PROSPECTIVE VS RETROSPECTIVE DELAY ANALYSIS: NEW TCC COMMENTARY

Matthew Taylor

A TCC decision last week has considered the difference between prospective and retrospective approaches to delay analysis. The decision finds that the two approaches will not necessarily lead to the same answer (contrary to suggestions made in a previous TCC decision). The decision may also provide support for the use of prospective approaches in the assessment of extension of time claims – a point which is likely to be controversial.

Introduction

Infrastructure, construction and energy disputes commonly involve issues which require delay to be assessed. Delay experts are often engaged by parties to prepare reports analysing the delays on a project. A range of delay analysis methodologies exist and there is broad consensus that no single methodology is to be preferred in all cases. The choice of methodology has both legal and factual aspects: it must meet the requirements of the legal issue under consideration, be consistent with the requirements of the contract and must also be appropriate to the evidence available and the factual characteristics of the project in question.

A broad distinction between delay analysis methodologies can be made between those which are "prospective" and those which are "retrospective". Prospective methodologies (such as "time impact" or "impacted as-planned" analyses) involve assessing criticality and delay contemporaneously at the time the events in question occurred. By contrast, retrospective methodologies take into account subsequent events and attempt to establish whether the events in question actually caused delay to completion when the progress of the work as a whole is considered.

Do both lead to the same result?

In 2012, the TCC gave judgment in the well-known *Walter Lilly* case. In considering claims for extension of time, the court was required to consider the appropriateness of what was said to be a prospective methodology. The court noted that:

> *"The debate about the 'prospective' or 'retrospective' approach to delay analysis was also sterile because both delay experts accepted that, if each approach was done correctly, they should produce the same result."*

This statement has proved to be controversial, with commentators pointing out that a retrospective approach, by definition, takes into account matters which a prospective approach does not. The court's comments in this regard may perhaps be explained by the unusual circumstances of the *Walter Lilly* case and the fact that the prospective methodology adopted by the Claimant's delay expert was "reality checked" against subsequent events.

Is one to be preferred over the other?

The circumstances in which the law might prefer a prospective approach over a retrospective approach are unsettled. Insofar as extensions of time are concerned, the original version of the SCL Delay and Disruption

Protocol had stated a preference for a prospective methodology in all cases, even where an analysis was to be carried out after the event by a judge, arbitrator or adjudicator. This had been criticised and the 2nd Edition of the Protocol now states that where an extension of time claim is being assessed at a time distant from the events in question, a "*prospective analysis of delay ... may no longer be appropriate*".

The contractual provisions dealing with extensions of time are important in this regard. Under the JCT form of contract, in addition to assessing extensions of time applied for during the course of the Works (which would by necessity be carried out on a prospective basis), the Architect / Employer is required to carry out a final extension of time exercise after Practical Completion, although at that time cannot reduce any previously awarded extension. This is often said to support a retrospective approach.

Other contracts, such as the NEC, contain language which at first glance would appear to require a prospective approach to extensions of time. However, an attempt to require a prospective approach to be taken under the NEC has recently failed in a Northern Ireland High Court decision (NIHE v Healthly Buildings (Ireland) Limited – for our LawNow on the case click here.

The *Healthy Buildings* decision relied in part on established case law in relation to the assessment of damages to the effect that assessments should be made with the benefit of full information. The colourful statement of the position given by Lord Macnaghten in the *Bwllfa* case in 1903 is often quoted in this respect: "*Why should [the arbitrator] guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?*". Or as Lord Robertson put it, "*estimate and conjecture are superseded by facts*". This case law usually requires a retrospective approach to be taken where claims for breach of contract rather than extension of time are concerned.

Fluor v Shanghai Zhenhua Heavy Industry Co

The present case concerned the construction of the Greater Gabbard wind farm 26 kilometres off the coast of Suffolk. Fluor entered into an EPC contract for the construction of the foundations and infrastructure to support the 140 wind turbine generators planned for the wind farm. Fluor subcontracted the fabrication of the steel foundation structures to Shanghai Zhenhua Heavy Industry Co ("**SZHI**").

Defects emerged in the welding carried out by SZHI, leading to large delays in Fluor's works under the EPC contract. Fluor sued SZHI for damages and was successful in a judgment on liability delivered last year. The present decision concerned quantum.

Part of Fluor's claim involved delay analysis and an issue arose over whether there had been a change in the critical path after the defects had been discovered. This involved consideration of whether a prospective or retrospective approach to delay analysis should be adopted. The court summarised the position as follows:

> "*There has been an extensive debate about the correct approach to delay analysis. Mr Morgan said, and I would accept, that a prospective analysis in other words considering the critical path at any particular point in time as viewed by those on the ground at that time does not necessarily produce the same answer as an analysis carried out retrospectively. The former is the correct approach when considering matters such as the award of an extension of time, but that is not the exercise with which the court is concerned in this case. I agree that some form of retrospective analysis is required.*"

Conclusions and Implication

The court's decision that a retrospective approach was required in this case would appear to follow the established principles noted above as to the assessment of damages for breach of contract. More interesting, however, are the court's comments that:

1. Prospective and retrospective approaches do not necessarily produce the same answer. This contrasts with the passage from Walter Lilly referred to above but is a more realistic assessment of the position brought out by these analyses.

2. A prospective approach should be used for the assessment of extensions of time. It is unclear whether this conclusion was intended to be a general statement of principle or limited to the contract before the court. As a general statement it would appear to be at odds with other cases in which retrospective assessments of extensions of time have been made and the softened stance on this issue taken in the 2nd Edition of the SCL Delay and Disruption Protocol. It also seems doubtful that any general rule can be stated for the assessment of entitlements to extensions of time, as ultimately the question will depend on the terms of the contract. Many contracts will require a broad ranging factual enquiry as to the cause of delay, leaving little scope for approaches limited to facts known only at the time the events in question occurred.

The court's comments are likely to encourage further debate over prospective and retrospective approaches to delay analysis in English law.

From a practical perspective, it would tend to be beneficial to a contractor to make applications for extension of time and press for these to be determined at an early stage. For contracts which allow this (such as JCT) it can mean that the contract administrator, if properly administering the contract, has to analyse prospectively. In reality, decisions on applications are often delayed meaning that a retrospective approach tends to be applied, taking account of the factual position as it then developed and despite any legal arguments which might be made in favour of a prospective approach.

End Notes

Bwllfa and Merthyr Dare Steam Colliers (1891) Limited v The Pontypridd Waterworks Company [1903] AC 426.

Walter Lilly & Company Ltd v Mackay & Anor [2012] EWHC 1773 (TCC). http://www.bailii.org/ew/cases/EWHC/TCC/2012/1773.html

Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd [2017] NIQB 43. www.bailii.org/nie/cases/NIHC/QB/2017/43.html

Fluor v Shanghai Zhenhua Heavy Industry Co, Ltd [2018] EWHC 1 (TCC). http://www.bailii.org/ew/cases/EWHC/TCC/2018/1.html

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