



# Bingham's Corner

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## CALCULATING EXTENSIONS OF TIME

### A FORESIGHT SAGA

**Assessing an extension-of-time dispute is a tricky business. Delay experts need to be able to transport themselves back to the time of the delay and take in the view from there.**

***ALL THE ARCHITECT HAS TO DO IS TAKE THE EVENT AS HE SEES IT, THEN GET HIS MIND TO BEHAVE WITH THE FORESIGHT OF A HEBREW PROPHET***

Top delay analyst John Marshall of EC Harris blinked hard at the explanation of extension of time machinery in *Walter Lilly vs MacKay*. So did I. He has written a splendid piece on it in the newsletter of the Technology & Construction Bar Association. He tells us that two delay experts, as opponents to each other, told the court how the JCT extension of time rules worked. Oh dear, oh dear that looks wrong, said I. On the other hand, *Walter Lilly vs MacKay* was special on its own facts. Marshall figured out why these two experts said what's what.

First, Marshall tells us what gives in "more usual disputes". Let's look. Everyone in construction is interested in the frightening business of liquidated and ascertained damages (LAD) for not hitting the contract completion date. Rather like the community chest card in Monopoly, the employer picks up squillions of pounds in damages. On the other hand, if the reason for the delay is found to be the employer's responsibility, the get-out-of-jail-free card says: "An extension of time is awarded ... get back the LAD from the employer or don't pay."

It works, or should work, like this: the builder tells the architect he is now in delay. The architect asks himself if the delay is likely to cause the end date to be pushed out. If so, the architect awards an extension of time by fixing a new later date. All the architect has to do is take the event as he sees it, then get his mind to behave with the foresight of a Hebrew prophet. In short, he asks what the delay will do, as seen today on site, to the future end date.

That's the "prospective" view. It's a fair system. In this way the contractor knows what his new end date is, for better or for worse. And when, at last, practical completion is reached, the architect has to again crank the handle on the extension of time machine to see if his prophecy was right. He adds time if he was short-sighted or unexpected consequences of the earlier delay

cropped up. A new later date has to be set if the merits are there. But, and this is important, the architect cannot reduce his earlier extension date because he was over-generous. He can only reduce for omitted work. That is the "retrospective" view.

Any grumble about the extension of time is a dispute. The opinion of the architect can be opened up, reviewed and revised by an adjudicator, arbitrator or judge.

## ***DID YOU NOTICE THE WORD ASSESS? THE ARCHITECT IS TO ASSESS THE LIKELY, NOT DEFINITE DELAY IMPACT. THE ROLE OF THE ARBITRATOR OR ADJUDICATOR IS PRECISELY THE SAME***

The usual approach for the adjudicator, arbitrator or delay analyst is first to identify all of the delays that cropped up during the works, assess whether each and every one can be classified as an extension of time, reason in the contract and then, most carefully, ease their feet into the shoes of the architect and assess what extension of time he ought to have given then (yes, then). It's not that difficult. Anyone with true experience of what happens on site can put himself into those shoes at the time of the delay and assess the impact on the completion date. Did you notice the word assess? The architect is to assess the likely, not definite delay impact. The role of the arbitrator or adjudicator is precisely the same as the architect or contract administrator operating the extension-of-time machinery at the time. Just do an assessment.

In *Walter Lilly vs MacKay*, however, the two expert delay analysts could only carry out a retrospective assessment of extension of time, as very few programmes of works were issued by Lilly after February 2007. The retrospective review is a difference exercise. The actual facts, the actual delays are fathomed. When looking back at what happened, the answer could easily be different from the prospective assessment. And if the earlier assessment was light, then more time is awarded and the end date pushed out even more. If the prospective extension was too great... there is no claw-back of earlier extension of time, save for omitted works.

In real life, the prospective view by the architect will almost certainly be different from a retrospective view done after the job is finished. In *Walter Lilly vs MacKay* they could only look back. You can put your money on it that if the machine had been operated prospectively and retrospectively as is usual, the outcome would have been different.



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