Delaying tactics

A recent case has implications for the use of computer programs to analyse delays in projects, and provides further insight into concurrency of delays. Ian Pease reports

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In the case of *City Inn Ltd v Shepherd Construction Ltd*, handed down at the end of November 2007, Lord Drummond Young, a Scottish judge in the country's Supreme Court, cast doubt on the use of computer programs to analyse delays to building projects. He also made important comments concerning a perennial problem of concurrent delay and the extension of time provision in the JCT Standard Form of Contract.

Computing delays

In commenting on the use of new technology, he said:

> The major difficulty, it seems to me, is that in the type of program used to carry out a critical path analysis any significant error in the information that is fed into the programme is liable to invalidate the entire analysis. Moreover, for reasons explained by [one of the experts], I conclude that it is easy to make such errors. That seems to me to invalidate the use of an as-built critical path analysis to discover after the event where the critical path lay, at least in a case where full electronic records are not available from the contractor.

Buildings are complex things to construct and for that reason the use of computerised planning programs has long been accepted as essential; likewise, in court such programs have become the norm. The decision in *City Inn*, though, puts the latter into question.

Whilst it could be said that this case is just another example of the old computer aphorism 'garbage in, garbage out', it does, I think, go further than that and express a wider disquiet about the 'black box' nature of these programs. By that I mean that it appears that the data goes in and the computer runs its programs, giving a result. How it gets there is often less than clear. Of course, this is the job of the expert who is using the program as part of their evidence, but often clarity is masked rather than enhanced by the technology.

One gets the feeling that this is what the judge was concerned about. He continued:

> I think it necessary to revert to the methods that were in use before computer software came to be used extensively in the programming of complex construction contracts. That is essentially what [one of the experts] did in his evidence. Those older methods are still plainly valid, and if computer-based techniques cannot be used accurately there is no alternative to using older, non-computer-based techniques.

This is essentially a plea for expert testimony that can readily be understood by the judiciary. Too often in the past the use of technology has provided a smokescreen behind which experts could shelter rather than providing an understandable explanation for events and delays.

Having said that, there is an essential inconsistency in the judge's reasoning on the point, for whilst he acknowledged the use of the same computer programs when the building is being constructed ('[t]hat does not invalidate the use of a critical path analysis as a planning tool, but that is a different matter, because it is being used then for an entirely different purpose'), he considered them inappropriate in a court scenario.

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Buildings are extremely complex and no one doubts that it would be impossible to bring them to fruition other than with the assistance of these programs. Likewise, the analysis of delaying events and their consequences is just as complex, and it is the duty of the architect (or, later, the judge in their stead) to analyse those delays in order to grant the extension of time in a proper and objective manner. Whilst the judge acknowledged this ('the architect exercises discretion, provided that it is recognised that the architect's decision must be based on the evidence that is available and must be reasonable in all the circumstances of the case'), his emphasis on the 'judgement' and 'discretion' of the professional is bound to lead to a rather broad-brush approach if not constrained by a rigorous methodology such as computerised delay analysis. Indeed in other cases (*John Barker Construction Ltd v London Portman Hotel Ltd* [1996]) it has been said that the architect is to undertake a:

> ... logical analysis in a methodical way of the impact which the relevant matters had or were likely to have on the plaintiffs' planned programme.

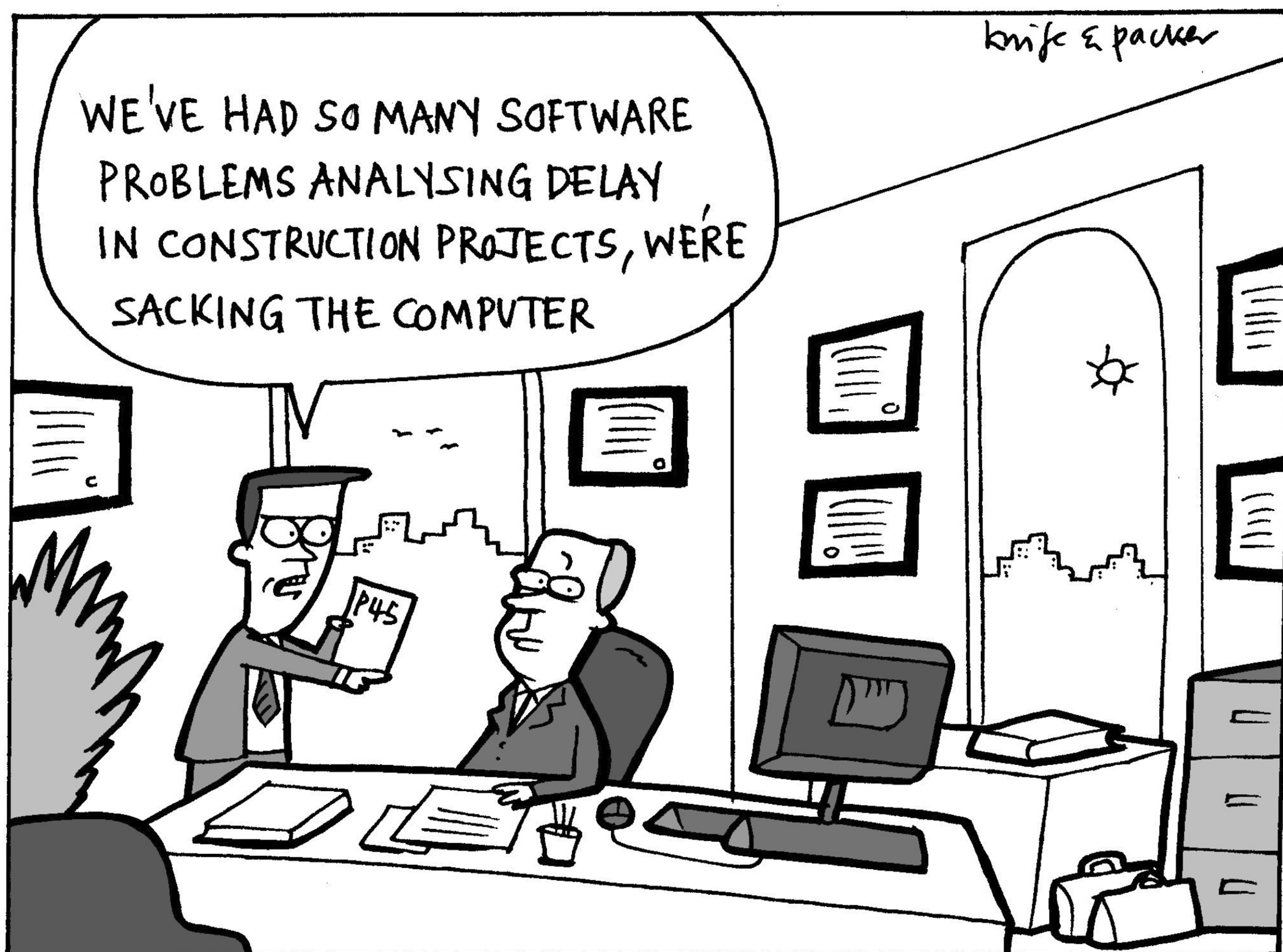
Concurrency of delay

The interest in *City Inn* does not end there, however, for it dealt with the tricky question of concurrency of delay. For example, is a contractor entitled to an extension of time for a delaying event when there is an existing delay to the project caused by its own fault? Of course, the answer lies in the proper interpretation of the extension of time provision in the contract (in the case of the JCT Standard Form, clause 25). This, as readers may know, sets out a series of 'relevant events' that may give rise to an extension of time to the contractor if it is considered by the architect to have delayed the works beyond the existing completion date. The architect is to make a 'fair and reasonable' assessment of what this might be.

The effect of the clause is to preserve the employer's right to liquidated damages for any remaining (contractor) delays and for this reason the clause is construed *contra proferentem* (against the employer).

The first matter of importance to note, therefore, is that in the application of clause 25, a relevant event may still be taken into account even though it operates concurrently with another matter that is not a relevant event. Hence, as the judge in *City Inn* noted:

> *The effect of JCT Standard Form clause 25 is to preserve the employer's right to liquidated damages for any remaining (contractor) delays and for this reason the clause is construed* contra proferentem *(against the employer).*



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Note

(1) A global claim is any claim that fails to show cause and effect as between the events causing the delays and the particular (loss and expense) consequences of those delays.

> In other words, the 'but for' rule of causation, that an event A will only be a cause of a result B if B would not have occurred but for A, has no application.

In *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [1999] Dyson J had made the position clear:

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

Although this was the agreed position (ie it was not argued before Dyson J) he did not demur from that position and Lord Young has now agreed with him.

Secondly, there was some uncertainty after *Royal Brompton Hospital NHS Trust v Hammond (No 7)* [2001] as to whether it mattered that one or other of the events commenced first or ran longer. In that case Judge Seymour drew a distinction between, on the one hand, a case where work has been delayed through a shortage of labour and a relevant event then occurs, and on the other hand, a case where works are proceeding regularly when both a relevant event and a shortage of labour occur, more or less simultaneously.

Lord Young (finding help from foreign case law – *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984]) found this to be 'an arbitrary criterion'. He thought:

> It should not matter whether the shortage of labour developed, for example, two days before or two days after the start of a
> substantial period of inclement weather; in either case the two matters operate concurrently to delay completion of the works.

It now seems certain, therefore, that such close distinctions do not have to be made when assessing the proper extension to be granted. However, how is the assessment to be made by the architect/judge where there are concurrent causes of delay? The answer is that, as various causes of delay are likely to 'interact in a complex manner', the architect must:

> ... exercise his judgement to determine the extent to which completion has been delayed by relevant events. The architect must make a determination on a fair and reasonable basis. Where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to *apportion responsibility* for the delay between the two causes; obviously, however, the basis for such apportionment must be fair and reasonable. Precisely what is fair and reasonable is likely to turn on the exact circumstances of the particular case. [Emphasis supplied]

Money for delay – that's a different exercise?

Whereas apportionment for time delays appears to have been officially sanctioned, the position on paying the contractor for delays of which some are of its own making and others down to the employer remains unchanged. This is the realm of 'global claims' under the loss and expense provisions (clause 26) of the JCT Standard Form, and as *John Doyle Construction v Laing Management (Scotland)* held if a global claim[1] fails, it fails in its entirety, there is no apportionment possible unless the contractor can extract an element of loss for which *it can prove* cause and effect.

Lord Young noted:

> The contractual wording relating to an extension of time is different from that relating to claims for loss and expense. In particular, in the form of contract that is presently under consideration, there is no reference in clause 26 to the architect's making such award as is 'fair and reasonable'.

It would appear, therefore, that the judge, at this point, thought that whereas apportionment was allowed for concurrent delays, it was not to be sanctioned for the costs associated with those delays, where the contractor would have to strictly prove cause and effect.

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Of course the courts have sanctioned global claims in cases going back to *J Crosby & Sons v Portland Urban District Council* [1967] where there was extremely complex interaction of different events. Indeed the leading case of recent years was *John Barker Construction Ltd v London Portman Hotel Ltd* [2004] (one of the judges being Lord Young himself). which held that even if the global claim[1] failed (because some of the events were caused by the contractor rather than the employer), that did not mean that no claim whatsoever could succeed; there may remain sufficient evidence of cause and effect to allow the court to find that certain losses are no longer to be classified as part of a global claim. This is to be contrasted with a making a general apportionment based upon what is fair and reasonable in all the circumstances (which *Laing Management* did not sanction).

Lord Young's interpretation of clause 26, up to this point, is in line with Laing Management. However, there appears at the end of his judgment to be something

of a *volte-face* as he concludes, without explanation as to why his previous reasoning on clause 26 should not hold good:

> It is I think correct that a claim for prolongation costs need not automatically follow success in a claim for extension of time. The wording of clause 26 differs from that of clause 25, and different considerations may apply. In the present case, however, I am of opinion that the claim for prolongation costs should follow the result of the claim for extension of time. In this respect the decision in *John Doyle Construction Ltd v Laing Management (Scotland) Ltd*... may be relevant. In that case it is recognised at paragraphs [16]-[18] that in an appropriate case where loss is caused both by events for which the employer is responsible and events for which the contractor is responsible it is possible to apportion the loss between the two causes. In my opinion that should be done in the present case. This is a case where delay has been caused by a number of different causes, most of which were the responsibility of the employer, through the architect, but two of which were the responsibility of the contractor. It is accordingly necessary to apportion the defenders' prolongation costs between these two categories of cause. I consider that the same general considerations, the causative significance of each of the sources of delay and the degree of culpability in respect of each of those sources, must be balanced. On this basis, I am of opinion that the result of the exercise should be the same; I am unable to discover any reason for treating the two exercises under clause 25 and clause 26 on a different basis.

Comment

This is a very instructive case for all experts giving opinion evidence of delays to building projects. You must not be overly reliant upon your technology. A clear explanation of the causes and effects of the delaying events needs to be given. It is obvious that there is disquiet in the judiciary regarding the use of computer programs, and whilst their use is by no means out of the question, the data used and particularly the logic links need explanation.

Secondly, and after something of a volte-face late in his judgment, the judge does seem to have sanctioned a perhaps more permissive view of claiming the 'global' costs associated with concurrent delays. ■

City Inn Ltd v Shepherd Construction Ltd [2007] CSOH 190

Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999) 70 Con LR 32 (TCC)

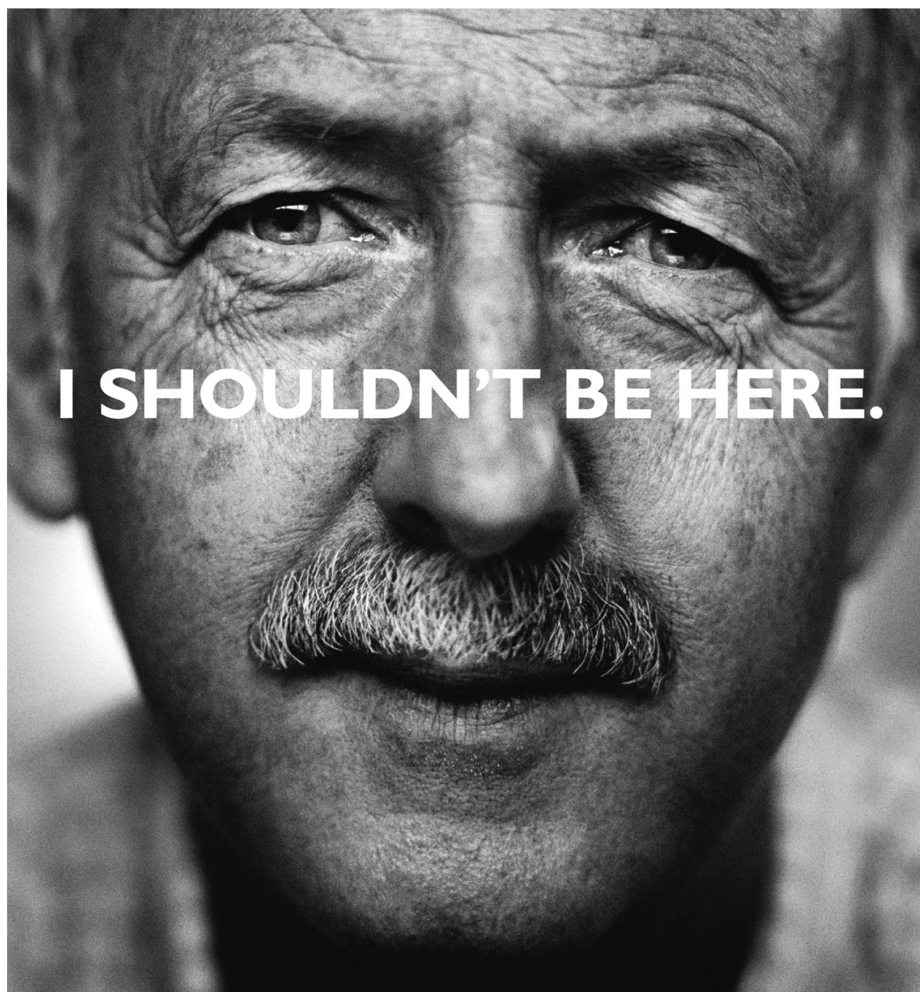
J Crosby & Sons Ltd v Portland Urban District Council (1967) 5 BLR 121

John Barker Construction Ltd v London Portman Hotel Ltd (1996) 83 BLR 31

John Doyle Construction v Laing Management (Scotland) [2004] 1 BLR 295

Royal Brompton Hospital NHS Trust v Hammond (No 7) (2001) 76 Con LR 148

SMK Cabinets v Hili Modern Electrics Pty Ltd [1984] VR 391



I had just taken voluntary redundancy when my wife noticed a lump in my neck. It was a bolt out of the blue, but I had lost my father to cancer so I went straight to the doctor's. It turned out to be a cancer of the lymph glands called lymphoma. When I came to have my treatment, I had a course of radiotherapy using the latest technique. It targets cancer cells better than ever before. And I am still here because of it. That's why I'm so thankful to Cancer Research UK and all its supporters. Help others to stay here.

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