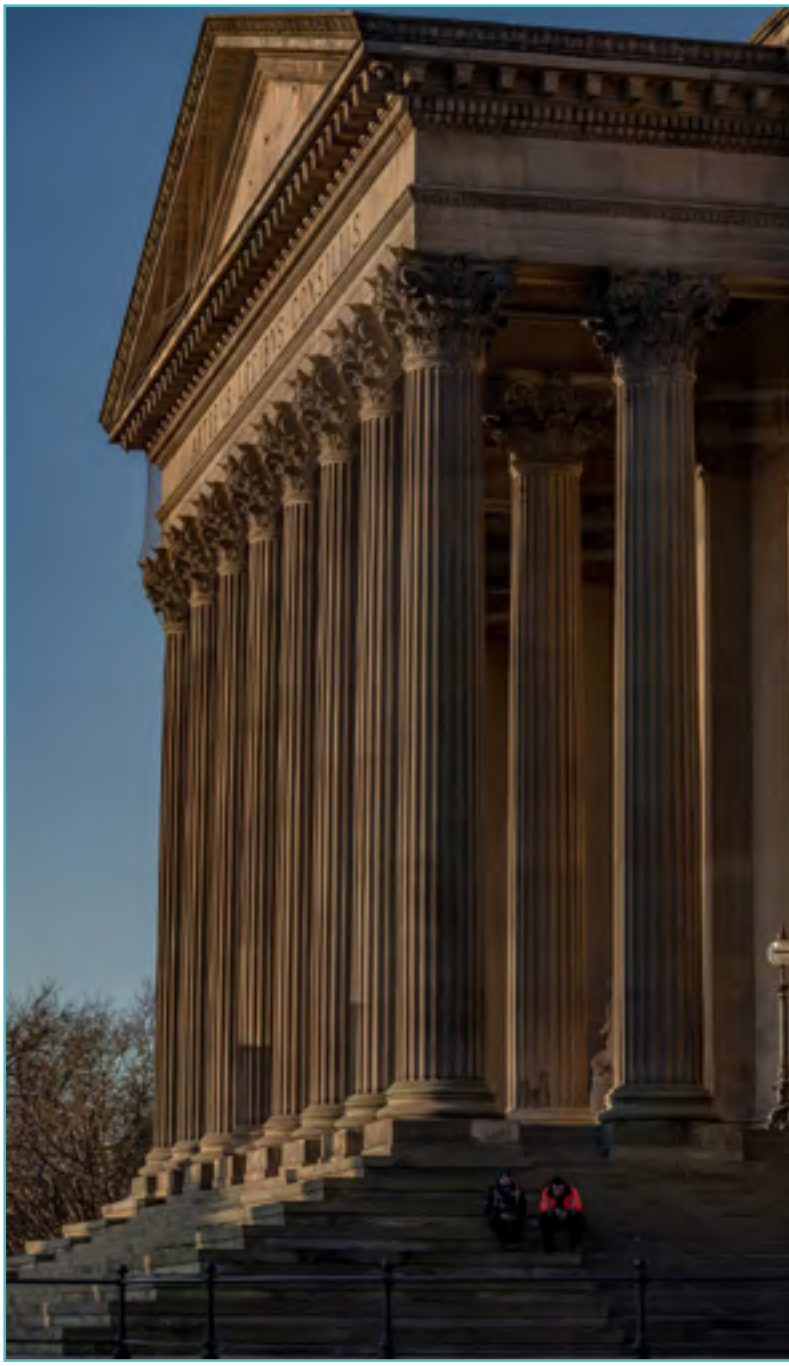
iii Holme v Guppy (1838) 3 M&W 387

iv Dodd v Churton (1887) 1 QB 562

The Court considered the case, and then Park, B stated:

> "On looking into the facts of the case we think no deduction ought to be allowed to the defendants. It is clear from the terms of the agreement that the plaintiffs undertake that they will complete the work in a given four months and a half and the particular time is extremely material because they probably would not have entered into the contract unless they had had those four months and a half within which they could work a greater number of hours a day. Then it appears that they were disabled from by the act of the defendants from the performance of that contract; and there are clear authorities, that if the party be prevented by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default ... It is clear, therefore, that the plaintiffs were excused from performing the agreement contained in the original contract and there is nothing to show that they entered into a new contract by which to perform the work in four months and a half ending at a later period. The plaintiffs were therefore left at large; and consequently, they are not to forfeit anything for the delay. The rule must therefore be discharged."[v]

Other more recent cases, such as *'Peak Construction v McKinney Foundations (1971)*[vi]*'* and *'Percy Bilton v GLV (1982)*[vii], refined the prevention principle as it relates to delay, and thereby encouraged the use of clear "extension of time" clauses in contracts.



v Holme v Guppy (1838) 3 M&W 389

vi Peak Construction v McKinney Foundations (1971) 1 BLR 111

vii Percy Bilton v Greater London Council [1982] 20 BLR

In the case of *'Peak Construction v McKinney Foundations Ltd (1971)'*[viii], Salmon LJ held that:

> "If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employer's own breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension of time on account of such a fault or breach on the part of the employer."[ix]

Interestingly, in relation to potentially concurrent delay, the judge added:

> "...if the failure to complete on time is due to the fault of both the employer and the contractor, in my view the [damages] clause does not bite. I cannot see how, in the ordinary course, the employer can insist on compliance with a condition if it is partly his own fault that it cannot be fulfilled".

In the case of *'Percy Bilton v GLC [1982]'*[x], Lord Fraser of Tullybelton stated that the extension of time provisions found in clause 25 were very important to ensuring that the contractor is protected from liquidated damages for events out of his control:

> "The general rule is that the main contractor is bound to complete the work by the date for completion stated in the contract. If he fails to do so, he will be liable for liquidated damages to the employer...That is subject to the exception that the employer is not entitled to liquidated damages if by his acts or omissions he has prevented the main contractor from completing his work by the completion date..."

In *'Balfour Beatty v Chestermount [1993]'*[xi], however, Coleman LJ highlighted the problems that could be encountered, if the prevention principle were to be applied too broadly (in a scenario when the delays were not truly concurrent):

> "The remarkable consequences of the application of this principle could therefore be as if ... the contractor fell well behind the clock and overshot the completion date ... if the architect then gave an instruction for the most trivial variation, representing perhaps only a day's extra work, the employer would thereby lose all right to liquidated damages for the culpable delay ... what might be a trivial variation instruction would destroy the whole liquidated damages regime..."

In *'Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd [2007]'*[xii], the court took this further by providing three clear propositions, stating:

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viii Peak Construction v McKinney Foundations (1971) 1 BLR 111

ix Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd [1970] 1 BLR 114, p121

x Percy Bilton v Greater London Council [1982] 1 WLR 784

xi Balfour Beatty v Chestermount (1993) 62 BLR 1 para 3

xii Multiplex v Honeywell No.2 [2207] EWHC 447 (TCC), para 56

(i) "Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion date.

(ii) Acts of prevention by an employer do not set time at large, if the contract provides for an extension of time in respect of those events.

(iii) Insofar as the extension of time clause is ambiguous, it should be construed in favour of the contractor."

In any event, the prevention principle may not always apply to cases of concurrent delay. An example of this is *'Adyard Abu Dhabi v SD Marine Services [2011]'*[xiii], where the ourt held that a party seeking to rely on the prevention principle must establish that actual delay was caused by the prevention relied upon. Because Adyard did not establish that actual delay, it was not entitled to rely on the prevention principle, and its claim was dismissed.

In *'Jerram Falkus Construction v Fenice Investments [2011]'*[xiv] , the court also considered that the prevention principle may not apply in cases of clear concurrent delay. It said:

> "Accordingly, I conclude that, for the prevention principle to apply, the contractor must be able to demonstrate that the employer's acts or omissions have prevented the contractor from achieving an earlier completion date and that, if that earlier completion date would not have been achieved anyway, because of concurrent delays caused by the contractor's own default, the prevention principle will not apply."

In *'North Midland v Cyden Homes [2017]'* [xv], it was shown that parties were able to agree contractual provisions that would allocate the risks associated with concurrent delay. The case was appealed in 2018, and in the Appeal Decision [xvi], Coulson LJ stated:

> "A building contract is a detailed allocation of risk and reward. If the parties do not stipulate that a particular act of prevention triggers an entitlement to an extension of time, then there will be no implied term to assist the employer and the application of the prevention principle would mean that, on the happening of that event, time was set at large. But it is a completely different thing if the parties negotiate and agree an express provision which states that, on the happening of a particular type of prevention (on this hypothesis, one that causes a concurrent delay), the risk and responsibility rests with the contractor".

From all the above, it is my conclusion that the prevention principle will, of course, remain in general application, even where there is concurrent delay, unless the contract states otherwise. However, it may not be considered relevant to the Contractor's claims for an

xiii Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm)

xiv Jerram Falkus v Fenice No.4 [2011] EWHC 1935 (TCC), para 52

xv North Midland Building Ltd v Cyden Homes Ltd [2017] EWHC 2414 (TCC)

xvi North Midland Building Ltd v Cyden Homes Ltd [2018] EWCA Civ 1744

extension of time, where the Employer's act of prevention, if concurrency does exist (and it is not the only cause of the critical delay).

'BUT FOR' TEST:

The main purpose of the 'But For' Test in legal cases is to seek to determine the real extent of factual causation in contractual disputes.

Keating 9.093 – 5, defines the 'but for' test stating:

> "This test requires it to be shown that "but for" the conduct complained of, the claimant would not have suffered the damage of which complaint is made.285 Satisfaction of the "but for" test is generally a necessary, but not sufficient, condition for establishing causation in fact in the law of contract. The "but for" test can be too restrictive and is departed from in unusual tort cases.286 In the contractual context the "but for" test need not be satisfied where there are two independent causes of loss caused by two defendants287 although there may be, in addition, exceptional circumstances where fairness and reasonableness also permit recovery where the test has not been satisfied.
>
> Subject to such exceptions, to the extent that common law concepts of causation are relevant to the test of causation under a loss and expense contractual provision, it is likely that there will be a requirement to satisfy the "but for" test.289 It may be, however, that in certain circumstances, the burden of proving that the loss in question would have occurred in any event, rests on the defendant.290" [xvii].

In *'De Beers UK Ltd v Atos Origin IT Services UK Ltd [2010] EWHC 3276 (TCC)*[xviii], it was determined that, irrespective of the Employer's delay, the Contractor would have suffered exactly the same financial loss because of his own delay (i.e. "But-for" the Employer's delay there would be no difference, and the Contractor would be no better off).

This case was stark, however, in that the delays assessed were considered fully and wholly concurrent. Such cases are considered rare.

The application of this test has received some criticism where concurrent delays occur that are of approximately equal causal potency. While it can be seen as a "common-sense" approach, when applied to complex delay cases, the results can be misleading (and may not accord with common sense and reasonability). As a result, the but-for test is less likely to be considered applicable or relevant when determining liability for concurrent delays.

The Courts have historically taken a relaxed view on the 'But For' Test when considering concurrent delay in order to avoid a result that runs contrary to the parties' express intentions - that is, in JCT cases at least, the contractor is entitled to a "fair and reasonable" extension of time.

xvii Keating on Construction Contracts, 11th Edition, November 2021, Sweet & Maxwell

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

Additionally, a significant disadvantage with the 'But For' Test is that, even though it might be suitable to ascertain whether an individual event has caused delay, the test does not assist the parties to allocate responsibility if there are concurrent events that both pass the test.

DOMINANT CAUSE APPROACH:

Iain Wishart has defined the dominant cause approach as follows:

> "If there are two causes, one the contractual responsibility of the defendant and the other the contractual responsibility of the plaintiff the plaintiff succeeds if he establishes that the cause for which the defendant is responsible is the effective, dominant cause"[xix] .

The 'But For' Test and 'Dominant Cause' approach are both 'all or nothing' tests. For example: if the Employer's delay is considered the more dominant delay, then the Contractor would be entitled to an extension of time (and money), whereas if the Contractor's delay were to be considered dominant, he would not be entitled to an extension of time (or money) and would be subject to damages.

Whether a clear dominant cause can be found in relation to delay will be a question of fact, based on the application of common sense (and not just the order or timing of the delays). If it is not possible to determine which delay event is "dominant", then it may be appropriate for the Contract Administrator to exercise discretion in determining an outcome which is "fair and reasonable". Such a decision becomes difficult and problematic if the competing causes of delay are of approximately equal causative potency.

In the case of *'H Fairweather & Company Ltd v London Borough of Wandsworth (1988)'*[xx], the arbitrator decided that where it was not possible to allocate the extension among different causes of delay, the extension must be given for the dominant reason. However, the Courts decision considered this an incorrect approach and referred to *'Henry Boot v Central Lancashire (1980)'*[xxi]

David Chappell, Vincent Powell-Smith and John Sims state, "Other cases, indeed, show that the courts have embraced the 'dominant cause approach' quite happily" [xxii].

The dominant cause approach was considered valid in the Scottish Court's decision in '*City Inn Limited v Shepherd Construction [2010]*'[xxiii]. It was held that if the "dominant cause" is a "relevant delay event" then a claim for extension of time will be successful. However, the decision went on to consider that it may be the responsibility of the tribunal to apportion the delay between the various competing causes, such that the Contractor only receives an extension

xix Iain Wishart, SCL Concurrent Delays, 4 June 1996

xx H Fairweather v London Borough (1988) 39 BLR 106

xxi Henry Boot v Central Lancashire New Town (1980) 15 BLR

xxii Chappell D, Powell-Smith V, Sims J, Building Contract Claims 4th Ed, 2005

xxiii City Inn Limited v Shepherd Construction [2010] CSIH 68

for the part of the overall delay reasonably apportioned between the concurrent causes. This has resulted in favour toward, and the development of, the "apportionment" approach (at least in Scotland). However, while English cases may consider dominance, they have tended not to support apportionment.

It seems that the case of Fairweather supports the view that the dominant cause approach should not be used for concurrent delay in extension of time claims.

If a dominant cause can clearly be found it seems reasonable that the court would run with that as it would mean that the dominant delay was effective, while the other was not resulting in the delays not being considered concurrent at all.

MALMAISON APPROACH (TIME BUT NO MONEY):

In recent years, if concurrency is likely to be established, English courts appear to consider the general rule to be that the Contractor is awarded 'Time but no money'. This philosophy was stated (albeit not actually used) in the landmark case of *'Henry Boot v Malmaison Hotel [1999]*[xxiv] and has become known as the 'Malmaison Approach'. In the case, when asserting what appeared to be "matters of common ground" between the parties, Mr Justice Dyson stated:

> "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." [xxv]

This approach was adopted by the Society of Construction Law[xxvi] when considering true concurrent delay.

xxiv Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd 70 ConLR 32

xxv Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd 70 ConLR 32, Dyson 13, p6

xxvi Society of Construction Law, Delay and Disruption Protocol, February 2017

Jeremy Winters, in his article, "How Should Delay be Analysed – Dominant Cause and its Relevance to Concurrent Delay", SCL Paper 153, January 2009, suggested that Malmaison represents how English law should deal with concurrency and that the dominant cause test is not applicable to extension of time claims where concurrency is a key component.

A case referred to in the Malmaison judgement was *'Balfour Beatty Building Ltd v Chestermount Properties Ltd (1993)'*[xxvii] . It involved relevant events occurring after the original completion date, in a period when the Contractor was in culpable delay. It was held that the Contractor was entitled to an extension of time to the extent that was attributable to the event (which were late variations or instructions). However, the period of any extension should relate to the additional critical delay actually caused (and the time due would be added to the original or extended completion date). In any case, the relevant event must be shown to cause a critical delay, and cause and effect must still be established between the event and the delay.

While the "Malmaison" test was supported in the case of *'Royal Brompton Hospital National Health Trust v Hammond [2001]'*[xxviii], the judge went on to decide that the timing of events was important when determining whether there was, in fact, concurrency. In this case, two events were both claimed to cause the delay, but the judge found that the first event that occurred (in time) was dominant and had caused all the delay.

Judge Seymour suggested the problem with the Malmaison approach was that Mr Justice Dyson was referring only to a situation of "true concurrency", that is, where two delay events occur at the same time and cause the same delay (that being a rare occurrence). From this judgement, it seems clear that, for a Contractor to obtain an extension of time, he must show that the relevant event caused the critical delay to completion. A detailed analysis of factual events and how they fit in with the project's critical path is likely to be required to determine if completion was actually affected when the delay events actually occurred.

It seems a large proportion of the English cases dealing with concurrency are based on versions of JCT Standard Contracts (Clause 25.3), albeit there are more recent exceptions, including Edwards-Stuart J's decision in '*De Beers UK Limited v Atos Origin IT Services UK Limited [2010]*'[xxix], and Hamblen J's decision in *'Adyard Abu Dhabi v SD Marine Services [2011]'*[xxx].

In *'Walter Lilley v MacKay & Others [2012]'* [xxxi], Mr Justice Akenhead also addressed the subject of whether the Contractor would be entitled to an extension of time in the event

xxvii Balfour Beatty Building Ltd v Chestermount Properties Ltd (1993)'. 32 ConLR 139

xxviii Royal Brompton Hospital NHS Trust v Hammond (No.7) [2001] EWCA Civ. 206

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

xxx Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm)

xxxi Walter Lilley v MacKay & Others [2012] EWHC 1773 (TCC), para 370

of concurrent delay, and supported the Malmaison approach (for "effective", or truly concurrent delays):

> "In any event, I am clearly of the view that, where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time. Part of the logic of this is that many of the Relevant Events would otherwise amount to acts of prevention and that it would be wrong in principle to construe cl. 25 on the basis that the Contractor should be denied a full extension of time in those circumstances. More importantly however, there is a straight contractual interpretation of cl. 25 which points very strongly in favour of the view that, provided that the Relevant Events can be shown to have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question."

Mr Justice Akenhead's judgment also confirmed that there should be a difference of approach between England and Scotland when dealing with concurrency. He confirmed that the 'apportionment approach' was not likely to be applicable in England.

In conclusion and in relation to English Law, while there are several approaches which might apply in the case of concurrent delay, in the majority of cases, the delays may be separable on the facts (and might therefore not be considered concurrent at all).

However, if there are two concurrent causes of delay (with approximately equal causative potency), one of which is a relevant event, and the other is not, then the Contractor is likely to be entitled to an extension of time for the period of delay caused by the relevant event. However, it is unlikely that the Contractor will be able to recover Loss and Expense associated with that delay, in circumstances where he would have suffered the same losses as a result of his own causes of delay.

This English law position (of getting "Time but No Money" where concurrent delay is established), appears to be reinforced by a number of recent cases, including the *'De Beers UK Ltd v Atos Origin IT Services UK Ltd [2010] EWHC 3276 (TCC)*[xxxii]*'*, *'Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm)'*[xxxiii] and *'Walter Lilly & Co Ltd v Giles Patrick Cyril Mackay and DMW Developments Limited[2012] EWHC 1773 (TCC)'*[xxxiv] cases. It is also supported by the SCL Delay and Disruption Protocol[xxxv].

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

xxxiii Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm)

xxxiv Walter Lilly & Co Ltd v Giles Patrick Cyril Mackay and DMW Developments Ltd [2012] EWHC 1773 (TCC)

xxxv The Society of Construction Law Delay & Disruption Protocol, 2nd Edition February 2017

SCOTTISH LAW

APPORTIONMENT

While Scottish courts often follow English cases, this is not the case for concurrent delay, as the principle of apportionment has found favour there (whereas it has not in England). The definitive case used to demonstrate the apportionment approach under Scottish Law is *'City Inn v Shepherd [2007]'*[xxxvi] (and the Court of Session appeal from 2010 which followed it).

The Judge in the case determined that there were a number of causes of delay, some of which were the responsibility of each party. He went on to consider that none of the causes of delay could be considered dominant and that all of them had some part to play in the overall effect on project completion. He decided that this effectively meant concurrency had occurred, and decided that finding some way to apportion the delay (as between the parties and the various events) was a suitable approach, but it had to be approached in a fair and reasonable manner.

As such, in Scotland, the responsibility for delay can be apportioned as between a Relevant Event and a Contractor Risk Event.

As already noted above, apportionment has been rejected by the English courts. As such, while the case has persuasive weight and appears to provide a "fair and reasonable" approach, the City Inn case is not applicable to the jurisdiction of England and Wales.

CONCLUSION

During the application and resolution of concurrent delay and its analysis, there appear to be three main possible outcomes, including:

- Contractor entitled to EOT / Employer not entitled to liquidated damages. (English Law).
- Contractor not entitled to EOT / Employer entitled to liquidated damages. (English Law).
- Apportionment. (Accepted jurisdiction in Scotland).

In the first two cases, there is unlikely to be any viable claim for costs, unless these can clearly be demonstrated to be associated with the Employer Events.

Mathew Cocklin stated the following in his article on concurrent delay,

> "The English courts have considered the 'but for' test, the burden of proof approach and the dominant cause approach for the assessment of causation and damage in

xxxvi City Inn Limited v Shepherd Construction [2010] CSIH 68

cases of concurrent delay. However, the preferred approach is derived from Henry Boot v Malmaison Hotel. This is described by the editors of Keating as 'the now accepted approach to resolving issues of true concurrency in the context of extension of time claims where one of the competing causes of delay cannot be said to be the dominant cause. This is confirmed by a number of English cases, the most recent being Walter Lilly v Mackay [2012]"[xxxvii].

In considering some of the legal principles:

- The Prevention principle under English law provides that a party cannot benefit from its own wrong (a breach or an act of prevention).
- The 'But For' Test considers whether the damage would have occurred, "but for" the wrongful conduct of the defendant. If the answer is no, then the wrongful conduct is treated as a full cause, otherwise it is not. However, this test does not provide a useful solution when the same damage has resulted from two concurrent causes.
- The Malmaison approach (Time but No Money), held that if there are two concurrent causes of delay, one a relevant event and the other is not, then the contractor is likely to be entitled to an extension of time for the period of delay caused by the relevant event. However, under English Law, the prolongation costs are likely to be refused for periods of concurrency, given that each party is considered to hold concurrent responsibility for the delay.
- The *'Royal Brompton Hospital v Hammond [2001] EWCA Civ 206*[xxxviii]' case considered that the Malmaison approach should only apply to cases of "True Concurrency". The Judge appeared to determine the case based on a sort of "Dominant Cause" principle, though such terminology appears to be falling out of favour in English decisions more recently.
- While "Apportionment" is an acceptable option in Scottish cases, the '*Walter Lilley v Mackay [2012] EWHC 1773 (TCC)*'[xxxix] case rejected the applicability of the 'City Inn' judgement to English Courts. Just because the Architect has to award a 'fair and reasonable' extension of time it does not imply that there should be any apportionment in the case of concurrent delays.

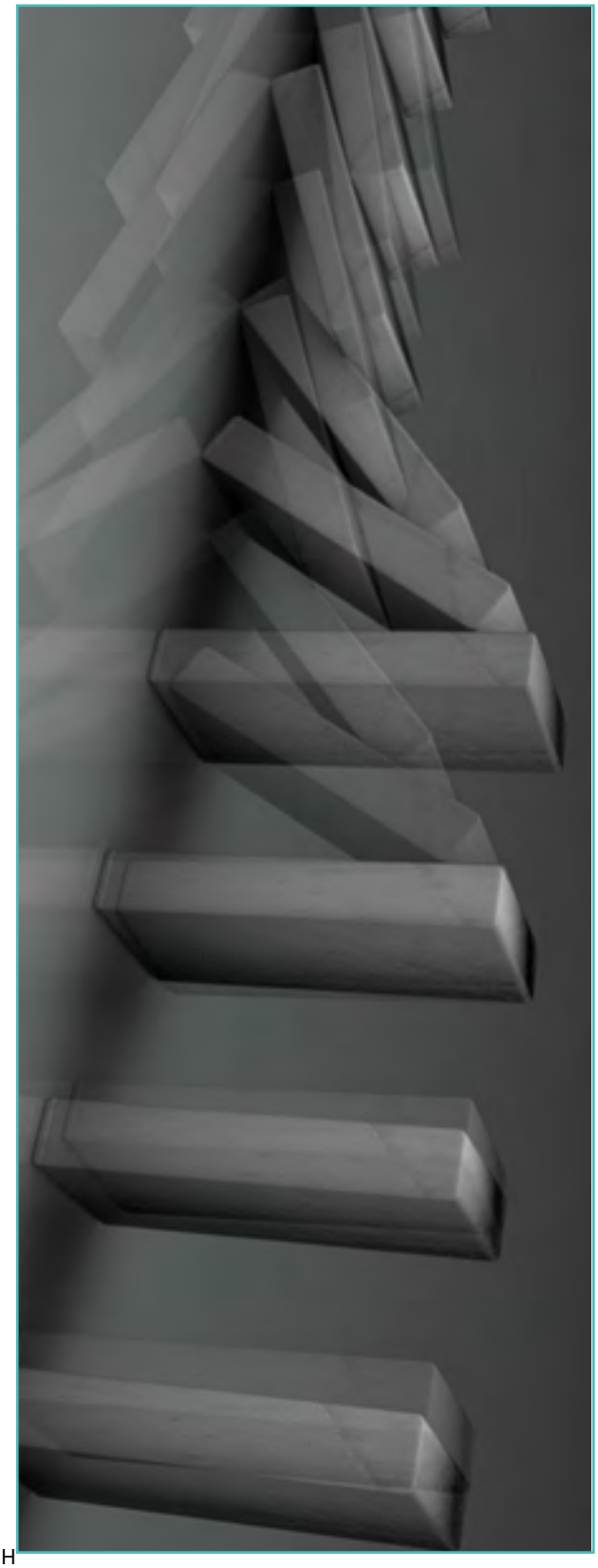
In England, therefore, it seems likely that the Malmaison Approach (of time but no money) is likely to be used for concurrent delay claims where clear dominance (or other factual enquiries) cannot separate out the cause of critical delay as the project progressed (such that the delays are considered of "approximately equal causative potency").

xxxvii Cocklin M, SCL, International Approaches to the Legal Analysis of Concurrent Delay: Is there a Solution for English Law?, April 2013

xxxviii Royal Brompton Hospital v Hammond [2001] EWCA Civ 206

xxxix Walter Lilly & Co Ltd v Giles Patrick Cyril Mackay and DMW Developments Ltd [2012] EWHC 1773 (TCC)

In Scotland, in a case such as *'City Inn v Shepherd Construction [2007] ScotCS CSOH 190'*[xl], where there is a true concurrency between relevant events and contractor events, apportionment can be considered appropriate, where there is no dominant cause of delay. Events might be regarded as concurrent in the broader sense, in that they both possessed a causative influence upon some subsequent event, such as the completion of works, even if they did not overlap in time.



xl City Inn Limited v Shepherd Construction [2010] CSIH 68

STATUTORY ADJUDICATION: A TALE OF TWO COUNTRIES

A COMPARISON BETWEEN AUSTRALIA AND THE UNITED KINGDOM

JACOB RODERICK

SENIOR CONSULTANT

Australia and the United Kingdom construction industries appear to have a lot in common, including common law and legislation concerning Adjudication.

Through operating in Australia and the United Kingdom, DGA Group has a unique insight into the similarities and the differences that define and distinguish adjudication within each country. In this article, I will review and analyse the fundamental components and elements of the adjudication system within each country and extract some of the key differences.

NARROWER SCOPE

Within the UK the Housing Grants Construction & Regeneration Act 1996[i] ("the Act") entitles a party to a construction contract, to refer any dispute to adjudication[ii]. "Any", means the dispute is not limited to the common problems of valuation and payment but also defects, delay, damages to name a few. In comparison, the types of dispute that may be resolved by an Australian state, or territories' respective Security of Payment Act are more limited.

i As amended by the Local Democracy Economic Development & Construction Act 2009

ii As defined under Section 104 of the Housing Grants, Construction and Regeneration Act 1996

In Victoria[iii] for instance a party can adjudicate but only if the following criteria are met:

- The disputed amount is 'a change in the scope of work'.
- It must be a 'claimable variation'.

Furthermore, under the Victorian Security of Payment Act 2002 (as amended 2006) the following are excluded amounts, which therefore make them unclaimable under the process of adjudication:

- Latent conditions.
- Time-related costs.
- Changes in regulatory requirements.
- Damages for breach of the construction contract.

For example, any costs relating to potential entitlement to an extension of time is deemed to be an excluded amount and, therefore, resolution through adjudication is not possible.

STATES, TERRITORIES AND LEGISLATION

While some minor drafting differences exist within the English/ Welsh and the Scottish Scheme for Construction Contract Regulations[iv] the UK enjoys a fairly uniform approach to adjudication. In contrast, each of Australia's States have their own legislation governing adjudication and the procedures surrounding the form of dispute resolution. In the 2017, Murray Review[v] identified two clear systems; the East Coast Model and the West Coast Model. The East Coast model was prevalent in NSW, Victoria and Queensland with the West Coast Model present in Western Australia and the Northern Territory.

Given the differing models and various legislative jurisdictions there are a variety of differences to the adjudication process within Australian States and within Murray's review[vi], he concluded the amount of legislation and form within which its prescribed as "unduly complex" and "confusing" (Murray,J, P17,2017).

iii Victorian Government, Building and Construction Industry Security of Payment Act 2002 (As Amended 2006).

iv Which apply if the construction contract provision for adjudication do not meet the requirements under s.108 of the Housing Grants, Construction and Regeneration Act 1996 as amended

v Murray, J. (2017) Review of Security of Payment Laws. Australian Government. Department of Jobs and Small Business. Building Trust and Harmony.

vi Murray, J. (2017) Review of Security of Payment Laws. Australian Government. Department of Jobs and Small Business. Building Trust and Harmony.

For instance, the time period within which an adjudicator application must be served, differ in the varying states. In Victoria, an application must be made within 10 business days of a Payment Schedule but within the Northern Territory, such an application can be served 90 days after the dispute arises and in Western Australia, this differs again to 28 days. Therefore, there is clearly a great care and knowledge needed in ensuring key time provisions are met within the state, within which adjudication is sought, to resolve a dispute.

Below we have outlined a summary of the Acts governing the Australian States for ease:

- New South Wales – Building and Construction Industry Security of Payment Act 1999 (As amended by the Amendment Act 2018)
- Victoria – Building and Construction Industry Security of Payment Act 2002 (As amended by the Amendment Act 2006)
- Queensland – Building Industry Fairness (Security of Payment) Act 2017 (As amended by Amendment Act 2020)
- Western Australia – Construction Contracts Act 2004 (As amended by the Amendment Act 2016 and The Building and Construction Industry (Security of Payment) Bill 2020)
- Southern Australia – Building and Construction Security of Payment 2009 (As amended by Amendment Act 2018)
- Northern Territory – Security of Payment Act 2004 (As amended by Amendment Bill 2019)
- Tasmania - Building and Construction Industry Security of Payment Act 2009
- ACT – Building and Construction Industry (Security of Payment) Act 2009

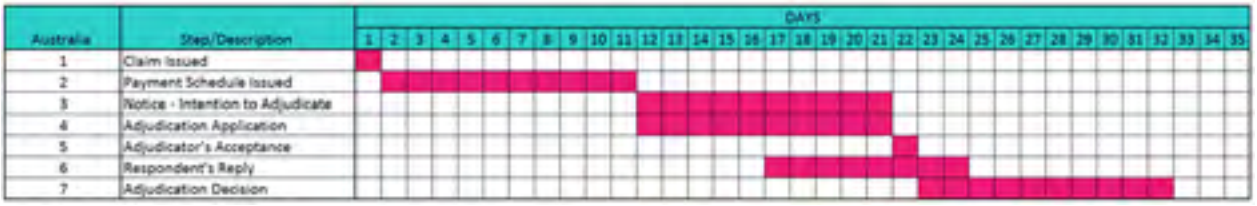
ADJUDICATION PROCESS - TIME PERIOD

The key principle of adjudication in the UK and Australia is to provide a quick resolution to disputes. The UK stipulates that the adjudicator must make his decision within 28-days of the referral. In comparison, the Victorian Building and Construction Industry Security of Payment Act 2002 requires the adjudicator to make its adjudication (i.e. decision) within 10-business days from an adjudicator's acceptance of the appointment. Both systems also allow an extension, which in the first instance, should be agreed by the claimant.

Below we have outlined the comparable timetables between the two countries:

United Kingdom

Australia – Victoria



While within the UK, parties have the right to refer a dispute to adjudication at any time, in Victoria, Australia, the ability to issue an adjudication application is intrinsically linked to the issuing of a 'Payment Schedule', and thereafter a dispute occurring on the information set out within this 'Payment Schedule'. This link is shown within the above example, with the adjudication application key to starting the adjudication process within Victoria.

It should be noted that although the UK procedure durations above are slightly longer in duration than the route to a decision in Victoria, Australia, the set of circumstances can differ greatly from case to case and so the UK procedure may result in a quicker decision. However, given an extension can be requested in both jurisdictions it's likely the Australian system will yield a decision faster.

OTHER NOTABLE DIFFERENCES

In UK, parties under a construction contract can name or agree on who is to stand as an adjudicator, whereas under some Australian jurisdictions, like New South Wales' Payment Act 1999[vii], the dispute and application should be referred to a nominating body, who will select an adjudicator on behalf of the parties in order to resolve the dispute.

Further differences exist concerning the Adjudicator's Decision itself. In Queensland, all decisions must be made public, including the reasoning behind the decision given. Whereas in the UK a party 'may' request the Adjudicator provides reasons with his decision, and the decision is made private .

In Queensland, recent changes to their Security of Payment Act introduced a number of set financial penalties for failing to adhere to the legislation and specifically an adjudicators

vii New South Wales Government, Building and Construction Industry Security of Payment Act 199 (As Amended 2018).

decision. In contrast, the UK has no such fixed penalty exists (but instead an adjudicator's decision may be enforced in the courts and, therefore, placing a non-complying party at risk of liability to pay legal costs of the other party and court costs). Another clear difference between the UK and Australia, is that statutory adjudication has been an available method in dispute resolution longer in the UK construction industry, as such there is a greater amount of caselaw that has emanated from enforcement by the courts within the UK in comparison with Australia.

CONCLUSION

While the process of adjudication seeks to achieve the same aim of quickly resolving a dispute, the processes and procedures vary between the UK and Australia. In the UK the ability to adjudicate is wide reaching. Australia is split by the states varying legislation and is often limited and has a far narrower jurisdiction within which to operate. In the UK adjudication provides an alternative to litigation and being able to refer a dispute at any time has been greatly received, it has led a few to criticise and view the current system as 'ambush by adjudication' (Mendelle,J,p21-22,2016), which it is claimed may lead to an unfair justice being reached by the party often starting the adjudication process. While both systems are clearly not perfect, adjudication still represents a quick and cost-effective method for resolving disputes in both construction markets.

CONSTRUCTION CONTRACTOR NOT PERMITTED TO PAY SECURITY OF PAYMENT MONEYS AS DIVIDENDS

LINDA HOLLAND

PARTNER

EAKIN McCAFFERY COX LAWYERS

The construction industry is a significant contributor to Australia's economy. In 2020 the National Housing Finance and Investment Corporation (NHFIC) estimated that residential construction alone contributed around 5% to the annual gross domestic product of Australia and accounted for about 134,000 jobs[i]. When commercial, retail and infrastructure projects are brought into the picture, the industry clearly underpins the country's economy.

However, the construction industry also suffers a disproportionate number of insolvencies – primarily because many participants have insufficient financial resources to withstand an unprofitable job or continually late payments.

To address this problem, in the period following 1999 the various Australian State Governments enacted security of payment ("SOP") legislation based on the model that has also been adopted by many other countries, including the United Kingdom, Canada, New Zealand and Singapore. Under this legislation, a contractor who carries out construction work is usually entitled to make a claim for payment for that work. By allowing the respondent limited opportunity and rights to resist making the payment, and a fast track adjudication process to determine any disputes, the SOP process is designed to ensure that the contractor's cash flow is maintained throughout the life of the project.

However, all payments made under the SOP process are of interim effect only. When the parties' final rights under the contract are assessed and certified in the final certificate, the contractor may be required to repay to the principal the amount of any overpayment that has previously been made.

The question then arises as to whether the contractor should preserve the payments it receives for its work, or whether it is entitled to distribute its profits to its shareholders before the final certificate is issued?

The Supreme Court of New South Wales has recently held[ii] that the directors of a construction company breached their duties under the *Corporations Act 2001 (Cth)* in declaring and paying

i Building Jobs – How Residential Construction Drives The Economy - NHFIC 13 July 2020

ii Fitz Jersey Pty Limited v. Atlas Construction Group Pty Limited (in liquidation) & Ors [2021] NSWSC 1692

dividends from funds received under the processes in the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("SOP Act").

BACKGROUND

Atlas Construction Group Pty Limited had been engaged by Fitz Jersey Pty Limited to design and construct 500 residential units at Mascot. One of Atlas' directors (Mr Yazbek) and the principal of Fitz Jersey had had a long-standing business relationship whereby several developments had previously been undertaken by them on a fairly informal basis.

The design of the units was undertaken from early 2010 onwards, but the contract was not executed until December 2010. Under the terms of the contract Atlas was entitled to be paid a fixed price of $180 million to construct the units, and to be reimbursed the costs incurred by it in relation to its design obligations and for other specific project items.

During the project, Atlas issued regular short-form invoices claiming proportions of the $180 million fixed price, as well as the reimbursable costs. Fitz Jersey had a practice of promptly paying those invoices, without the benefit of any independent assessment by a quantity surveyor.

Following a meeting in 2013, it was agreed that the fixed price of $180 million would be increased to $190 million to account for various additional costs incurred due to design changes on the project. However, the precise items covered by this agreement was later the subject of dispute between the parties.

By September 2014, Atlas had claimed and been paid 100% of the $190 million fixed price component of the project, and the majority of the reimbursables. The overall project was finally completed in around January 2016.

In around 2014 a separate corporate entity operated by Atlas' directors had been granted the right to manage the tenancies of over 200 of the units at the development that were to be retained by Fitz Jersey. However, by late 2016 the relationship between the principals of Fitz Jersey and Atlas broke down and Fitz Jersey terminated the property management agreement.

Atlas submitted a payment claim under the SOP Act in November 2016 claiming an additional entitlement to approximately $10.75 million. Fitz Jersey disputed this claim and it proceeded to adjudication. The adjudicator determined that Atlas was entitled to the full amount of its claim plus interest and costs – an amount totalling approximately $11 million. Fitz Jersey commenced proceedings in the Supreme Court challenging the validity of the adjudication on the basis that there was no reference date available to Atlas, and further that the items claimed in the payment claim had already been the subject of the 2013 agreement.

On 3 February 2017 Atlas received the $11 million from Fitz Jersey pursuant to a garnishee order. On 6 February 2017 the directors of Fitz Jersey resolved that, after an allowance of approximately $4 million to pay income tax, most of the balance of the $11 million would be immediately paid out to its shareholders (being corporate entities operated by the directors) by way of dividends. Outstanding loans made by Atlas to the shareholder entities were also written off.

Importantly, also on 6 February 2017 (after becoming aware of the garnisheeing of the amount of the adjudication determination from Fitz Jersey's bank account), its then lawyers had sent an email to Atlas' then lawyers stating:

> "Our client holds great concern about your client's ability to repay the amount obtained pursuant to the Garnishee Order served on the National Australia Bank Limited dated 27 January 2017 ..."

This had been followed up with a letter on the same day stating:

> "We hereby put your client on notice that our client intends to amend its Summons shortly in Proceedings No. 2017/11963 to include a claim for repayment of the garnished amount of $11,023,799.76 on the basis that your client is not entitled to these moneys under the contract."

This latter correspondence was described in the trial as "the Holland Letter".

The dividends were paid on 8 February 2017 and over the course of the next six months were circulated around various other entities associated with the directors and their wives. In September 2017 a large proportion of the funds were used by Mr Yazbek and his wife to purchase a luxury waterfront house at Avalon, New South Wales for around $13 million.

Fitz Jersey continued its Supreme Court proceedings, amending its claim to include a claim under the contract for reimbursement of over $30 million for overpayments made to Atlas during the course of the project and including the security of payment moneys. Atlas continued to defend the claim.

In April 2018 administrators were appointed to Atlas and it was later placed into liquidation. The liquidator held public examinations into Atlas' affairs (during which Mr Yazbek and the other director were examined on their actions in February 2017) and the liquidator admitted Fitz Jersey as a creditor of Atlas in the sum of around $12.8 million.

In December 2019 the liquidator assigned to Fitz Jersey various rights that he and the company enjoyed pursuant to the *Corporations Act 2001* (Cth) against the directors, the shareholders

and the other recipients of the dividend moneys with respect to the dividend declaration and payment, and the writing off of the loans. Fitz Jersey then amended its claim to include these causes of action, adding eight further defendants to the proceedings (including the other director and Mrs Yazbek).

The matter was heard by Justice Stevenson in the Supreme Court of New South Wales. Justice Stevenson found that the directors of Atlas were determined to pay dividends to the shareholders (corporate entities that they controlled) "no matter what", even though they were on notice that Fitz Jersey intended to claim reimbursement of moneys that had been overpaid to Atlas.

Recognition of the garnisheed moneys in Atlas' accounts

Section 254T of the *Corporations Act 2001* (Cth) provides that a company must not pay a dividend unless the company's assets exceed its liabilities immediately before the dividend is declared, and the payment of the dividend does not materially prejudice the company's ability to pay its creditors.

Therefore, it was necessary for the Court to determine how the SOP funds should properly have been recognised in Atlas' financial accounts.

The accounting experts qualified by the parties agreed that if the SOP funds could not be recognised as revenue, then Atlas could treat it as an asset (cash at bank) but would also have to book a corresponding liability being "deferred revenue". This would mean that Atlas' assets would not have exceeded its liabilities and it would not have been permitted to pay dividends.

The question therefore was whether the SOP funds should have been recognised as revenue.

Fitz Jersey had submitted that Australian Accounting Standard AASB 111 (Construction Contracts) had applied to the amount received under the adjudication determination. The directors had contended that it did not so apply.

AASB 111 provides that for an amount received under a construction contract to be recognised as revenue, one of the following needs to have occurred:

a) the payment is made under the agreed fixed price or payment terms of the contract;

b) if it is for a claimed variation:

   (i) negotiations with the principal on its liability to pay the amount of the variation must have advanced to a stage whereby it is probable that the principal has accepted its liability; and

(ii) the quantum of the principal's liability must be capable of being measured reliably.

The expert qualified by the directors had accepted that AASB 111 applied to the Atlas contract but had provided an opinion that a payment to a contractor under the SOP process was equivalent to a payment following a final determination of the contractor's rights under the contract, and thus the adjudication process had the effect of *"exhausting all the processes that the building contract allows"*. However, Justice Stevenson noted that this was not an accurate understanding of the effect of the SOP process.

Accordingly, Justice Stevenson held that the requirements of AASB 111 had not been satisfied, with the result that the garnisheed amount should have been treated as revenue with a corresponding liability also recorded, and thus as at 6 February 2017 Atlas did not have assets exceeding its liabilities sufficient to allow payment of the dividends.

The Court also held that the payment of the dividends constituted an alienation of property with the intention to defraud Fitz Jersey as creditor within the meaning of s.37 of the *Conveyancing Act 1919* (NSW), and accordingly the dividends were to be restored to Atlas for distribution by Atlas' liquidator.

Breach of directors' duties

Fitz Jersey had claimed that the directors had breached their duties under various provisions of the *Corporations Act 2001* (Cth) when they declared and paid the dividends, and permitted the writing off of the shareholder loans.

The directors had argued that their only knowledge of Fitz Jersey's contentions concerning its entitlements under the contract were those revealed in its SOP payment schedule and adjudication response submissions, and that it was not a creditor at the time that the dividends were declared and paid. They also claimed that they had relied on advice received from the lawyer who assisted the company with its SOP claim, and the company's accountant.

Justice Stevenson held that Fitz Jersey had accrued rights as at February 2017 and was thus a creditor. He also held that the evidence did not show that the directors sought or obtained any specific advice as to whether they were entitled to declare and pay dividends from the SOP funds.

The Court held that in the circumstances of this case the directors had breached their statutory duties as directors, as well as their duties owed to the company itself.

Relevant to the Court's decision was the evidence in the trial that the directors:

- knew that the payment Atlas had received under the SOP process was an interim or provisional payment;
- had resolved to declare the dividends urgently, as soon as the garnisheed amount cleared, in circumstances where neither shareholder had urgent need for the funds;
- knew that Fitz Jersey's position was that it was entitled to recover the garnisheed amount;
- knew that Fitz Jersey and its principals had the financial resources and would take all steps available to it to prosecute a claim to recover the garnisheed amount;
- had resolved to declare the dividends with the object of removing funds from Atlas before Fitz Jersey could progress its foreshadowed claim;
- had not sought any legal advice as to Atlas' ultimate entitlement to retain the garnisheed amount; and
- knew that since Atlas had effectively stopped trading after completing the Mascot project it had no significant source of future income following payment of the dividends.

IMPACT ON THE INDUSTRY

While the Court's findings in this case were based on the specific circumstances of the dividend payments made by Atlas, the principles apply equally to all moneys received by construction contractors, subcontractors and suppliers under the SOP processes in Australia.

It is extremely important that recipients of SOP funds understand that while they are entitled to use these funds in the usual course of their business (such as paying their own subcontractors and suppliers), they should be cautious about how these funds are recognised in their financial accounts, and whether than can be included in dividends paid to shareholders.

Further, if the company has received notice that the payer of the SOP funds disputes the contractor's entitlement to retain those funds on a final basis under the contract, the directors would be prudent to obtain comprehensive legal advice about the company's final entitlements.

DGA GROUP NEWS

Asia Pacific team expands with 6 new hires

Karen Wenham

Director of Programming Services, Asia Pacific

'Karen's appointment strengthens our expert capability, as part of our strategy to grow our global experts team. Karen is an experienced testified delay expert who is well respected by lawyers, counsel, arbitrators and judges for giving clear independent evidence.' David Gibson, CEO DGA Group.

"I am delighted to join DGA Group, which is one of the preeminent construction consulting firms, being able to offer programming and quantum expert and advisory services with a global reach. I look forward to working closely with David Gibson, John Donnelly and Joseph Tong across the Asia Pacific region."

Karen Wenham, Director of Programming Services, Asia Pacific Region.

New Staff

- Karen Wenham - Sydney
- Brenden Jordaan - Sydney
- Senior Consultant
- Will Dorsch - Melbourne
- Sehan Wickramasinghe - Melbourne
- Niraka Harriman - Melbourne
- Anton McArdle - Melbourne

DGA TRAINING SERVICES

DGA UK IN-HOUSE TRAINING & PUBLIC COURSES

Due to DGA's expertise in the provision of contractual advice, commercial and programming services, and dispute resolution across all construction industry sectors, we have created educational training seminars on the understanding and administration of the various forms of construction contracts.

Our highly experienced course presenters are able to apply the contract to the day to day tasks and problems encountered by the delegates.

Our in-house training seminars are provided for a fixed fee at your chosen venue. The benefit of this is the ability to choose the number, position type, and experience of delegates who attend without a price increase. We appreciate that workload and training is a fine balance and, therefore, our in-house seminars minimise disruption to the delegates duties that can occur with public seminars.

NEC3 & NEC4

UNDERSTANDING AND USING THE NEC3 ENGINEERING AND CONSTRUCTION CONTRACT

FULL DAY SEMINAR

This training seminar is aimed at novice through to professionals with experience of the NEC3 ECC:

- Introduction – The agreement

  Contract Data 1 and 2, Risk Register, Site Information, Works Information, Activity Schedule , Main Options, Secondary Options, Z Clauses, precedence of documents.

- Providing the Works

  Mutual trust & co-operation, Communication, Early Warning notifications, Works Information, Design, Instructions.

- Quality

  Defects, Defect correction, access given/ not given, assessment of cost of correction.

- Time obligations & Programming

  Start Date, Access Date, Key Dates, planned Completion, Completion Date, float, Accepted Programme, revised programme, Acceleration.

- Payment

  Activity Schedule, Price for Work Done to Date, Applications for payment, Project Manager's assessment.

- Compensation events

  Significance of Early Warning notice, notification of compensation events, time barring late notification, an overview of the assessment of the change to the Prices and/or delay (calculation of Defined Cost, Shorter or Full Schedule of Cost Components), dividing date, quotations, rejection of quotations, Project Manager's assessment, implementation.

UNDERSTANDING AND USING THE NEC4 ENGINEERING AND CONSTRUCTION CONTRACT

FULL DAY SEMINAR

The NEC4 seminar will follow the NEC3 training (above) format while incorporating the changes in the new NEC4 edition.

NEC3 TO NEC4 ENGINEERING AND CONSTRUCTION CONTRACT – THE CHANGES AND IMPLICATIONS

HALF DAY SEMINAR

This training is an ideal follow on from the Understanding & Using the NEC3 Engineering and Construction Contract. Best suited to professionals with experience of the NEC3 ECC as it solely considers the changes and the impacts from the NEC3 ECC to the NEC4 ECC:

- Why a new edition?
- New terminology
- New clauses
- Amendments to clauses of the NEC3 ECC
- Amendments to Schedules of Cost Components
- Questions

NEC3/ 4 ECC COMPENSATION EVENTS: THE EVENTS, NOTIFICATION & ASSESSMENT

HALF DAY

This seminar considers all of the events that are compensation events, which party is liable to notify the event, the mechanism for notification and assessment in more detail. The delegates will receive training in correctly assessing and submitting quotations for compensation events.

FULL DAY SEMINAR

As above plus workshop

TERM SERVICE CONTRACTS

FULL DAY SEMINAR

Much like the Understanding and Using seminars (above), this considers the Term Service Contract, looking at Contract Data, works information and providing the service itself.

JCT FORM OF CONTRACT

JCT MINOR WORKS AND INTERMEDIATE BUILDING CONTRACTS 2016

JCT INTERMEDIATE AND STANDARD FORM BUILDING CONTRACTS 2016

JCT DESIGN AND BUILD CONTRACT 2016

FULL DAY SEMINARS

Each of our JCT contract seminars are full day and consider the Contract Particulars, Execution of the documents, Carrying out the Works, Sub-Contracting, time for completion, delays, valuation, payment; and design (where applicable).

CONTRACTUAL & COMMERCIAL AWARENESS

FULL DAY SEMINAR

In this seminar, we consider issues commonly encountered during the course of a contract, including but not limited to, formation of contract, deeds, letters of intent, changes to the terms and the scope of works, authority, design liability, records and notification of events, claims for delay, loss and/or expense or damages, payment, liquidated damages, time bar clauses, exclusive remedy provisions, termination and repudiation.

WHAT TO DO NEXT?

For more information about our training seminars, please email scott.milner@dga-group.com; or telephone 0113 337 2174

Terms & Conditions apply

MORE INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at DGAGroup@dga-group.com

DGA GROUP HEADQUARTERS

25 Eastcheap
London
EC3M 1DE

Tel: +44 (0)203 961 5340

SINGAPORE

#11-09,
Eon Shenton
70 Shenton Way
Singapore
079118

Tel: +65 62916208

AUSTRALIA

Level 8
One Melbourne Quarter
699 Collins Stree
Melbourne
Vic 3000

Tel: +61 (0)3 8375 7620

AUSTRALIA

Level 23
52 Martin Place
Sydney
NSW 2000
Australia

Tel: +61 (0)2 9220 5027

UNITED ARAB EMIRATES

PO Box 6384
Dubai
United Arab Emirates

Tel: +971 4 437 2470

CANADA

61 Legacy Landing SE
Calgary
Alberta
Canada
T2X 2EH

Tel: +1(587) 586 5502

AFRICA

Building 2
Country Club Estate
21 Woodmead
Sandton
South Africa
2054

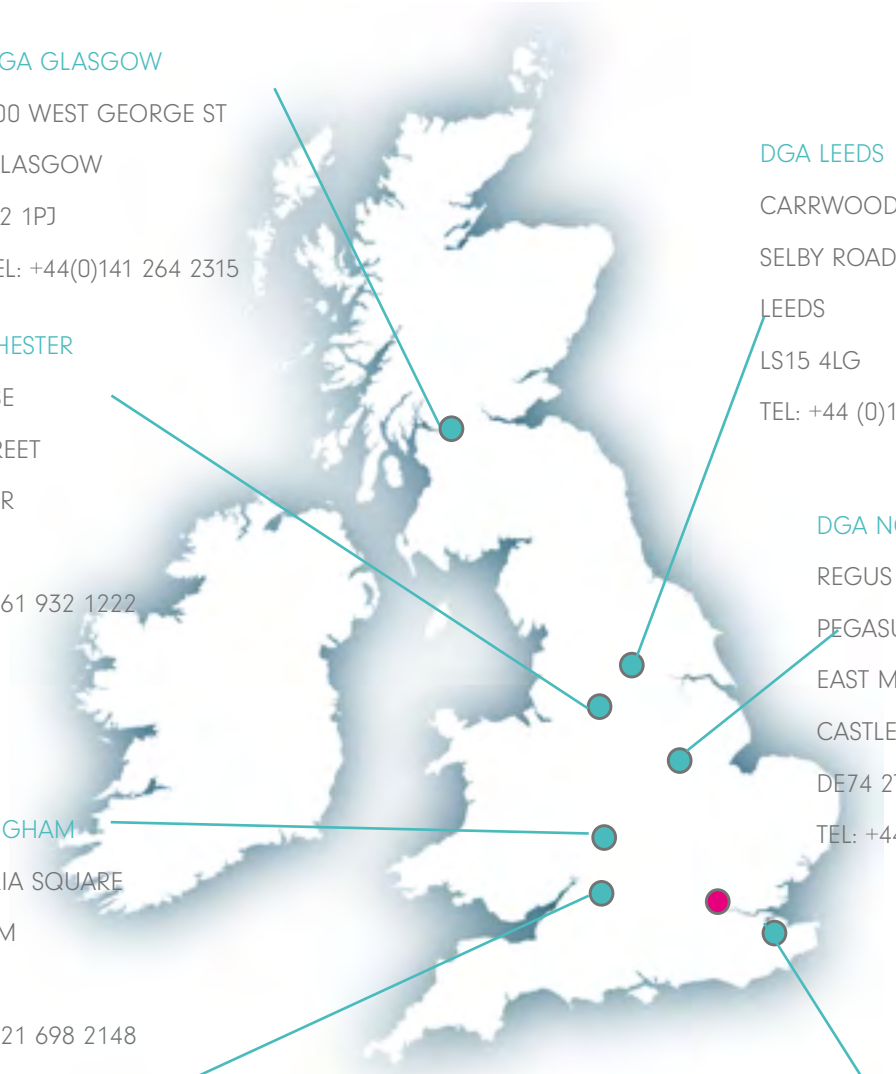
Tel: +27 (0)11 258 8703

HONG KONG

6/F Luk Kwok Centre
72 Gloucester Road
Wan Chai
Hong Kong

Tel: +852 3127 5580

DGA UNITED KINGDOM



DGA GLASGOW
100 WEST GEORGE ST
GLASGOW
G2 1PJ
TEL: +44(0)141 264 2315

DGA MANCHESTER
PETER HOUSE
OXFORD STREET
MANCHESTER
M1 5AN
TEL: +44 (0)161 932 1222

DGA BIRMINGHAM
ONE VICTORIA SQUARE
BIRMINGHAM
B1 1BD
TEL: +44 (0)121 698 2148

DGA BRISTOL
1, THE FRIARY
TEMPLE QUAY
BRISTOL
BS1 6EA
T: +44 (0)117 344 5023

DGA LEEDS
CARRWOOD PARK
SELBY ROAD
LEEDS
LS15 4LG
TEL: +44 (0)113 337 2174

DGA NOTTINGHAM
REGUS HOUSE, HERALD WAY
PEGASUS BUSINESS PARK
EAST MIDLANDS AIRPORT
CASTLE DONINGTON,
DE74 2TZ
TEL: +44 (0)1332 638 061

DGA Headquarters
25 Eastcheap
London
EC3M 1DE
T: +44(0)203 961 5340
E:dgagroup@dga-group.com

DGA MAIDSTONE
VINTERS BUSINESS PARK
NEW CUT ROAD
MAIDSTONE
KENT
ME14 5NZ
TEL: +44 (0)1622 673 021


DGA